The Journal of Legal Medicine, 30:27–50

0194-7648 print / 1521-057X online
DOI: 10.1080/01947640802694528

Dangerous People, Unsafe Conditions
The Constitutional Basis for Public Health Surveillance

Edward P. Richards, J.D., M.P.H.*

INTRODUCTION

This article reviews the legal framework for administrative surveillance for dangerous people and conditions. Although the theme of this symposium is dangerous people, dangerous people and dangerous conditions cannot be separated in public health jurisprudence. For purposes of this article, the detection of the dangerous mentally ill will be treated as a subset of public health law. Procedurally, the mental health jurisprudence is much richer than the public health jurisprudence, but it is mostly concerned with commitment orders and conditions of confinement and release. Constitutionally, the standards for public health and mental health surveillance are the same.

Surveillance—the collection of data about the incidence and prevalence of conditions that pose a threat to public health and safety—is the starting point for public health. Surveillance provides the data that epidemiologists use to identify threats, test strategies for managing those threats, and, once mitigation strategies are developed, identify dangerous people and conditions that should be subject to public health interventions. There are two types of public health surveillance, searches by public health investigators and reports of specific conditions or individuals by third parties such as physicians, medical laboratories, schools, and counselors. Searches are discussed first, then reporting laws. The article concludes by identifying the key policy issues for maintaining an appropriate balance between individual privacy and public safety.

* Harvey A. Peltier Professor of Law and Director, Program in Law, Science, and Public Health at the Paul M. Herbert Law Center, Louisiana State University. Address correspondence to Professor Richards at LSU, Baton Rouge, LA 70803-1000, or via e-mail at Richards@lsu.edu. He maintains a Web site at http://biotech.law.lsu.edu.

I. CRIMINAL VERSUS ADMINISTRATIVE LAW DUE PROCESS

The United States has two parallel systems for dealing with dangerous persons, whether they are disease carriers, the mentally ill, or terrorists. The popular consciousness is dominated by the criminal law system. It has only been since the terrorist attacks of September 11, 2001 that administrative detentions and surveillance have become topics of public consideration and concern. FISA,[1] warrantless wiretapping, emergency detention of thousands of young Muslim men, and, most visibly, the Guantanamo Bay detention camp, suddenly put administrative searches and detention on the front pages. In the post-9/11 national security world, public health and national security powers have been reunited in emergency powers laws and bioterrorism and pandemic flu response laws.

The thesis of this article is that the key distinction in public health law is between criminal and administrative law.[2] In the alternative world of administrative law, searches do not have to meet Fourth Amendment standards, incarcerations are not for punishment, and due process is after the fact with habeas corpus review.[3] As long as the state is acting to prevent future harm to society and not to punish the individual, the individual's recourse to constitutional protections are much more limited than in a criminal prosecution or investigation. This analysis leads to a cohesive public health jurisprudence. The same framework can be used for preventing and mitigating risks posed by disease carriers, unsanitary restaurants, dangerous dogs, and public nuisances.[4]

In contrast, the civil libertarian argument that criminal law due process standards should be used for public health measures increases the costs of carrying out public measures, reducing their effectiveness and endangering the public.[5] It also leads to an inconsistent jurisprudence, with different standards for each public health measure.

The different due process standards for administrative and criminal management of dangerous persons have three roots. First, the risks to the individual

---

[1] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1885c (2006).

[2] Punishing a murderer is criminal law. Outpatient or inpatient commitment of a dangerous individual to prevent a murder is administrative law. Searching for a disease carrier or unsanitary conditions in a restaurant to ameliorate those conditions is administrative law, while prosecuting an HIV carrier for recklessly endangering the lives of others is criminal law.

[3] Edward P. Richards, *Public Health Law as Administrative Law*, 10 J. HEALTH CARE L. & POL'Y 61, 85 (2007).

[4] The framework also fits the dangerous mentally ill, but the details are more complex and there are more due process protections because of the uncertainty in predictions of dangerousness and the effects of treatment. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); Zinermon v. Burch, 494 U.S. 113 (1990); Youngberg v. Romeo, 457 U.S. 307 (1982); Kansas v. Hendricks, 521 U.S. 346 (1997); Seling v. Young, 531 U.S. 250 (2001).

[5] In many cases, the argument also applies to denying the dangerous person needed social services and, frequently, treatment.

are higher in a criminal proceeding: the special societal stigmata of a criminal conviction, with the resulting loss of many civil rights and possible incarnation and even execution. Second is the nature of the decision maker and the facts to be relied on. In public health dangerousness cases, there are usually laboratory tests or other objective evidence on infection, as well as specific behavior or environmental facts that point to dangerousness.[6] The most difficult questions of criminal law—intent and mens rea—are not at issue. Third, with the exception of cases of drug-resistant tuberculosis and certain other rare communicable diseases, public health restrictions are limited either by time or intrusiveness. In all cases, the restrictions are limited to what is necessary to prevent the spread of the disease and may not be used as a punishment for being infected.

A. The Constitutional Creation of Criminal Due Process

Prior to the adoption of the Constitution, the colonies, and then the states under the Articles of Confederation, carried out administrative regulations based on the traditional right of the government to protect itself and its population from threats such as plagues and attacks by foreign invaders.[7] In this world, communicable diseases such as yellow fever and smallpox were as much a national security threat as a foreign invasion.[8] It is this common heritage that explains the broad reach of these administrative powers. What is surprising for many who encounter these powers today is that they were not limited by the criminal due process rights when the Constitution and Bill of Rights were drafted.

The Bill of Rights, through the Fourth and Fifth Amendments, limited the powers the colonial governments wielded in the criminal law arena by imposing warrant and due process requirements, at least on actions by the federal government.[9] Although the original Fourth and Fifth Amendment protections were far from the criminal due process protections eventually provided by the Warren Court and the incorporation of the Bill of Rights to the states by the Fourteenth Amendment, they were a great advance over the situation under British rule in the colonies.

---

[6] Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Persons*, 16 HASTINGS CONST. L.Q. 329, 338 (1989).

[7] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (reviewing the history of state regulations to protect public health and safety).

[8] This view was well grounded in fact. The Black Plague destabilized the feudal system in Europe, and measles helped destroy the Aztec civilization, allowing conquest by the Spanish. *See* W. H. MCNEILL, PLAGUES AND PEOPLES 160-65 (1976).

[9] These provisions were not applied to the states until after the Fourteenth Amendment and subsequent United States Supreme Court decisions interpreting it; however, most state constitutions provided the same basic protections as the Fourth and Fifth Amendments.

