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Search and Seizure--Warrant Requirement for Welfare Searches

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COMMENTS

SEARCH AND SEIZURE — WARRANT REQUIREMENT FOR WELFARE SEARCHES*

In *James v. Goldberg*,[1] a three-judge federal district court in New York increased by one the lately accruing rights of that state's welfare recipients. Relying extensively on *Camara v. Municipal Court*,[2] the court asserted the right of privacy of a mother receiving benefits under Aid to Families with Dependent Children[3] and imposed a search warrant requirement on caseworkers attempting to gain interviews in the homes of recipients without the recipient's consent.

In response to a letter from her caseworker requesting a home visit, plaintiff, a welfare recipient on AFDC and a resident of New York City, refused to admit the caseworker to her home under any circumstances. After an explanation that regulations required the home visit and that refusing the visit was a ground for termination of benefits, plaintiff remained staunch in her refusal, though affirming a willingness to provide any desired information at the Welfare Department's offices. Upon an administrative hearing by the Welfare Department, a determination that such visits were mandatory and that benefits could be conditioned upon the recipient's submission to them resulted in the termination of benefits to plaintiff's family.[4]

An examination of the court's holding on these facts will show the sound basis for the warrant requirement in administrative law, as well as the logic of extending that requirement to the administration of welfare. In spite of these positive steps, a look at the court's qualification of probable cause in this field will reveal an unnecessary compromise in the decision which can be alleviated on review by the Supreme Court.

* James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969).

1. James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969).
2. 387 U.S. 523 (1967).
3. 42 U.S.C. §§ 601 *et seq.* (1964) and the regulations promulgated thereunder (hereinafter called AFDC).
4. 303 F. Supp. at 938. The recent decision of *Goldberg v. Kelly*, 38 U.S.L.W. 4223 (U.S. Mar. 23, 1970) (No. 62), bars states from terminating benefits unless the recipient is allowed to appear personally, have counsel, present evidence, and confront and cross-examine witnesses. Full administrative review must be at least provided by a post-termination hearing, although a pre-termination hearing need not be judicial or quasi-judicial if full review is had later.

I. The Fourth Amendment and the Warrant Requirement in Administrative Law

In terms of legal history, the recognition of fourth amendment rights and warrant requirements in administrative law is a recent phenomenon. In *Frank v. Maryland*,[5] protection against such administrative inspections and intrusions was considered peripheral at most to the constitutional guaranty of privacy. Justice Frankfurter drew a line between searches for evidence of criminal activity and purely administrative searches, applying the right of privacy only to the former; consequently, no warrant requirement was introduced in the public health area.

The *Frank* doctrine was rejected eight years later in *Camara*, which announced a warrant requirement and a standard of probable cause for the issue of those warrants.[6] With the express overruling of *Frank*, the *Camara* Court extended the traditional bounds of the fourth amendment and took a stand to uphold the individual's right of privacy in other areas where official intrusion was accepted procedure. Recent decisions favoring the generally disenfranchised welfare recipient made the welfare search among the logical areas of application for *Camara's* pronouncement.

II. The Emerging Rights of Welfare Recipients — A Prelude to James

James is not a mere restatement of a status which people receiving public assistance already enjoy. It is characteristic of a recent trend of decisions giving this dependent class of our society the rights which other citizens presently enjoy.

Three Supreme Court cases illustrate this trend. *Sherbert v. Verner*[7] held that a state may not constitutionally condition eligibility for receipt of unemployment compensation upon the relinquishment of first amendment freedom of religion, either directly, or more importantly, indirectly. Abolition of the "substitute father rule," which required termination of AFDC benefits to children in a family where the mother was cohabiting with a man not their father, came via *King v. Smith*.[8] The

5. 359 U.S. 360 (1959).
6. 387 U.S. 523 (1967). The impact and shortcomings of the *Camara* decision will be discussed later as a force in molding the *James* holding.
7. 374 U.S. 398 (1963). Plaintiff was a Seventh Day Adventist who refused Saturday employment since that was her day of worship. Her refusal resulted in termination of unemployment compensation benefits, a predicament which effectively made her choose between her religious tenets and a state-granted benefit to those without work.
8. 392 U.S. 309 (1968).

