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Poverty Law -- Is a Search Warrant Required for Home Visitation by Welfare Officials?

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fearing loss of driving privileges, may possibly be discouraged from seeking necessary treatment. It is conceivable that the driver posing the highest risk to society, who faces almost certain loss of his license if reported, might forego treatment, continue to drive as his condition worsens, and eventually kill himself and others. If he had sought treatment, he might have improved or been cured. This assumption may be purely speculative and is founded on the presumption that the patient avoiding treatment because of the law is aware of its existence. In fact, the general public probably is not aware of the law. Nevertheless, the risk that some, and perhaps many, drivers with reportable problems will be discouraged from seeking needed medical help must be weighed in any evaluation of section 20-17.1.

In conclusion, the statute appears to be a valid exercise of the power of the state to protect the motoring public, pedestrians, and the affected individuals. However, to avoid possible constitutional defects and to achieve fully the policy behind the legislation, the present law may need to be broadened to require reporting of *all* patients possessing the enumerated characteristics whether they are institutionalized or not. Moreover, it would be desirable for some concessions to be made in the area of psychiatric treatment. Finally, in view of the present reporting rate, the appropriate penalty provisions[35] should be utilized to bring about full compliance.

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Poverty Law—Is a Search Warrant Required for Home Visitation by Welfare Officials?

> The fact that public assistance is a statutory right means, therefore, that it is subject to conditions imposed by the Legislature. . . . It means that the Legislature may require that the applicant waive his right to privacy to permit a thorough investigation of his eligibility for public assistance. It means that the applicant must open his home to admit representatives of the Welfare Department to enter and to observe. . . . [I]f he refuses to submit and refuses to permit such infringement upon his right to privacy, then he may not exercise his right to receive public assistance.[1]

[35] N.C. GEN. STAT. § 20-35 (1965) provides that it is a misdemeanor to violate any of the article's provisions, which is punishable by a fine up to five-hundred dollars or by imprisonment for not more than six months.

[1] Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV.

The foregoing remarks were made by a high-ranking official in the New York City Department of Social Services and represent the widely-held theory that public assistance is a "gratuity" furnished by the state and thus may be made subject to whatever conditions the state sees fit to impose. This idea has recently been successfully challenged in *James v. Goldberg*[2]—a case adding to the slowly rising reservoir of case law defining the rights of welfare recipients.

Mrs. James, a resident of the city of New York and a recipient of payments under Aid to Families with Dependent Children (AFDC),[3] received a letter from her caseworker requesting an appointment to visit her at her home. She replied that under no circumstances could the caseworker make a home visit. The caseworker explained that the law required home visits[4] and that refusal by Mrs. James to permit them would result in the termination of her AFDC benefits. At a subsequent hearing, the Department of Social Services' review officer upheld the caseworker's decision to terminate benefits. Mrs. James then commenced a suit in which she sought to prevent the termination of the benefits on the grounds that such action constituted a violation of her fourth-amendment right to be secure from unreasonable searches of her home and of her fourth- and ninth-amendment rights to privacy.

In opposition to the plaintiff's application for relief, the Department urged that home visits by caseworkers were not searches since the purposes for them were to verify eligibility for public assistance and to offer the recipient professional counseling.[5] The department pointed out that caseworkers were instructed not to enter homes without permission or under false pretenses and not to look into closets or drawers.[6] In rejecting these arguments, the three-judge district court relied on recent Supreme Court decisions establishing that an individual's right to privacy is within the scope of the protection of the fourth amendment.[7] Un-

1184, 1203 (1965) (quoting the then Deputy Commissioner of the New York City Department of Social Services).

[2] 303 F. Supp. 935 (S.D.N.Y. 1969), *prob. juris. noted sub nom.*, Wyman v. James 38 U.S.L.W. 3319 (U.S. Feb. 24, 1970).

[3] 42 U.S.C. § 601-10 (Supp. III, 1965-67). The Aid to Families with Dependent Children program provides aid to needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who live with any of certain enumerated relatives. 42 U.S.C. § 606(a)(1) (Supp. III 1965-67).

[4] *See* N.Y. Soc. Welfare Law § 134 (McKinney Supp. 1970).