The United States Constitution is silent on administrative law. Constitutional administrative law was created by the courts as necessary to allow the functioning of government.[10] State administrative law was encompassed in the police powers retained by the states under the Constitution, and, as long as it did not interfere with specific federal statutes or constitutional constraints, it evolved on its own path in each state.[11] As regards dangerous persons and conditions, the responsibility for public health and managing the mentally ill traditionally rested with the states, while the federal government managed terrorists and other national security threats. Thus, public health law was almost completely state law until very recently, and mental health law remains state law, subject to modern federal constitutional standards.

When the courts first considered cases involving dangerous persons under the Constitution, they rejected criminal law standards without comment, continuing to allow the states to use administrative standards for managing dangerous persons who were not being prosecuted for crimes.[12] For example, as discussed below, the United States Supreme Court did not require warrants of any form for administrative searches until 1967.[13] This poses the key question in public health jurisprudence: why did the courts not apply criminal law due process protections in all contexts?

B. Balancing Rights and Risks in the Early Constitutional Period

The major reason the early courts allowed the continuation of colonial police powers was that they were living in times made perilous by public health and national security threats. The period from the mid-1700s through the early constitutional period was one of external risk through wars and internal risk from epidemic disease. There were wars on the American continent between

---

[10] There were stumbling blocks on the way to modern administrative law, which illustrate that a literal reading of the Constitution would make many basic government functions impossible. The best example of such a conflict was over the non-delegation doctrine, which deals with whether Congress can delegate rulemaking and judicial powers to executive branch agencies. The impasse between the courts and President Franklin Roosevelt during the New Deal over the non-delegation doctrine lead to Roosevelt's court packing plan, and in turn the abandonment of the non-delegation doctrine as a reason for finding legislation unconstitutional. For a discussion of the modern view on the non-delegation doctrine, see Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

[11] The United States Supreme Court was urged to use the then-new Fourteenth Amendment to review state administrative law actions in the *Slaughter House Cases*, but declined, allowing New Orleans to regulate slaughterhouse sanitation without federal court intervention. *See* Slaughter-House Cases, 83 U.S. (1 Wall) 36 (1872).

[12] As discussed more fully *infra*, the United States Supreme Court has not found state public health detentions unconstitutional, beyond assuring that public health powers are not used as a subterfuge for criminal law ends. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001). By contrast, the Supreme Court has set basic standards for mental health commitment. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982).

[13] *See* Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967); *see also* See v. Seattle, 387 U.S. 541 (1967).

colonial powers and with the Native Americans, and also extraterritorial wars among England, France, and Spain. The United States was born through the Revolutionary War, and a major concern of the drafters of the Constitution was how to make a government that could cope with external threats better than states did under the Articles of Confederation.

The majority of the colonial population lived on or near waterways, since water transportation was the major vehicle of commerce. This subjected the population to mosquito-borne illnesses during the summer and fall,[14] water-borne illness all year round,[15] and constant exposure to diseases brought in by ships and their passengers.[16] Even as late as the mid-1850s, life expectancy in cities was around 21.5 years.[17]

The classic book, *Rats, Lice, and History*, provides a graphic view of this world:

> In earlier ages, pestilences were mysterious visitations, expressions of the wrath of higher powers which came out of a dark nowhere, pitiless, dreadful, and inescapable. In their terror and ignorance, men did the very things which increased death rates and aggravated calamity . . . . Panic bred social and moral disorganization; farms were abandoned, and there was shortage of food; famine led to . . . civil war, and, in some instances, to fanatical religious movements which contributed to profound spiritual and political transformations.[18]

The drafters of the Constitution lived in an age when death from communicable disease was the norm, when almost every family had lost a child to illness, and when the fundamental security of the nation was frequently under threat from external enemies and conflicts with native peoples. The threat of disease was not just to the individual, but to the state itself. The yellow fever epidemic of 1793 killed 10% of the population, nearly precipitating a collapse of civic order.[19]

The severity of these threats was in the minds of the judges who would review governmental actions against dangerous persons and conditions, the legislators who passed the acts enabling these actions, and the citizens whose support the government needed to function. Individuals might resist, but there was a societal consensus that the protection of society was more important

---

[14] These diseases consisted of malaria and yellow fever.

[15] These diseases consisted of typhoid and cholera.

[16] These diseases consisted of smallpox most commonly, but also plague and other epidemic diseases.

[17] LEMUEL SHATTUCK ET AL., REPORT OF THE SANITARY COMMISSION OF MASSACHUSETTS 1850, at 69 (1850) (noting that the life expectancy of a person living in Boston was 27.85 years between 1810 to 1820, and that it declined to 21.43 years between 1840 and 1845 as the city became more populous).

[18] HANS ZINSSER, RATS, LICE AND HISTORY: BEING A STUDY IN BIOGRAPHY, WHICH, AFTER TWELVE PRELIMINARY CHAPTERS INDISPENSABLE FOR THE PREPARATION OF THE LAY READER, DEALS WITH THE LIFE HISTORY OF TYPHUS FEVER 129 (1997).

[19] J.H. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793 (1949).

than the rights of the individual. As the Supreme Court said in a 1905 case testing the right of Massachusetts legislators to empower the local health department to require smallpox vaccinations and to enforce this requirement with a criminal fine:

> [P]ersons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.[20]

C. Criminal Law Standards for Searches

Criminal law searches are post-crime, directed at finding evidence that will help prosecute the person who committed the crime.[21] Searches of the individual's home and property, subject to certain exceptions, may only be done pursuant to a warrant specifically describing the area to be searched and the nature of the evidence to be seized. The warrant must be issued by a neutral magistrate or judge[22] and must be based on information that there is probable cause to believe that evidence of a crime will be found by the search. The policy behind criminal law warrant requirements is to protect the defendant's privacy, especially the privacy of the home:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.[23]

If the defendant consents to the search, then no warrant is needed. There are exceptions to the warrant requirement based on exigency and possible threats to the arresting officers. Otherwise, the primary issue in determining whether a probable cause warrant is required is the defendant's reasonable expectation of privacy. In some situations, this is technical, depending on

---

[20] Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 26 (1905).

[21] This criminal law due process discussion is intended only to provide the context for the comparative administrative due process discussion, and is not intended to be definitive. There are many excellent articles and monographs on criminal due process. *See*, *e.g.*, WAYNE R. LAFAVE ET AL., HORNBOOK ON CRIMINAL PROCEDURE (4th ed. 2004).

[22] Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court there rejected a warrant issued by a magistrate who was also involved in the investigation of the case.

[23] Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

statutorily created zones of privacy.[24] In many cases, the issue is whether the defendant has control of the property where the search is to be performed, such control being determined by ownership or terms of contractual agreements, with no expectation of privacy in situations such as that created when the defendant leaves personal items in the home of another person.[25]

There also is no expectation of privacy if the evidence is in plain view. Plain view has three criteria. First, the officer must either see the evidence from outside the premises[26] or be legally on the premises. Second, the evidence must be visible without opening doors or otherwise searching. Third, the officer must have probable cause to believe that the evidence is related to a crime.[27] Plain view becomes a difficult issue in public health law because public health inspectors may enter premises without a warrant. Applying the plain view in these circumstances would undermine criminal law warrant protections.