Supreme Court found that the word "parent" in section 406(a) of the Social Security Act[9] was intended to mean one who has a legal obligation to support a child. Since a "substitute father" had no such legal obligation, termination of benefits due to the substitute father's presence was inconsistent with the right to receive benefits under the Act for which the children were otherwise qualified. Thus, the rule was deemed void. In *Shapiro v. Thompson*,[10] a one year residency requirment was found to infringe on the fundamental right to travel, and no compelling state interest was produced to justify the encroachment.[11]

In addition, regulations have been formulated to protect the rights of the welfare recipient as a matter of national policy. Section 2220 of the *HEW Handbook of Public Assistance Administration*[12] requires states to provide plans which protect individual rights "and will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights."[13] Subsequently, section 2230 specifically cautions against entering homes "by force or without permission," visiting "outside working hours" or "during sleeping hours," or "searching [for] clues to possible deception."[14] All of these cases and regulations provided the district court a foundation upon which to base the *James* reasoning as well as affording solid grounds for future affirmance by the Supreme Court on appeal.[15]

III. THE JAMES OPINION

A. The Search Warrant Requirement

Absent effective consent, a search warrant is necessary to gain entrance to the recipient's home. The cornerstone of this state-

9. 42 U.S.C. § 606(a) (1964). Section 606(a)(1) defines a "dependent child" as one who is needy and

> . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a *parent*, and who is living with [one of certain specified relatives in the relative's home]. *Id.* (emphasis added.)

10. 394 U.S. 618 (1969).
11. *Id.* Limitation of welfare expenditures and minimization of fraudulent payments were considered permissible state goals, but not compelling state interests under the "special scrutiny" test of the equal protection clause in the fourteenth amendment.
12. U.S.DEP'T OF HEALTH, EDUC., AND WELFARE, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE'S HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION Part IV at § 2220 (1967).
13. *Id.*
14. *Id.* at § 2230.
15. The Supreme Court has accepted the case to be decided probably next term; *cert. granted*, 38 U.S.L.W. 3310 (U.S. Feb. 24, 1970) (No. 977).

ment originates in the criminal law which has applied the fourth amendment to govern "all intrusions by agents of the public upon personal privacy and security."[16] Encompassing administrative procedure in one category, the *James* court draws an analogy to *Camara* and acknowledges that, although administrative searches may be "less hostile" intrusions, they are nonetheless 'searches' within the meaning of the fourth amendment.[17] However broad such a conclusion may seem, it cannot be called unsound. The California state court in *Parrish v. Civil Service Commission*[18] recognized this and denounced the most repugnant type of search—the pre-dawn raid to ferret out undeclared heads of families or illicit cohabitation in the homes of welfare recipients, which could be a basis for termination of benefits. It is to prevent abuses such as this that *James* correctly extends fourth amendment protection to the recipient.

It may be argued, as it was in *James*,[19] that a mere home visit by the caseworker is only an offer of aid or counsel to the recipient to promote the economic spending of what is likely to be a meager allowance. Perhaps a certain personal rapport is beneficial to the recipient in helping her define and solve her financial, social, or medical problems. But as the *James* court recognizes,[20] it seems impossible to divorce these helpful services from the investigative element inherent in any home interview. With any entrance into a home, the caseworker must necessarily notice the presence of new furnishings, appliances, or anything else indicative of an undisclosed source of income to the recipient, and under New York law,[21] the worker is bound to report it.

In asking that welfare recipients be made an exception to fourth amendment protection, the defendants asserted two reasons: (1) welfare is a privilege, not a right; and (2) compelling

16. 303 F. Supp. at 940. The court cites throughout the opinion many fourth amendment cases which lend support to this general conclusion, *e.g., Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Abel v. United States*, 362 U.S. 217 (1960).

17. 303 F. Supp. at 941.

18. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

19. 303 F. Supp. at 939.

20. *Id.* at 944.