[5] 303 F. Supp. at 939.

[6] *Id.* at 940.

[7] *Id.* at 940-42. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

doubtedly an influential factor was the New York law providing that if a caseworker visited a home and found any evidence of fraud, he would be obligated to report what he observed[8] even though the visit was not for that purpose. The court was compelled to recognize the paradoxical nature of a caseworker's job—that his duties are dichotomous. He is trained to give professional counseling; yet he must also serve as an informer. The court therefore concluded that all home visits "may appropriately be considered searches for evidence of welfare fraud or other criminal activity."[9]

The constitutionality of home visits by caseworkers to provide counseling has never before been questioned. Traditionally caseworkers have had ready access to recipients' homes. In a recent study of the attitudes of recipients of AFDC in Wisconsin toward unannounced visits by caseworkers, those receiving payments were asked the following question: "Should a welfare client have the right to refuse access to his home to a caseworker who calls unannounced?" Less than twenty-eight per cent of those questioned answered this question affirmatively.[10] However, the study did not cover the situation that was perhaps the most significant fact in *James*—the caseworker's being refused admittance *after having made an appointment* with the welfare client.

On the other hand, welfare searches (as distinguished from counseling visits) have long been under attack by civil libertarians although only one case was found in which the question has been litigated. In *Parrish v. Civil Service Commission*,[11] early-morning mass raids, primarily for the purpose[12] of securing proof of welfare ineligibility in order to reduce the number of persons on public assistance, had been made on the homes of recipients of AFDC. No search warrants had been obtained, but each home had been searched thoroughly. On appeal from denial of a petition for reinstatement brought by a caseworker who had refused to participate and had been dismissed, the Supreme Court of California held that the raids were unconstitutional.[13] Despite the court's condemnation of the mass raids, there was no suggestion that all searches by welfare officials are illegal. The court's repudiation was, in fact,

[8] *See* note 33 *infra* and accompanying text.

[9] 303 F. Supp. at 944.

[10] Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 11 (table 6) (1969).

[11] 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

[12] Evidently another purpose was to counter local criticism of the AFDC program by exhibiting the infrequency of fraud.

[13] 66 Cal. 2d 623, 425 P.2d at 225, 57 Cal. Rptr. at 625.

limited to mass raids conducted at a time "inconvenient" for the recipient.[14] If the decision in *Parrish* is strictly interpreted, it is not authority against a warrantless search of a welfare recipient's home made at a reasonable hour.

Although *Parrish* is the only reported decision prior to *James* in which a court has dealt directly with the merits of searches of the homes of those receiving welfare payments, there have occasionally been other instances of formal complaints filed in court concerning the issue. For example, in a case from the District of Columbia,[15] a welfare recipient sought a declaratory judgment and injunctive relief against allegedly unlawful and harassing searches and surveillance by investigators of the District Department of Public Welfare. The recipient averred that the Department had threatened to terminate her assistance payments unless she allowed the searches. Denial of relief by the district court was affirmed on the ground that administrative remedies had not been exhausted.[16] Undoubtedly, the infrequency of similar challenges[17] is evidence of the understandable reluctance of welfare recipients to dispute the authority of those upon whom they are totally dependent for support.

An analogous situation arising from the actions of other administrative agencies led to the first serious constitutional challenge of civil searches in the federal courts. In *Frank v. Maryland*,[18] the Supreme Court upheld the conviction in state court of a homeowner who had refused to permit a municipal health inspector to enter his premises without a search warrant. The Court's rationale was that "[n]o evidence for criminal prosecution is sought to be seized."[19] This decision was overruled in *Camara v. Municipal Court*.[20] A lessee had refused to allow a warrantless inspection

[14] Perhaps the court in *Parrish* would have been willing to hold all searches by welfare officials illegal had they not been compelled to distinguish the facts of *Parrish* from those of Frank v. Maryland, 359 U.S. 360 (1959), in which the Supreme Court had upheld a warrantless health inspection. The court in *Parrish* stated that "[t]he great gulf which separates an 'orderly' afternoon visit from the searches conducted shortly after dawn in the present case would itself suffice to deprive defendant of any support from the *Frank* opinion." *Id.* at 267, 425 P.2d at 228, 57 Cal. Rptr. at 628. *Frank* has since been overruled in Camara v. United States, 387 U.S. 523 (1967).