The remedy for a legally defective search is the exclusion of the evidence from admission in a criminal prosecution,[28] as well as any evidence dependent on it.[29] This rule is intended to create an incentive for the police to use proper warrant procedures, but it is controversial because it can put a potentially dangerous criminal back on the street because of technical issues with the search. The criminal law warrant requirements reflect the potential impact of criminal evidence on the defendant and the power of the state over the defendant. Thus, the combination of the warrant requirements and the exclusionary rule limits the state's power to abuse the defendant's rights. If the remedy for improperly obtained evidence were a damage claim rather than

---

[24] For example, federal law creates an expectation of privacy in traditional phone calls and in the United States mail, but there is no expectation of privacy in electronic mail.

[25] Although the third party can demand that the police have a probable cause warrant showing what they are looking for and why it is related to a crime, if this warrant is defective the defendant cannot invoke the exclusionary rule, because only the third party's rights were violated. If a third party with control of the premises gives permission for the search, the police do not need a warrant.

[26] As new technologies are introduced, the courts evaluate whether they interfere with a reasonable expectation of privacy. The use of binoculars or cameras with telephoto lenses is well accepted, as these are well-known technologies. New technologies, such as using lasers reflected off of windows to record conversations by measuring the vibration of the window or high resolution satellite images from military surveillance satellites, might be found to be outside the reasonable expectation of privacy today. However, the better known such technologies become, such as the widespread use of satellite images through Google Earth, the more likely the courts are to find them within the plain view exception.

[27] Arizona v. Hicks, 480 U.S. 321, 321 (1987). In this case, while the police were in defendant's apartment to investigate a shooting, they noticed he had expensive stereo gear. They moved the gear to obtain serial numbers, which showed that it was stolen. The court found that the police did not have probable cause to believe the gear was stolen, thus the plain view exception was not available. Had the property been contraband such as illegal drugs, however, the plain view exception would have applied. Washington v. Chrisman, 455 U.S. 1, 5 (1982).

[28] This is the exclusionary rule. If the prosecuting authorities never use the evidence, the defendant would have a remedy for the improper search only if it violated other laws, such as trespassing.

[29] This is the "fruit of the poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

exclusion of the evidence, the state could safely assume that few juries would award damages when the evidence showed the defendant's guilt.

D. Historical Limits on Criminal Due Process Rights

When contrasting criminal and administrative due process rights, it is important to keep in mind that criminal due process rights, although part of the Bill of Rights, were very narrowly construed by the courts until relatively recently. Contemporary notions of state criminal due process rights are really post-1960s criminal due process rights. For example, the exclusionary rule, which prevents the police from using evidence obtained by a search that violates the Fourth Amendment warrant requirement, was first adopted in 1914 and, even then, it only applied to the federal government.[30] It was not until 1961 that the United States Supreme Court found that the Fourteenth Amendment extended the exclusionary rule to the states.[31]

A comparison of actual police procedures and administrative procedures in the nineteenth and early twentieth centuries would show that there was less difference between criminal due process rights and administrative due process in those periods than there is now. Thus, the divergence of administrative and criminal due process standards, although present since the early constitutional period, became much more pronounced as the United States Supreme Court broadened and strengthened criminal due process rights while only marginally expanding administrative due process rights.

E. Administrative Searches

Administrative searches raise the most important due process issue in public health law. Quarantine and isolation[32] receive the most publicity, but both of these are relatively rare in modern public health practice. Administrative searches and reporting requirements are the primary vehicle for collecting epidemiologic data. They also are used to find public health threats such as rat infestations, life-safety code violations, and cases of communicable diseases. Mental health law relies on reporting laws to identify dangerous individuals, especially those who may be prone to violence but who have not yet committed a violent act.

---

[30] Weeks v. United States, 232 U.S. 383 (1914).

[31] Mapp v. Ohio, 367 U.S. 643 (1961).

[32] Quarantine is the detention of a person exposed to a communicable disease, with the objective of preventing the spread of the disease if the person contracts it and becomes infectious. This is most important in diseases where the patient becomes infectious before significant symptoms of the disease develop. It is also important for diseases such as smallpox, where the disease poses such a high risk to the community that every possible case must be contained. Isolation is the detention of a person who is infected with a communicable disease, such as infectious tuberculosis, until they no longer pose a threat to the community. The older cases and medical literature use the term quarantine to refer to all detentions for disease control purposes.

There has been significant political opposition to reporting dangerous persons. HIV reporting was seen as an invasion of privacy, an attitude that interfered with controlling the HIV epidemic in the United States.[33] Educational privacy laws limit the identification and management of dangerous mentally ill students, contributing to disasters such as the Virginia Tech shootings.[34]

Ideally, public health searches are prospective, looking for risks before there is harm. Frequently, however, they are used to investigate the cause of an outbreak of a disease. In either case, the objective is to prevent future harm, not to find evidence to support prosecutions. This distinction between prevention and punishment was key to the traditional understanding of the administrative search authority of public health officials. *Frank v. Maryland*,[35] a 1959 case, reviewed the history and then-current standards for public health searches.

1. Warrantless Searches and the Frank *Case*

Frank is not a sexy case about quarantine or medical privacy rights, but a real-life public health situation. Gentry, a public health inspector, was looking for rats, or, more precisely, the source of a rat infestation that had generated a complaint to the Baltimore health department. When inspecting the exterior of Frank's house, Gentry found a "pile later identified as 'rodent feces mixed with straw and trash and debris to approximately half a ton.'"[36] Gentry then asked Frank to allow him to enter the house and continue his inspection for rats. Frank refused, and Gentry returned the next day with two police officers. Frank was arrested for failing to allow entry to a public health inspector, and Gentry completed his search. Frank was convicted and fined $20,[37] the conviction was upheld by the Maryland courts, and he appealed to the United States Supreme Court.

At the United States Supreme Court level, the most interesting aspect of the *Frank* case is that it appears to be a case of first impression.[38] The

---

[33] The CDC did not make HIV reporting a national policy until 2006. BERNARD M. BRANSON ET AL., MMWR, REVISED RECOMMENDATIONS FOR HIV TESTING OF ADULTS, ADOLESCENTS, AND PREGNANT WOMEN IN HEALTH-CARE SETTINGS, 55 MMWR No. RR-14 (2006).