21. N.Y. Social Welfare Law § 145 (McKinney 1966). This statute provides a penalty for fraudulent procurement of public assistance and concludes:

> 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.

state interests outweigh the recipient's right of privacy.[22] The mere fact that welfare may be a privilege and not a right begs the question of the state's second assertion, since even a privilege cannot be conditioned upon the relinquishment of a constitutional guarantee absent some showing of a compelling state interest therefor.[23] The crux of New York's state interest argument, minimization of fraudulent payments,[24] would seem to be a settled issue even at the Supreme Court level because of the *Shapiro*[25] decision, and would, therefore, appear to be invalid. The court's ruling here seems very sound especially in light of the simple and easily accessible alternative sources of information.[26]

B. The Standard of Probable Cause

The mere requirement of a warrant as precedent to the caseworker's visit leaves in limbo the basic fourth amendment mandate that "no warrants shall issue, but upon probable cause . . . ."[27] Traditional probable cause has been defined in various ways; probably the most representative statement comes, as follows, from *Berger v. New York*:[28]

> [P]robable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.[29]

Though the "facts and circumstances," the "affiant's knowledge," and the "reasonably trustworthy information" have all been

22. The possibility that state policy considerations may have no place in a balancing process against fourth amendment rights will be discussed below.
23. Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).
24. *See* 303 F. Supp. at 939, 942.
25. 394 U.S. 618 (1969).
26. 303 F. Supp. at 943. The court, in note 13 of its opinion, refers to the proposed declaration system of HEW [Dep't of HEW, Determination of Eligibility for Public Assistance Programs, 33 Fed. Reg. 17189 (1968)], with only spot checks on credibility. This parallels the present income tax return procedure and seems to place certain aspects of national policy in opposition to the welfare visits contested in *James*. Also, President Nixon in his welfare proposals has asked for a declaration system "with demeaning and costly investigations replaced by simplified reviews and spot checks . . . ." (115 CONG. REC. H7239, S982 (daily ed. Aug. 11, 1969).
27. U.S. CONST. amend. IV.
28. Berger v. New York, 388 U.S. 41, 55 (1967). *See* Brinegar v. United States, 338 U.S. 160 (1949).
29. Berger v. New York, 388 U.S. at 55.

questioned,[30] a certain particularity regarding both the crime and the evidence to be seized has been required for probable cause to exist, with a lack of particularization rendering the warrant invalid.[31]

Camara, while instituting the administrative warrant, proceeded to compromise the heretofore accepted criteria of probable cause.[32] Suddenly, probable cause in the administrative warrant was a balancing process which considered "the municipal program being enforced, . . . the passage of time, the nature of the building, . . . or the condition of the entire area . . . ."[33] It would no longer "necessarily depend upon specific knowledge of the condition of the particular dwelling."[34] Or more broadly, "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[35]

Since *James* relied on *Camara* as precedent, it chose to follow the questionable qualification of probable cause. According to *James*, a judicial officer must

> test the particular decision to search against the constitutional mandate of reasonableness. Should this official determine that a valid public interest justifies the intrusion contemplated, then there exists probable cause to issue a suitably restricted search warrant.[36]

The departures from the *Berger* standard quoted above are patent, the most obvious being the terms "reasonableness" and "valid public interest." Both imply that in order to give government optimum policing of welfare expenditures, traditional probable cause must be sacrificed. This is because welfare searches are considered less hostile intrusions than searches for evidence of a crime. Similar approaches in the criminal

30. *See* Spinelli v. United States, 393 U.S. 410 (1969); United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); Johnson v. United States, 333 U.S. 10 (1948).

31. *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967); Aguilar v. Texas, 378 U.S. 108 (1964).

32. LaFave, *Administrative Searches and the Fourth Amendment: the Camara and See Cases*, 1967 Sup. Ct. Rev. 1 (1967). LaFave states:

> To say that probable cause required by the Fourth Amendment is not a fixed test, but instead involves a sort of calculus incorporating all the surrounding circumstances of the intended search, constitutes a major departure from existing constitutional doctrine. *Id.* at 12-13.

33. Camara v. Municipal Ct., 387 U.S. 523, 538 (1967).

34. *Id.*

35. *Id.* at 539.

36. 303 F. Supp. at 944.

law have been rejected. "[I]nstead we are committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive police state."[37] Precedent shows that the basic function of the fourth amendment is to protect personal privacy and should not fluctuate depending on whether the victim of the search is sought on criminal grounds rather than for housing code violations or welfare eligibility infractions.