[15] Smith v. Board of Comm'rs, 380 F.2d 632 (D.C. Cir. 1967), *noted in* 9 WELFARE L. BULL. 4 (1967).

[16] 380 F.2d at 633.

[17] Bradley v. Gingsberg, Civ. No. 3047 (S.D.N.Y., filed August 10, 1967), *noted in* 10 WELFARE L. BULL. 8 (1967), is another example of a suit complaining of searches brought by a welfare recipient.

[18] 359 U.S. 360 (1959).

[19] *Id.* at 366.

[20] 387 U.S. 523 (1967).

of his apartment by housing inspectors. Although the inspection could not have resulted in criminal prosecution, the Court struck down the civil-criminal distinction that it had articlulated in *Frank* and held that a citizen has the right to keep his private premises free from being entered for administrative safety and health inspections without the authority of a warrant.

Although in *Camara* the Court was concerned with inspections by a city's building investigators and limited its decision to "administrative searches of the kind at issue here,"[21] the rationale of the holding[22] should extend to administrative visits to the homes of welfare recipients. The majority in *James* relied in part on *Camara* in reaching its decision.[23] Before *Camara,* if the immediate purpose of the search was to determine eligibility for welfare rather than to initiate criminal prosecution, the proposition that the search required no warrant was at least colorably supportable. An argument for this proposition after the decision in *Camara* is indeed difficult to accept. There is a less demanding public interest in searches of welfare recipients' homes than in health and safety inspections because of the unavailability of equally effective substitutes for the latter. To inspect a home for building-code violations requires access into the home; to ascertain eligibility for welfare or to provide counseling does not.[24]

Nevertheless, Judge McLean, dissenting in *James,* voiced his fear that extending the fourth amendment to require warrants for counseling visits would hobble caseworkers in their attempts to carry out the aims of the AFDC program:

> We are concerned here with a program of public assistance to dependent children who are to be cared for in their homes. . . . It is essential that the welfare workers who administer this program enter the

[21] *Id.* at 534.

[22] [W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . .

Id.

[23] 303 F. Supp. at 941.

[24] One AFDC supervisor stated that although refusals to allow entrance into the home for counseling were rare, the department's policy was to honor the refusal. Implicit in this policy is the recognition that home visits are not imperative in the AFDC program. Interview with Ann De Main, Supervisor of AFDC program, Durham County, North Carolina, in Durham, Feb. 9, 1970.

> children's home to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law.[25]

But this language indicates that Judge McLean overlooked the fact that a visit by a caseworker may be for any one of three often-overlapping purposes. First, the purpose of the visit may be the one to which Judge McLean addresses himself—to provide social services. Second, the visit may be to determine welfare eligibility. Finally, it may be for the sole purpose of searchng for evidence of welfare fraud.

In *James*, all of these categories were lumped together as "searches" for which a warrant must be obtained if consent is not given. The court stated that "for [a] search of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of 'probable cause,' will test the particular decision to search against the constitutional mandate of reasonableness."[26] The court intimated that *Camara*, which provides a relaxed standard of probable cause for administrative searches, should provide guidelines for the issuance of a warrant to welfare officials. The Supreme Court in *Camara* emphasized that " 'a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of a crime.' "[27]

The approach to probable cause in *Camara* leaves much to be desired, especially when the standard of that decision is applied to visits to recipients by welfare officials. The criteria suggested by the Supreme Court that might constitute probable cause for health and safety inspections (such as the length of the interval between inspections or the general condition of the area)[28] would not be helpful in legitimizing official visits to welfare recipients. And unless judicial approval is to be a "rubber stamp," an allegation that the visit is merely to provide professional guidance for the recipient should not demonstrate sufficient

[25] 303 F. Supp. at 946 (dissenting opinion).

[26] 303 F. Supp. at 943-44.