[34] VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR KAINE, COMMONWEALTH OF VIRGINIA (2007), *available at* http://biotech.law.lsu.edu/cases/psyc/V-tech-April2007.pdf (last visited Oct. 6, 2008).

[35] 359 U.S. 360 (1959).

[36] *Id*. at 361.

[37] The Baltimore City Code provided:

> Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars. *Id*.

[38] This is not really surprising, because there are very few United States Supreme Court cases on public

Court began its analysis by looking back to the Writ of Assistance used by the British to search homes in colonial Boston for smuggled goods. Alluding to a challenge to these writs by James Otis in 1761, the Court quoted President John Adams, who was reported in the biography of Otis as saying that "American Independence was then and there born."[39] After referring to *Boyd v. United States*[40] for a more detailed history of the Fourth Amendment, the Court came to its critical conclusion, which, with limitations discussed below, still governs public health searches and has also been used in more controversial contexts such as national security searches.

> Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought . . . . But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection, and what he cannot properly resist, namely, act in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own. Appellant's resistance can only be based, not on admissible self-protection, but on a rarely voiced denial of any official justification for seeking to enter his home. The constitutional "liberty" that is asserted is 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.[41]

The *Frank* Court thus found that a public health search was not subject to the Fourth Amendment warrant requirements because it was not directed at finding evidence for criminal prosecutions. The *Frank* Court did not cite its earlier decision in *Jacobson v. Massachusetts*,[42] upholding a criminal fine for resisting mandatory smallpox immunization, but *Frank* is based on the same jurisprudential assumption that an individual's rights, outside of the criminal context, are subject to the needs of society and that individual rights give way when they endanger the common good.[43] The Court bolsters its holding by

---

health law. Nonetheless, given the number of criminal law warrant cases and the strength of the language in the case about the sanctity of the home against government intrusion, it is interesting that it took until 1959 for a case such as this one to reach the United States Supreme Court.

[39] *Frank*, 359 U.S. at 364; Richards, *supra* note 3, at 85.

[40] 116 U.S. 616 (1886).

[41] *Frank*, 359 U.S. at 365–66.

[42] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[43] The Court stated:

> We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local

noting that Maryland has used its power to conduct warrantless searches back to colonial times, and that this power is used by all states.

2. Crossing the Criminal Line

The *Frank* Court importantly limited its ruling by focusing on the consequences of the search and the unreasonableness of an individual who would refuse entry into his or her home without regard to the duty to not endanger the community's health. The Court makes it clear that its holding is predicated on the search not being used to find criminal evidence or to prosecute the defendant.[44] This clearly rules out using public health searches as a subterfuge to find evidence for criminal prosecutions.

The United States Supreme Court relied on this limitation to strike down a drug testing program for pregnant women.[45] Because illegal drug use can complicate pregnancy and threaten the fetus, the program would have been a valid public health measure had it been used to address women's medical needs or the needs of the fetus. However, the results were used to threaten women with criminal sanctions, not to offer them public health services. The court held that this made the public health purpose of the search a subterfuge, despite there being a valid public health rationale for the testing. The state argued in the alternative that the women in this case gave valid consent to the testing. On remand for factfinding on this issue, the Court of Appeals did not find effective consent waiving the expectation of privacy.[46]

The harder question, which does not appear to have been addressed by the United States Supreme Court or other courts, arises when criminal evidence is found incident to a proper public health search. There is, though, case law on firefighting, which is a hybrid activity including both the health and safety components of fire prevention and control, and on the investigation of arson, a criminal law function.

In *People v. Tyler*,[47] the Michigan Supreme Court found that evidence of arson collected on reentry of the premises after the fire was out was seized

---

government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. *Id.* at 37–38.

[44] The Court also detailed the procedural limits in the Baltimore City Code, which required inspectors to have probable cause for their inspections and to conduct the inspections at convenient times for the homeowners. These administrative limits are dropped in subsequent cases and have not proven to be essential to the holding.

[45] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[46] Ferguson v. City of Charleston, 308 F.3d 380 (4th Cir. 2002).

[47] 250 N.W.2d 467 (Mich. 1977).

in violation of the defendant's Fourth Amendment rights and that a probable cause warrant was required. On appeal, the Supreme Court found that seizure of evidence of arson discovered on reentry to the premises four hours after the fire was extinguished did not violate the defendant's Fourth Amendment rights.[48] However, the Court used the exigency exception to the Fourth Amendment warrant requirement rather than a plain view exception based on the firefighters being lawfully on the premises incident to fighting the fire.[49] In a later case, the Court reiterated that this kind of warrantless entry was tied to the need to enter for firefighting purposes, thus excluding evidence found on reentry after the fire was clearly extinguished.[50]

Traditional public health is not a hybrid activity, because health inspectors do not have a parallel criminal investigation role; hence, these cases do not provide a rationale for allowing the admission of criminal evidence found by a public health official otherwise lawfully on the premises. This reading is bolstered by the *Frank* Court's language that its opinion was based on the defendant having no "admissible self-protection"[51] reason for not admitting the investigator. The *Frank* Court seems to be saying that, if the defendant does have a legitimate claim of self-protection—which he would if evidence in plain view could be used for criminal prosecution—that person would be within his or her rights to deny the inspector entry. There is no United States Supreme Court case resolving this issue, and few cases in any other courts that address it even tangentially.

3. Limiting Frank*—The Area Warrant*

Frank was decided before the major due process reforms of the Warren Court. These reforms transformed criminal due process rights. Public health law, however, was little affected by the Warren Court. Although several members of the Court showed their displeasure with *Frank* in the 1960 case of

---

[48] Michigan v. Tyler, 436 U.S. 499 (1978).

[49] Officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. Further, if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional. *Id*. at 510.

[50] Michigan v. Clifford, 464 U.S. 287 (1984). Interestingly, the delay on reentry was about the same, four or five hours, in both cases, but the facts in *Clifford* more clearly indicated that the fire was fully extinguished before reentry. For additional fire cases exploring the acceptable delay for reentry, see People v. Holloway, 426 N.E.2d 871 (Ill. 1981); People v. Zeisler, 445 N.E.2d 1324 (Ill. 1983); Commonwealth v. Jung, 651 N.E.2d 1211 (Mass. 1995); State v. Monosso, 308 N.W.2d 891 (Wis. App. 1981).

[51] Frank v. Maryland, 359 U.S. 360, 366 (1959). The dissents tried to limit *Frank* to situations where the inspector had specific probable cause, showing the dissenter's disgust with the majority by quoting from an older case: "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity." *Id*. at 378 (quoting District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd*, District of Columbia v. Little, 339 U.S. 1 (1950)).

