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Constitutional Law - Welfare Law - Welfare Benefits Conditioned Upon Consent to a Warrantless Home Visit Held Not to Violate Fourth Amendment

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CONSTITUTIONAL LAW—WELFARE LAW—Welfare Benefits Conditioned Upon Consent to a Warrantless Home Visit Held Not to Violate Fourth Amendment.

Mrs. Barbara James, a resident of New York City, had been receiving welfare benefits[1] since the birth of her son, Maurice, in 1967. At the time of her initial application, Mrs. James consented to a visit to her home that was required in order that her eligibility could be determined.[2]

On May 8, 1967, Mrs. James received written notice that her home would again be visited by a caseworker on May 14. Upon receipt of the notice, Mrs. James informed the caseworker that, while she was willing to provide the information necessary to establish her continued need, she would not allow the visit to take place in her home. Mrs. James was advised by the caseworker that the visit was required by law,[3] and that refusal would result in termination of benefits. At Mrs. James' request a hearing[4] was held May 27, at which Mrs. James appeared with an attorney, and again offered to meet with the caseworker outside her home. She also offered to provide any pertinent information to the agency, but refused permission for the home visit. The City Department of Social Services officer ruled that a termination of benefits was proper.

Mrs. James, therefore, brought a suit seeking declaratory and injunctive relief on behalf of herself, her son, and all others similarly situated. She alleged that the mandatory home visit constituted an unreasonable search, and violated her right to privacy.[5] A three-judge Federal Dis-

1. Aid to Families with Dependent Children (AFDC) is a categorical assistance program, financed by federal grants-in-aid, and administered by the States in accordance with the regulations of the Secretary of Health, Education and Welfare. Goldberg v. Kelly, 397 U.S. 254, 256 n.1 (1970).

2. Title 18 New York Code, Rules and Regulaitons § 351.10(a) (1967) provides that "Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly. . . ."

3. New York Social Services Law § 134 (McKinney 1966) and § 134a (McKinney Supp. 1967).

4. Goldberg v. Kelly, *supra* note 1, held that due process, guaranteed through the Fourteenth Amendment, required that the recipient be given an evidentiary hearing prior to the termination of benefits. See also Wheeler v. Montgomery, 397 U.S. 280 (1970).

5. Mrs. James also alleged that the proposed visit was a violation of Subchapter IV of the Social Security Act of 1935. 42 U.S.C. § 602. Wyman v. James, 400 U.S. 309, 314 (1971). Neither the District Court opinion nor the majority opinion of the Supreme Court discussed this allegation. In his dissent, however, Justice Marshall argued that § 2200(a) of Part IV of the H.E.W. Handbook of Public Assistance is a regulation binding upon the states that prohibited an unconsented home visit, and by implication, the denial of benefits for withholding consent. Wyman, *supra*, at 345.

trict Court was convened.[6]

The District Court found in favor of Mrs. James, declaring the relevant sections of the New York law and regulations unconstitutional, and granting the requested injunction.[7] Ruling that the proposed visit was within the scope of the Fourth Amendment the court placed heavy emphasis on the Supreme Court's decision in *Camara v. Municipal Court*[8] that except in a few carefully defined situations,[9] an intrusion of the home must be authorized by a warrant. Furthermore the court ruled, in order to condition the receipt of welfare benefits upon the surrender of a constitutional right, the state must show a compelling public interest served by the surrender, in this case the visit.[10] Judge McLean dissented, unable to view the visit as a true search, and unwilling to burden welfare administration with an unnecessary and undesirable search warrant requirement. The defendant appealed.

The Supreme Court reversed,[11] on grounds that the welfare visit was not a search within the meaning of the Fourth Amendment, and, even if it were a search, it would not have violated the Amendment's standard of reasonableness. The required home visit did not deny the welfare recipient a constitutional right, but served as a "reasonable administrative tool"[12] in the welfare program.