[27] 387 U.S. at 538, *quoting from* Justice Douglas' dissenting opinion in Frank v. Maryland, 359 U.S. 360, 383 (1959).

[28] The court in Camara stated that

> [s]uch standards [of probable cause] which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the conditions of the entire area, but they will not necessarily depend upon specific knowledge of the conditions of the particular building.

387 U.S. at 538.

cause for a warrant under even a relaxed standard.[29] Rightly understood, the practical thrust of *James* is that if the recipient does not wish to have counseling done within his home, it cannot be forced upon him even though the visit purports to be for the sole purpose of benefitting his children.

If the court's decision in *James* does mean that social services may no longer be forced upon a recipient in his home, what will its effect be? Under New York's policy, home visits to recipients of AFDC are to be made once every three months.[30] Although heavy case loads perhaps dictate this small number of visits, the amount of benefit derived from four visits a year is likely minimal. The recent study in Wisconsin mentioned earlier revealed that visits of caseworkers to recipients of AFDC amounted to a thirty-minute chat every three months.[31] The authors of the report reached the following conclusion:

> Our overall finding was that very little social service activity goes on. This follows from the pattern of caseworker visits. Since the caseworkers visit the clients so infrequently and for such short periods of time, *there is of necessity very little supportive service work or regulation of client's lives.*[32]

Thus the decision in *James* may not have so drastic an effect on the AFDC program as the dissenting judge anticipated.

The question remains whether the standard of probable cause enunciated in *Camara* is applicable to visits of caseworkers for the purposes of either determining eligibility or searching for evidence of welfare fraud. As a practical matter, the two purposes may be indistinguishable: in either instance the informatoin sought can be used not only to terminate welfare assistance but also to initiate criminal prosecution based on fraudulent misrepresentation.[33] These relatively severe consequences

[29] Judge McLean attacked the majority opinion in *James* on this point: "If . . . the welfare worker can obtain a warrant merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality." 303 F. Supp. at 946 (dissenting opinion).

[30] *Id.* at 938.

[31] Handler & Hollingsworth, *supra* note 10, at 8.

[32] *Id.* at 10 (emphasis added).

[33] N.Y. Soc. WELFARE LAW § 145 (McKinney 1966) provides in part:

> Any person who by means of a false statement or representation, or by a deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York,

weigh heavily against relaxing the standard of probable cause for obtaining a warrant for these purposes; the same degree of justification should be shown to the issuing magistrate as the police officer must show before he initiates his search for evidence of a crime.[34] This conclusion does not mean that welfare eligibility cannot be checked: "[L]ess drastic means may be suggested for achieving the same basic purposes for which the City and State urge home visits are designed."[35]

The consent of the recipient eliminates the requirement of a warrant for welfare officials to enter his home.[36] Does a citizen who accepts public assistance impliedly consent to a search of his home in order for the caseworker to review his continuing eligibility? After *James*, this question must be answered in the negative.[37] But if the recipient *expressly* agrees to the visit, will the courts show the same reluctance to find legally effective consent as they have in scrutinizing police searches? Consent to a search in criminal cases, to be legally effective, must be

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in which case he shall be punished in accordance with the penalties fixed by such law . . . . *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official* [emphasis added].

[34] A representative definition of probable cause is:

Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Bringar v. United States, 338 U.S. 160, 175-76 (1949).

[35] 303 F. Supp. at 943. The court deciding *James* suggested some alternatives to home visits:

Proof of actual residence may be ascertained . . . by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission . . . of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers . . . . Information regarding goods or services which the recipient may need in the management of her home can equally be obtained in the offices of the Department should the recipient wish to make her needs known there rather than in the convenience of her home. The regularity of school attendance, academic achievement . . . can more accurately reflect the effects of a child's home environment than an interview with his or her parents in the home.

Id.

The objection may be raised that home visits are necessary to discover the presence of persons residing in the home who owe a legally enforceable duty of support to the recipient or to discover possession of unreported gifts of personal property. The answer is that visits for such purposes can be made by obtaining a search warrant based on the requisite probable cause.

[36] *Cf.* Calhoun v. United States, 172 F.2d 457 (5th Cir. 1949).