Ohio v. Price,[52] when *Frank* was limited by *See v. Seattle*[53] and *Camara v. Municipal Court of San Francisco*,[54] the ultimate change was relatively small. Both cases involved fines for refusing to allow a warrantless inspection by a public health inspector, with *Camara* involving a private residence and *See* involving a business. The Warren Court reviewed the *Frank* case in light of its expanded notion of Fourth Amendment due process rights. The Court left the core of *Frank* intact; it retained the rule that full Fourth Amendment warrant protections are not required for public health inspections.[55] It was concerned, however, about the potential for public health warrantless searches being used for harassment or discrimination purposes.[56]

The Court recognized that requiring Fourth Amendment warrants would make it difficult to carry out public health inspections. In particular, the Fourth Amendment model fails for preventive inspections, where the inspection is to discover public health threats rather than to respond to complaints about known threats. The Fourth Amendment does not allow screening for crime, but screening is key to public health.[57] The Fourth Amendment model is also resource intensive, which raises the cost of enforcement. When a warrant is constitutionally required, cost is not an issue,[58] but when there is no constitutional requirement for full criminal law due process protections, costs are a valid consideration.[59] Thus, the Court was unwilling to burden public health officials with the costs and delays inherent in the Fourth Amendment warrant process.

The compromise takes place in the area warrant arena. In these cases, which involve building inspections, the court has held that if the owner refused entry, the public health inspector would need to get a warrant from a judge. But rather than having to show the judge individualized probable case for a specific building, the inspector would need to show only a reasonable rationale for the inspection, the legal basis for the inspection,[60] and the area covered by the

---

[52] Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960).

[53] 387 U.S. 541 (1967).

[54] 387 U.S. 523 (1967).

[55] *Id*. at 537.

[56] The Court stated:

> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

Id. at 532.

[57] There is no individualized probable cause in the screening context, so it would be impossible to satisfy the requirements of the Fourth Amendment.

[58] Other costs, such as time, are recognized—hence, the exigency exception.

[59] For a discussion of the use of cost-benefit analysis in administrative due process, see Mathews v. Eldridge, 424 U.S. 319 (1976).

[60] Although showing the legal authority for a search is usually a technicality, the Washington Supreme Court held a Seattle building inspection program invalid because the city council had not properly

warrant.[61] For example, a warrant for fire inspections could be based on time period, such as yearly inspections, the statute or rule allowing such inspections, and a geographical or other method of determining which buildings would be inspected. This single warrant would be good for all of the buildings being inspected, obviating any specific knowledge of conditions or the identity of the owners of specific buildings.

4. The Regulated Industry Exception to the Area Warrant

The two major exceptions to Fourth Amendment warrant requirements for criminal and administrative searches are consent and lack of a reasonable expectation of privacy. The regulated industry cases combine these to create a major exception to warrant requirements for administrative searches with criminal consequences. The lead case is *New York v. Burger*,[62] which involves the warrantless search of an automobile salvage yard.[63] The search was an administrative one to assure compliance with salvage yard regulations; however, the inspection was carried out by police officers and the owner was arrested for violating regulations intended to prevent trafficking in stolen automobile parts. The defendant was convicted in state trial court, the conviction was reversed by the state appeals court, and the state appealed to the United States Supreme Court.

Defendant argued that allowing his prosecution based on evidence obtained through a warrantless administrative search violated the *Frank* premise that warrantless searches (or searches based on area warrants) were only permitted when the defendant had no expectation of criminal prosecution. The *Burger* Court found that such searches would be proper if the business owner had a sufficiently reduced expectation of privacy. The *Burger* Court identified three factors to use to evaluate the business owner's expectation of privacy:[64]

---

enacted an ordinance to authorize a judge to issue the area warrants used in the inspections. *See* City of Seattle v. McCready, 868 P.2d 134 (Wash. 1994).

[61] "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 multifamily 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." *Camara*, 387 U.S. at 538.

[62] New York v. Burger,482 U.S. 691 (1987).

[63] *Burger* is not the first regulated industry case, but it sets out the Supreme Court's standards for deciding when the regulated industries doctrine applies. *Burger,* 482 U.S. at 702. The Court had previously found that warrantless searches were permitted for businesses licensed to sell liquor, see, e.g., Colonnade Corp. v. United States, 397 U.S. 72 (1970), and gun dealers, see, e.g., United States v. Biswell, 406 U.S. 311 (1972).

[64] Applying these factors, the *Burger* Court found that automobile salvage yards were regulated industries and that the evidence would be admissible under United States constitutional standards. *Burger,* 482 U.S. at 701. In a later case, the New York Supreme Court rejected the regulated industries doctrine, finding that the New York Constitution provided greater protection than the Fourth Amendment. People v. Scott, 593 N.E.2d 1328 (N.Y. 1992).

"First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."[65] The court identified three examples of such governmental interests: mining;[66] firearms;[67] and protecting tax revenues from fraud.[68] In public health, the government would have a substantial interest in regulating activities such as food handling, mental institutions caring for the dangerous mentally ill, and the manufacture or sale of over-the-counter and prescription drugs.

> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." For example, in *Dewey* we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act—to detect and thus to deter safety and health violations.[69]

This problem cannot be solved with an area warrant, because regulated industries are more difficult to include in simple geographic designations and, more fundamentally, because *See* and *Camara* do not contemplate criminal prosecutions based on area warrants.

Finally,

> the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.[70]

This is a consent to search, in that it requires the law put the owner on notice that, to obtain a license or permit to engage in the regulated activity, the owner is consenting to warrantless searches. Although this is a coerced consent, that is allowable as long as regulated industries are not constitutionally protected activities.

Just being a regulated business does not meet the *Burger* standards; the regulations must be pervasive. The courts have not specifically defined what this means, but the Occupational Health and Safety Administration (OSHA) cases provide useful guidance. OSHA regulations, which include the right to do administrative searches, apply to most private businesses. When a business owner objected to warrantless searches by OSHA inspectors, the Supreme

---

[65] *Burger,* 482 U.S. at 702.
[66] *See* Donovan v. Dewey, 452 U.S. 594 (1981).
[67] *See Biswell*, 406 U.S. 311 (1972).
[68] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
[69] *Burger,* 482 U.S. at 702–03.
[70] *Id*. at 703.

Court reviewed OSHA searches in the light of *See*,[71] *Camara*,[72] and *Biswell*.[73] The Court required OSHA to obtain an area type warrant,[74] consistent with *See* and *Camara*.[75] A later decision specifically held that the pervasively regulated industries exception does apply to federal health and safety regulations, by allowing warrantless searches of underground mines.[76]

5. Consent to Searches Through Licenses and Permits

Most businesses that can endanger the public health require a permit or license to operate. This has two regulatory benefits. First, it requires that the business show it is in compliance with the law before it opens. It is much simpler procedurally to assure a business meets legal standards before it is open than to later prove it does not meet those standards and close it down. It also assures that the business owner is on notice of the regulations governing the business and has agreed to comply with them. This obviates the need for the *Burger* analysis for pervasive regulation because the owner has been put on notice that he or she is subject to warrantless searches during regular business hours as a condition of doing business.