The danger implicit in decisions like *James* and *Camara* is an erosion of probable cause in other areas. First, in a system where the same judicial officer, *e.g.*, a magistrate, is charged with issuing all kinds of warrants, it is practically inevitable that separate standards of probable cause in separate areas will not long remain completely distinguishable. Nor is the safeguard of higher judicial review a sufficient check, for constant review of both standards, administrative and criminal, can only result in merger at the appellate level as well. Probable cause in the end would yield to the proverbial "rubber stamp" process. An even more dangerous result would be a conscious formulation of different standards. Perhaps more serious crimes and more expensive crimes would require a less quantum of evidence for search since public interest (and opinion) would run higher in such offenses. Only the individual's interest remains constant regardless of the offense and its seriousness; so only protection of the individual's interest offers a firm basis for a meaningful standard of probable cause. Only the traditional standard, of which *Berger* is representative, has individual interest as its base, and as such, should remain unchanged.

IV. ALTERNATIVES

On review, there are two possible grounds for adopting the more stringent probable cause standard. First, it is possible that welfare visits can never be completely divorced from possible criminal prosecution. As discussed above, the senses of the caseworker must necessarily perceive evidence of extra income in a home, and at some point prosecution for fraud must be considered.[38] This ubiquitous criminal element suggests that

37. LaFave, *supra* n.32 at 14. Decisions like *Miranda v. Arizona*, 384 U.S. 436 (1966), are not susceptible to any reasonable interpretation other than a built-in bias in our judicial system of respect for individual rights.

38. Even if the only sanction was termination of benefits, there still remains the matter of restitution of money fraudulently obtained which inevitably leads to some threat of prosecution. In contrast is the housing code violation of *Camara*. It is possible to follow various punitive routes such as fines or tax assessments to ultimate eviction or public sale without criminal prosecution, and even though it remains a possibility, prosecution is simply a more remote possibility in the housing code area.

only the criminal standard is applicable and therefore must be used. Second, the welfare violation tends to be more of an individual or private offense. It reduces itself to a matter of one person obtaining money to which he is not entitled. On the other hand, the housing code violation has more threat of immediate public danger such as disease, fire, or personal injury.[39] This distinction is closely related to the "area" nature of housing code enforcement vis-à-vis individual scrutiny in welfare.

Finally, should the administrative standard be adopted, certain procedural safeguards should be introduced to compensate for the compromise of specificity and particularization in the warrant procedure. First, since the recipient's consent is of less importance under this procedure,[40] a higher level determination of the reasonableness of the intrusion should be made prior to the visit,[41] by the customary judicial officer. The value of this step would be to cut out essentially useless visits to which the recipient must submit; and conversely, authorized visits would necessarily rest on grounds of some importance or benefit to the recipient. A second criteria would require advance notice of a visit to a recipient.[42] If visits are not for the purpose of discovering fraud,[43] this should work no hardship on the caseworker. Further, one should be allowed some notice in order to prepare his home for public review and to safeguard personal matters. Third, as a policy matter, visits should be made only upon request, except where the exigency of the situation dictates otherwise.[44] From the welfare department's point of view, this is no great burden since most pertinent information can be gathered elsewhere. For example, the well-being of a child could be assured through periodic medical examinations made availa-

39. Undeniably, this is a countervailing consideration of public interest, but nevertheless represents one more distinction between *Camara* and *James*.

40. Nothing is gained by refusal, since the caseworker could obtain a warrant much more easily. See LaFave, *supra* n.29 at 23.

41. Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 530-31 (1968).

42. *Id.* at 533.

43. *See* 303 F. Supp. at 939, *citing* Memorandum of Law in Behalf of Defendant Wyman, dated June 26, 1969 at 5. Defendants' second contention was that visits were for counselling and making available certain social services, not for searches.

44. The emergency situation is, of course, an existing exception to the search warrant requirement in any circumstance, and is recognized in *James*. *See* James, 303 F. Supp. at 943, *citing, e.g.*, in support of this conclusion *Terry v. Ohio*, 392 U.S. 1 (1968); and *Berger v. New York*, 388 U.S. 41 (1967).

ble to the AFDC mother.[45] Regularity of school attendance is another source of information concerning the child.[46]

V. CONCLUSION

James has the potential to expand the rights of welfare recipients on a nationwide scale, and there is no sound logic in denying this class of people a right enjoyed by the rest of the population. It is unfortunate that a compromise of traditional probable cause was thought necessary before recipients could be vested with fourth amendment protection. Higher review affords a last chance for averting this unnecessary result and checking what may begin an erosion of the warrant procedure in other areas.

S. JACKSON KIMBALL, III

45. 303 F. Supp. at 943.
46. *Id.*