The opinion of the Court in *Wyman v. James* is significant because the Court indicated its intention not to expand the application of the Fourth Amendment, and in this respect, broke with the apparent trend created by the most recent decisions concerning that Amendment.

Search Or Visit?

In answering the appellant's contention that her Fourth Amendment rights had been denied, the Court, through Justice Blackmun, considered the nature of the visit and found that it lacked the charactristics of a search with which the Amendment is concerned. The purpose of the visit was to provide rehabilitation and counseling for the beneficiary,

6. James v. Goldberg, 302 F. Supp. 478 (S.D.N.Y. 1969).
7. James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969). See comments, 48 N.C.L. Rev. 1010 (1970), 65 Nw. U.L. Rev. 113 (1970), 79 Yale L.J. 746 (1970), 45 N.Y.U.L. Rev. 168 (1970).
8. 387 U.S. 523 (1967).
9. The exceptions to the general warrant requirement have been expressed as "hot pursuit", Johnson v. U.S., 333 U.S. 10 (1948) (dictum); possible destruction of evidence, Schmerber v. California, 384 U.S. 757 (1966); stop and frisk laws, Terry v. Ohio, 392 U.S. 1 (1968); searches pursuant to a valid arrest, Chimel v. California, 395 U.S. 752 (1969).
10. James, *supra*, note 7, at 942.
11. Wyman v. James, *supra*, note 5.
12. *Id.*, at 326.

and not to gather evidence in support of a criminal proceeding. The Court tacitly acknowledged that the New York Social Welfare Law[13] imposes upon the caseworker a duty to report, to the proper prosecuting attorney, any evidence of child abuse or welfare fraud discovered in the course of his contact with the welfare recipient.[14] But the Court felt that this "investigative" aspect of the visit had been overemphasized, and had obscured the true rehabilitative nature of the visit.

It is not apparent in the instant case whether the Court's view is justified as an accurate description of the primary purpose and effect of the visitation,[15] since there is evidence of the very real possibility of criminal prosecution resulting from welfare "visits."[16]

The Court declined to express an opinion on the question of admissibility, in a criminal proceeding, of any evidence that the visit might yield.[17] It is interesting to note, however, that the Court characterzed the possibility of the visit precipitating such criminal proscution as a "routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct."[18]

It seems questionable whether these two different possibilities can be equated. The citizen enters Mrs. James' home upon her invitation and this invitation may be withheld as she sees fit. The caseworker, on the other hand, enters as a condition to Mrs. James' receiving welfare

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13. New York Social Services Law § 145 (McKinney 1966) provides in part:
> 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 district attorney or other prosecuting official. . . .

14. The Court's view that the purpose of the visit was rehabilitation rather than a search for criminal evidence also played an important part in the Court's determination that the visit was reasonable. Wyman, *supra*, note 5, at 319.

15. In the opinion, the Court intimated that Mrs. James had, in her past dealings with the welfare agency, been uncooperative, and also noted the problems the child has had (skull fracture, dent in the head, possible rat bite), leaving the implication that the child's care had been somewhat neglected. Wyman, *supra*, note 5, at 322, n.9.

16. Reich, *Midnight Welfare Searches*, 72 Yale L.J. 1347 (1963), examines some of the prosecutions for welfare fraud that have directly resulted from home visits.

17. On the issue of admissability, the rationale of Abel v. U.S., 362 U.S. 217 (1960) should be considered. Abel had been arrested under an administrative warrant of the Immigration and Naturalization Service. Incident to the arrest, officers of the department conducted a thorough search of Abel's hotel room, seeking evidence to be utilized in the contemplated deportation hearing, a civil proceeding. A portion of the evidence found was given to the F.B.I. and formed the basis for an espionage prosecution. The Supreme Court found the arrest valid, and therefore, the search incident to the arrest was not violative of the Fourth or Fifth Amendments. The F.B.I. was given the benefit of the evidence at the espionage trial. By analogy, information obtained by a caseworker during the quarterly visit to the welfare recipient's home would be available to the state in a subsequent criminal proceeding. (Although it appears doubtful whether such a thorough search would be upheld today in light of Chimel v. California, 395 U.S. 752 (1969), the basic principle of Abel remains the same.)