These public health licenses and permits satisfy the *Burger* factors, making these businesses regulated industries. It is clear that a business owner could be prosecuted on evidence of a crime related to the permitted business found during a warrantless search.[77] One court found that a pharmacy owner could be prosecuted for illegally obtaining prescription drugs, based on a warrantless search of the pharmacy records as provided for in the pharmacy license.[78]

But, what about evidence of unrelated crimes? The question then becomes whether the permit or license erases all expectations of privacy, or only those related to the regulated activity.

Commonwealth v. Accaputo[79] involved the seizure of a gun found in a bag at the back of a pharmacy. The officer seizing the gun was in the pharmacy

---

[71] See v. City of Seattle, 387 U.S. 541 (1967).

[72] Camara v. Municipal Court of San Franciso, 387 U.S. 523, 528 (1967).

[73] United States v. Biswell, 406 U.S. 311, 313 (1972). Biswell was used as a standard before *Burger* was decided.

[74] A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978).

[75] *See* Trinity Industries, Inc. v. Occupational Safety and Health Review Comm'n, 16 F.3d 1455 (6th Cir. 1994).

[76] Donovan v. Dewey, 452 U.S. 594 (1981).

[77] The states remain free to provide greater statutory protections. *See, e.g.,* Commonwealth v. Frodyma, 436 N.E.2d 925 (Mass. 1982).

[78] State v. Welch, 624 A.2d 1105 (Vt. 1992); *see also* United States v. New England Grocers Supply Co., 488 F. Supp. 230, 239 (D. Mass. 1980).

[79] Commonwealth v. Accaputo, 404 N.E.2d 1204 (Mass. 1980).

on an administrative warrant based on the pharmacy license. The court found that the gun was in plain view, and thus admissible. This is a difficult case to characterize because the officer did not need any warrant, or even a *Burger*-regulated industry exception, to be in the store; as with any customer, he was free to enter the store and browse the public areas. A case closer to the question is *State v. Voss*,[80] in which firefighters opened a freezer and found illegal drugs. The court found that the firefighters opened the freezer out of curiosity and not for any valid purpose related to firefighting. The court found that, although they were legally on the premises, they did not have the right go beyond their designated firefighting function.

We are left with little guidance on the issue of unrelated crimes. *See*, *Camara*, and *Frank* seem to premise warrantless and area warrant public health searches on the absence of a threat of criminal prosecution. This would seem to prohibit calls to have public health inspectors alert the police when they see possible terrorist activity or illegal activity such as methamphetamine laboratories. Keeping public health and police roles separate is also important because public health searches depend on public cooperation. Most searches are done with the owner's consent. If public health officials had to secure warrants—even area warrants—for every investigation, it would reduce their effectiveness. In some communities, having public health investigators identified with the police could endanger their lives.

II. REPORTING LAWS

A. Third-Party Reporting Laws

Despite the broad legal authority authorizing inspections, such inspections are costly in staff time and resources. Although there are cases where a public health investigator will examine medical records to identify dangerous individuals or conditions, most data on dangerous persons—whether involving infectiousness or potential violence—come from third parties complying with mandatory reporting laws. There are three classes of reporting laws: public health reports; vital statistics reports; and reports of physically dangerous persons.[81] These are all instances of third-party reporting, that is, reports by persons other than the person who is the subject of the report.

Laws that mandate first-party reporting implicate the constitutional protections against self-incrimination,[82] a comprehensive discussion of which is

[80] State v. Voss, 683 N.W.2d 846 (Minn. App. 2004).

[81] The following description of the different types of reports is provided as context for the discussion of the legal issues surrounding reporting, and is not intended as a comprehensive review of reporting laws and their policy implications.

[82] Matter of Grant, 264 N.W.2d 587 (Wis. 1978).

beyond the scope of this article.[83] Although disease investigators may ask individuals where they became infected and who they might have infected, disclosure is all done voluntarily. There are no legally mandated first-party reporting duties in public health.

B. Public Health Reports

From the earliest days of public health, physicians have been required to report communicable diseases as specified by their state or local health department.[84] In 1878, Congress authorized the United States Marine Hospital Service, the forerunner of the United States Public Health Service, to begin collecting reports on cholera, smallpox, plague, and yellow fever from United States consuls overseas. This charge was expanded to include collection of reports from the states in 1893. Although most reporting laws are still state laws, these are developed in cooperation with the federal National Notifiable Diseases Surveillance System at the Centers for Disease Control and Prevention (CDC).[85]

Communicable diseases are reported in two ways, by aggregate totals and by reports that identify specific infected individuals by name and address. Aggregate reports are used for diseases such as gonorrhea and chlamydia trachomatis. These are extremely common sexually transmitted infections that are not individually investigated.[86] Most communicable diseases are reported by name and there is an effort to investigate the source of the illness and who might have been subsequently exposed.

Reporting laws are directed to persons and institutions who are likely to identify persons with the listed diseases. These include physicians and other health care providers, medical laboratories, schools, and day care centers. The most reliable source of communicable disease reports are laboratories, because the reporting can be made part of the electronic records generated by the laboratory equipment. Physicians and other individual reporters have a low compliance rate with reporting laws.

State laws and local ordinances require that these diseases be reported to the state health department, directly or through a local health department

---

[83] There is no privilege against self-incrimination in administrative proceedings. Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982). Self-incrimination becomes an issue when the administrative reporting requirement concerns illegal activity. *See* Marchetti v. United States, 390 U.S. 39, 57 (1968); Haynes v. United States, 390 U.S. 85 (1968).

[84] For an 1882 case about disciplining a physician for failing to report smallpox, see State of Ohio v. Chandler, 8 Ohio Dec. Reprint 322 (1882).

[85] For more information and a list of the currently reportable diseases, see CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL NOTIFIABLE DISEASES SURVEILLANCE SYSTEM: HISTORY, *available at* http://www.cdc.gov/ncphi/disss/nndss/nndsshis.htm (last visited Oct. 6, 2008).

[86] There are in excess of 2,000,000 cases of each disease per year. The cost of investigating each case is prohibitive for most health departments, so infected patients are treated and sometimes given medicine to take to their partner.

(depending on the state). The state then sends aggregate data to the CDC. The CDC does not receive personal information on disease carriers in most cases. If the state wants help in investigating the case, or if it is a disease that is monitored by the CDC because it might pose an interstate threat, then the CDC will be provided with fully identified data. Because this data flows through the state, the state controls the data that is collected and sent to the CDC. For many years California, New York, and other states with large populations of HIV-infected individuals refused to collect individually named data for HIV. It was not until 2006, when the CDC made named reporting a criteria for receiving federal funding for HIV control and treatment programs, that California—the last holdout state—started requiring named reporting.