[37] 303 F. Supp. at 945; *accord*, Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

given as an "understanding and intentional waiver of a constitutional right."[38] The burden on the government of demonstrating the voluntariness of the consent is heavier when the person whose home was searched is illiterate.[39] Professor Jacobus tenBroek has observed that recipients of AFDC payments in California are "[o]nly slightly educated —a third of them have not passed beyond grammar school and they average a ninth grade education . . . ."[40] Perhaps any waiver to a search that is given by a recipient with so little education is prima facie ineffective.

The disparity of position between the caseworker and the welfare recipient makes it unlikely that any consent given is wholly without compulsion. To be effective, consent cannot have been granted in "submission to authority."[41]

> [C]aseworkers . . . represent . . . authority to the recipient, authority whose mere presence constitutes coercion to some degree and whose request to enter, however politely phrased, is in the nature of an order. Even more important, the readily available means by which authority may be exerted is sharp in her mind. She is almost certain to feel that refusal to consent will bear adversely on her aid grant and thus deprive her and her children of their only source of support.[42]

In *Parrish*, the California Supreme Court relied on this inherent coercion to nullify the recipients' consent to pre-dawn searches.[43]

Since the recipient of welfare payments now has the right to demand a search warrant before a welfare official can visit him in his private residence, the only procedure likely to assure that consent to the visitation is freely given is for the official to advise the recipient of his fourth-amendment rights. Especially should the official advise the recipient that his refusal to consent to a visit will in no way affect his welfare payments. This method, which would be similar to the *Miranda* warnings,[44] may not be an ideal solution, but informed, reliable consent is necessary if caseworkers are ever to be able to visit welfare recipients in their homes.

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[38] Johnson v. United States, 333 U.S. 10, 13 (1948).

[39] Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

[40] tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 670 (1965).

[41] Johnson v. United States, 333 U.S. 10 (1948); *accord*, Pekar v. United States, 315 F.2d 319, 324 (5th Cir. 1963), in which the court stated that if "superior authority had any place in the obtaining of the consent [to search], the consent is no consent at all . . . ."

[42] tenBroek, *supra* note 41, at 669-70.

[43] 66 Cal. 2d at 270, 425 P.2d at 229, 57 Cal. Rptr. at 629.

[44] The warnings to be given to a person under custodial interrogation may be found in Miranda v. Arizonia, 384 U.S. 436, 444 (1965).

The decision in *James* will no doubt be subjected to much criticism, but in view of the dual nature of a public caseworker's duties, the court, in requiring warrants for all home visits, reached a very practical solution.

> To attempt to draw a distinction regarding the applicability of the [Fourth] Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment.[45]

Although intrusion into a welfare recipient's home is motivated by the highest public purpose, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[46]

F. FINCHER JARRELL

Uniform Commercial Code—Checks—Cash Deduction from Check Prior to Deposit as Final Payment under Article Four

The Supreme Court of Appeals of Virginia in *Kirby v. First & Merchants National Bank*[1] recently applied Article Four of the UNIFORM COMMERCIAL CODE[2] to reach a result that may be surprising to bankers in the states that have adopted the U.C.C.[3] The court held that the bank had made a final cash payment under section 4-213(1)(a)[4] of the U.C.C. when it permitted a customer to make a cash deduction from a check that was being deposited.[5]

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[45] 303 F. Supp. at 942.

[46] Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion of Justice Brandeis).

[1] 210 Va. 88, 168 S.E.2d 273 (1969).

[2] The UNIFORM COMMERCIAL CODE [hereinafter cited as U.C.C.] has been codified in VA. CODE ANN. §§ 8.1-.10 (1965). References *infra* will be to the Code as adopted in Virginia, but the number 8 will be omitted.

[3] Every state except Louisiana has now adopted the U.C.C. The U.C.C. is found in N.C. GEN. STAT. ch. 25 (1965). For a basic study of Article 4 as adopted in North Carolina, see Davis, *Article Four: Bank Deposits and Collections*, 44 N.C.L. REV. 627 (1966).

[4] § 4-213(1)(a) provides:

> (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) paid the item in cash;

[5] 210 Va. at —, 168 S.E.2d at 276.