18. Wyman, *supra*, note 5, at 323.

benefits and is under a statutory duty to report any evidence of welfare fraud or child abuse. As a practical matter, Mrs. James can withhold consent to the caseworker's visit only at the expense of losing her welfare benefits.

The implication of the Court's opinion is that the nature of the government's intrusion will vary, depending upon the primary motive of the caseworker. The Court distinguished the present case from *Parrish v. Civil Service Commission.*[19] There, early morning mass raids upon the homes of welfare recipients had been conducted with the expressed intent of finding evidence of ineligibility, rather than as a means of rehabilitation. A caseworker, dismissed for his refusal to participate in the raid, brought suit and won reinstatement on the grounds that such "visits" were unreasonable searches.

The visit in *Parrish* seems to have constituted a search because of the visitor's objectives. The time the visit takes place should be primarily a factor in determining the reasonableness of the visit, and should not, in itself, change the nature of the visit. It appears, therefore, that one of the determinative elements in applying the initial protection of the Fourth Amendment is the caseworker's motive in conducting the visit.

In the past, the Court has been warned of the danger inherent in allowing the motive of the government to influence the determination of the rights of a citizen in the face of governmental action. Justice Brandeis, dissenting in *Olmstead v. United States,*[20] found that "The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." Furthermore, Justice Brennan dissenting in *Abel v. United States,*[21] contended that the thrust of the Fourth Amendment was the protection of the individual's interest in privacy, "and that would not appear to fluctuate with the 'intent' of the invading officers."

However, the Court's opinion may be read to indicate that an intrusion of the home becomes a search when the objective of the government's action is to gather information leading to a criminal proceeding against the individual. If this is the proper test, the prior assurances by the Court that the protection of the Fourth Amendment belongs to "all men, not merely criminals, real or suspected,"[22] lose their force.

The Fourth Amendment has usually been invoked in criminal cases,

19. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).
20. 277 U.S. 438, 479 (1928) (dissenting opinion).
21. 362 U.S. 217, 255 (1960) (dissenting opinion).
22. Agnello v. U.S., 269 U.S. 20, 32 (1925).

but, as Mr. Justice Frankfurther cautioned, "[T]he application of the Fourth Amendment, and the essential right of privacy . . . are not restricted within these historic bounds."[23] Since the landmark decision of *Boyd v. United States*,[24] the Court has advocated a liberal construction of the Amendment. As the Court stated in *McDonald v. United States*, it ". . . marks the right of privacy as one of the unique values of our civilization. . . ."[25] By the Amendment, there has been reserved to the people "the right to shut the door on officials of the state unless their entry is under proper authority of law."[26]

In spite of the broad reading of the Fourth Amendment that this history directs, the present Court found that the protection of the Amendment could not be invoked by Mrs. James because the visit forced her to submit to neither a search for criminal evidence, nor the threat of criminal sanctions.[27] By conditioning the application of the Fourth Amendment upon these factors, the Court implies that the purpose of the Amendment is to serve as a citizen's protection against criminal conviction. As recently as the decision in *Camara v. Municipal Court*[28] the Court, through Mr. Justice White[29] stated that:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[30]

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23. Frank v. Maryland, 359 U.S. 360, 365-66 (1959).

24. 116 U.S. 616 (1886). In Boyd, Justice Bradly carefully analyzed the political and judicial forces, both in England and America, which had sparked the adoption of, and found expression in the Fourth Amendment, and concluded:

> "[T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . . ." *Id.*, at 630.