Occupational illness and injuries are unusual in the public health world because the primary reporting duties stem from federal, rather than state, law. Although states require their own reporting, the Occupational Safety and Health Administration (OHSA) requires employers to keep records of workplace injuries and certain occupation illnesses and to provide those records directly to OHSA.[87] This includes giving OSHA inspectors warrantless access to the records.

C. Vital Statistics Reports

Vital statistics records include birth and death certificates, as well as fetal death or stillbirth certificates. The required reporters are persons attending births and certifying deaths. Vital statistics records are different from other public health records, in that the goal of the reporting system is a capture of every event. Although it would be ideal if communicable disease reports were filed for every case of a reportable disease, it is accepted that many cases are missed and investigators are used to help track down diseases that are dangerous enough to justify the expense. Unlike other reporting laws, vital statistics records have important functions for the subjects of the report and their families. Birth certificates are increasing necessary for participating in civil life in the United States, and even staying in the country. Death certificates are necessary to claim insurance benefits, settle estates, and for many other legal purposes. These records are used for public purposes, while communicable disease reports are kept strictly confidential.

Disease registries entail a special class of reporting that is a hybrid between public health reporting laws and vital statistics laws.[88] Registries are used to develop epidemiologic information about chronic illness, especially cancers. Because the objective is not to control a communicable disease that

---

[87] Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916-6135 (Jan. 19, 2001) (codified as 28 C.F.R. §§ 1904, 1952).

[88] This hybrid nature is reflected in the legal fights over public access to registry data. *See* Southern Illinoisan v. Dep't of Pub. Health, 812 N.E.2d 27 (Ill. App. 2004).

poses a present danger to the public, there often is no penalty for failing to report to a disease registry. Most disease registries are statewide, but there also are national registries maintained by the CDC and OSHA. Registries are used to determine the extent of certain problems in the community and to try to determine causes. If they are inaccurate, they may give false correlations and become useless for research and prevention.

D. Reporting Physically Dangerous Persons

This is the most legally complicated area of mandatory reporting, because it can result in criminal prosecution. Every jurisdiction requires reporting of certain types of injuries to law enforcement officials or social service agencies. Generally, these laws require reporting of child abuse and neglect,[89] spousal abuse and other family violence, and violent injuries such as gun shots that raise a suspicion of criminal activity. Child abuse and family violence reporting is a hybrid process, in that the primary responder is an administrative agency (child welfare), but there will also be a criminal investigation if the administrative agency finds the report was well founded. Violent injury reporting is purely a law enforcement matter.

These laws may also require reporting of persons who are potentially dangerous because of mental illness or defect.[90] For example, physicians in some states are required to report to the state driver's license bureau people with neurological impairments that could influence driving an automobile. The most systematic approach is in firearms regulations. Federal law restricts firearm ownership by persons who have a potentially dangerous mental illness,[91] and many states have more strict laws tracking mentally ill persons and regulating their access to firearms. Twenty states have mental health databases for this purpose. Data are obtained from reporting laws applying to all mental health care providers in California, but just from public hospitals in Massachusetts.[92] There is pressure to expand these laws in an attempt to prevent mental illness-related homicides.

---

[89] Child abuse and neglect reporting requirements are state laws and the reports are made to state or local social service agencies, but the states have made their laws compliant with the federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101, 42 U.S.C. § 5116 (1996), implementing regulations at 45 C.F.R. 1340.

[90] There are also common-law duties and private liability for failing to warn of the risks of the dangerous mentally ill. These duties usually run to the threatened person, rather than the state, and pose difficult policy questions about whether such private warnings are a meaningful substitute for state intervention. *See* Tarasoff v. Regents of U. of Cal., 551 P.2d 334 (Cal. 1976) and its progeny, *e.g.*, Bradley v. Ray, 904 S.W.2d 302 (Mo. App. 1995).

[91] Federal Gun Control Act, 18 U.S.C. § 922 (1968).

[92] Donna M. Norris et al., *Firearm Laws, Patients, and the Roles of Psychiatrists*, 163 AM. J. PSYCHIATRY 1392, 1394 (2006).

E. The Constitutional Basis for Reporting Laws

As with public health searches, third-party public health reporting requirements were standard practice for more than 175 years before the United States Supreme Court addressed their constitutionality. One basis of challenges to third-party reporting laws is the Fifth Amendment protection against self-incrimination. The courts have found that the Fifth Amendment created a personal right that cannot be asserted on behalf of others. The courts have stressed that the key to successful assertion of a Fifth Amendment violation is that the individual would be coerced into testifying against himself or herself. Thus, when a subpoena was sent to an accountant requiring him to provide information that would implicate his client, the accountant could not assert the privilege against self-incrimination on behalf of the client.[93] Because the client was not the target of the subpoena, he did not have standing to contest it.[94]

The second potential source of protection against mandatory third-party reporting is the common-law right to privacy. This was used to challenge a state law that required physicians and pharmacies to report all controlled substances prescriptions to a state agency. The purpose of the reporting was to prevent inappropriate prescribing and trafficking in narcotics by health professionals. The plaintiffs were physicians who claimed the law interfered with their right to practice medicine and patients who argued the law violated their right of privacy and threatened to injure their reputations.

In *Whalen v. Roe*,[95] the United States Supreme Court first found, unsurprisingly, that the physicians did not have a right to practice without state interference.[96] The Court found that the patients had an interest in their own privacy, but it balanced this against the state's interest in controlling the use of narcotics, using the deferential rational relationship test. The Court found that the state had the right to require these reports, but that this right was predicated on the state protecting the reports against improper use. The courts also have allowed access to patient information in the more constitutionally protected area of abortion clinic regulation, finding that public health and safety regulation of the clinics that required access to abortion records did not violate the patients' right of privacy.[97]

Legal privilege is the only claim that has been used by the courts to limit reporting laws. The three traditional privileges recognized in the United

---

[93] Fisher v. United States, 425 U.S. 391, 410-12 (1976).

[94] *See also* S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984).

[95] Whalen v. Roe, 429 U.S. 589 (1977).

[96] For an analysis of the breadth of the state's right to regulate medical practice, see Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201 (1999).

[97] Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000).

States are the clergy privilege, the spousal privilege,[98] and the lawyer-client privilege. (Contrary to common belief, there is no traditional physician-patient privilege. Any privacy rights arise from statute, and thus can be limited by reporting laws.) These privileges complicate the reporting of child abuse, family violence, and the dangerous mentally ill in limited situations.

Despite the frequency of claims of clergy privilege in crime dramas, there are very few real cases. *In re Grand Jury Investigation*[99] provides a good analysis of the privilege. The Third Circuit Court of Appeals found that it was limited to spiritual matters, not family counseling or discussion of business matters. It also reviewed the history and the ambiguous roots of the privilege, calling into question its constitutional origin, but found it was justified by federal statute.[100] After the widespread recent scandals of sexual abuse of children by Catholic priests, policy arguments for requiring clergy to report child abuse were strengthened and now several states require clergy to report child abuse.[101]

Conversely, attorney-client privilege is firmly rooted in the Constitution and has been the subject of many legal cases.[102] It is limited to communications, not physical evidence—the attorney cannot hide the client's bloody knife—and it survives the client's death.[103] Consistent with the separation of prevention and punishment that underlies all of this article, the privilege only protects communications about crimes already committed. Attorneys may be constitutionally required to report future crimes, and some professional legal organizations have ethical guidelines that require their members to report situations where there is a threat of future child abuse:[104] "An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client."[105] This position, however, has not been adopted by the American Bar Association or state disciplinary rules.

Some states that require attorneys to report child abuse have an explicit exclusion for communications from a client who would be charged with the abuse.[106] If the exemption is not stated in the statute, the attorney still can invoke it for communications about past crimes, but it is unclear whether the attorney could invoke the attorney-client privilege for potential future crimes.

---

[98] Because spouses are not subject to third-party reporting laws, spousal privilege is not discussed here.

[99] *In re* Grand Jury Investigation, 918 F.2d 374 (3rd Cir. 1990).

[100] This creates an opening for a state to reject completely the clergy privilege, but politically that would be very difficult.

[101] *See, e.g.*, MO. REV. STAT. § 210.115 (2007).

[102] *E.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[103] Swidler & Berlin v. United States, 524 U.S. 399 (1998).

[104] Robert A. Aronson et al., *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW. 1, 1 (1992).

[105] *Id.* at 29. This is discussed in an excellent comment, Lisa Hansen, *Attorneys' Duty to Report Child Abuse*, 19 J. AM. ACAD. MATRIM. LAW. 59 (2004).

[106] "An attorney, unless he has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect, [has a reporting duty]." NEV. REV. STAT. § 432B.220(4)(i) (2007).

There do not appear to be any cases disciplining attorneys for failing to report abuse, and, pragmatically—because the information is buried in the attorney's private files—it is unlikely that it would come to light.

F. Limitations on Reporting Laws

Although privilege can be used to block reporting laws in limited contexts, this has little significant effect on the public health and mental health reporting systems. The core of third-party reporting is done by health care professionals, medical laboratories, social workers, schools, and other entities who are not shielded by privilege and thus must comply with reporting laws. The only real limit on the authority to require third-party public health reports is political. Interest groups opposed to reporting may convince legislatures to pass laws limiting reporting, or public agencies may fail to implement reporting rules because of their political opposition to reporting certain conditions, as happened for HIV.[107]

Medical privacy has been largely federalized through the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[108] The regulations on medical privacy promulgated under the authority of HIPAA are complex,[109] but the analysis of public health reporting is simple because the HIPAA regulations exempt public health and safety reporting.[110] The major federal obstacle to public health reporting is the unsupportable position of the Department of Education (DOE) that the Family Educational Rights and Privacy Act (FERPA)[111] prevents educational institutions from complying with state public health reporting requirements.[112] This position has generated a great deal of conflict among the DOE, state health departments, and educational institutions. This interpretation also makes it difficult or impossible for schools to properly deal with potentially dangerous students who have not yet engaged in a violent act.

---

[107] *In re* New York Soc'y of Surgeons v. Axelrod, 572 N.E.2d 605, 609 (1991).

[108] Pub. L. No. 104-191, Stat. 1936 (2000) (codified in scattered sections of titles 18, 26, 29, and 42 of the United States Code).

[109] Office for Civil Rights, Department of Health and Human Services, 45 C.F.R. §§ 160 & 164 (2003) *available at* http://www.dhhs.gov/ocr/combinedregtext.pdf (last visited Oct. 10, 2008).

[110] 45 C.F.R. § 164.512(b) (2002). For a detailed discussion of the exemption of public health reporting from HIPAA, see MMWR, *HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services*, 52 MMWR Supp. May 2, 2003, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/m2e411a1.htm (last visited Oct. 10, 2008).

[111] 20 U.S.C. § 1232g (2000).

[112] *See, e.g.,* Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, United States Department of Education (Nov. 29, 2004), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html (last visited Oct. 10, 2008).

CONCLUSION

The Constitution grants broad authority for public health surveillance. As long as public health authorities do not use administrative searches as a subterfuge for criminal law searches, the courts will uphold these searches when they are conducted either pursuant to an area warrant or through the regulated industries exception to a warrant requirement. Surveillance, however, is just the first step in protecting the public health and safety. Surveillance data must be combined with good epidemiologic analysis, and then become the basis for public health interventions.

There have been few abuses of public health administrative searches. Public health authorities, if anything, have been too reticent to use proper surveillance techniques. Although some of this reticence is because of concerns about being seen as violating individual rights, most of it stems from lack of staff and other resources.[113] Despite the push on public health preparedness since the terrorist attacks on September 11, 2001, health departments around the United States continue to suffer budget and staff cuts. The impacts of these cuts are exacerbated by legislatures pushing ever-increasing responsibilities on health departments without providing the budgets or staff to carry out these new tasks.[114] The hardest issue for public health policy makers is to avoid pressures to transform public health agencies into extensions of the Department of Homeland Security. As we have seen from the adoption of Draconian emergency powers laws, it is more difficult to maintain a balance between individual rights and community protection than to attempt to satisfy political pressures by swinging wildly between extreme positions.[115]

---

[113] Adam Reichardt & Melissa Lewis, 2007 State Public Health Workforce Survey Results, ASTHO Publications (2008), *available at* http://www.astho.org/pubs/WorkforceReport.pdf (last visited Oct. 10, 2008); *see also* Courtney M. Perlino, *The Public Health Workforce Shortage: Left Unchecked, Will We Be Protected? American Public Health Association Issue Brief* (2006), *available at* http://www.apha.org/about/news/pressreleases/2006/06crisis.htm (last visited Oct. 10, 2008).

[114] For example, health departments are being enlisted in the national crusade against obesity. Although obesity may be a legitimate public health (as opposed to personal health) problem, these new tasks come at the expenses of traditional public health services, which include the identification of dangerous persons and conditions.

[115] George J. Annas, *Puppy Love: Bioterrorism, Civil Rights, and Public Health*, 55 FLA. L. REV. 1171 (2003).