25. 335 U.S. 451, 453 (1948). The most recent example of the liberal construction of the Fourth Amendment in a criminal context is Katz v. U.S., 389 U.S. 347 (1967). There, the Court found that electronic eavesdropping may constitute a search within the meaning of the Fourth Amendment even though no physical trespass had occurred, and even though the area in question was a public telephone booth, simply because the "Fourth Amendment protects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz, *supra*, at 351-52. For a discussion of the possible further developments indicated by this opinion, see Ketch, *Katz v. U.S.: The Limits of the Fourth Amendment*, 1968 S. Ct. Rev. 133.

26. Frank, *supra*, note 23, at 365.

27. Wyman, *supra*, note 5, at 317.

28. Camara, *supra*, note 8. In Camara, the petitioner sought a writ of prohibition while awaiting trial for refusing to allow a warrantless inspection of his home by a San Francisco housing inspector. The Court granted the writ, holding that absent valid consent, or exigent circumstances, any inspection of the home required a warrant.

29. It is interesting to note that while Justice White joined in the opinion of the Court in the instant case, he refused to agree with the Court's finding that the visit did not constitute a search. It is apparent, however, that the view he expressed in Camara on the state's need for a search warrant to enter a home, is not as broad as usually interpreted. See *infra*, note 34 and accompanying text.

30. Camara, *supra*, note 8, at 530.

This anomaly is the necessary result when the state's presence in the home does not fall within the scope of the Fourth Amendment because the principle purpose of the state is not to obtain criminal evidence but rather to benefit the individual.

Reasonableness Absent A Warrant

The Court found that even if the visit were a search, it would not have been violative of the Fourth Amendment "because it does not descend to the level of unreasonableness."[31] By holding that the Fourth Amendment standard of reasonableness may be fulfilled in the absence of a warrant, the Court seems to abandon the principle of *Camara* and *See v. City of Seattle*.[32]

The Court quoted, without apparent disapproval,[33] a section from Justice White's opinion in *Camara* that seemed to make quite clear that, with the exception of a few specifically defined situations, any unconsented search of a home was unreasonable in the absence of a valid search warrant.[34] With this principle as the basic command of the Fourth Amendment, the Court in *Camara* proposed and applied the following test to determine whether an exception to the general warrant requirement existed:

> [T]he question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[35]

The Court concluded that a search by a housing inspector failed to meet this test, and would require a warrant. The holding of *Camara* was merely the extension of the warrant requirement from a long history of criminal cases[36] to a quasi-criminal proceeding. The concern of the Court in *Camara* was to secure to the citizen, in the absence of unique circumstances, the protection of their privacy by imposing prior judicial review upon the proposed government action. Justice White felt that the Fourth Amendment should shield the individual from the dilemma

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31. Wyman, *supra*, note 5, at 318.
32. 387 U.S. 541 (1967). *See*, a companion case to *Camara*, had dictated that the warrant requirement that *Camara* had imposed upon inspection of a home, applied also to commercial buildings. See also LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 S. Ct. Rev. 1.
33. Wyman, *supra*, note 5, at 317.
34. Camara, *supra*, note 8, at 528-29.
35. *Id.*, at 533.
36. Agnello v. U.S., *supra*, note 22; McDonald v. U.S., 335 U.S. 451 (1948); Chapman v. U.S., 365 U.S. 610 (1961).

of being forced to expose himself to a fine in order to challenge the state's entry.[37] Mrs. James' dilemma is no less painful. The price she must pay in order to have a judicial review of the proposed visit, may very well, both in relative and absolute terms, exceed the fine threatened the petitioner in *Camara.*

Justice Marshall, dissenting in *Wyman,* saw "neither logic in nor precedent for" the notion that the application of the Fourth Amendment depends upon the type of penalty the state has chosen to apply for refusal,[38] rather than upon the extent to which privacy is invaded.

The weakness inherent in the distinction between the instant case and *Camara* becomes apparent when the majority concedes "If a statute made her refusal a criminal offense . . . *Camara* and *See* would have conceivable pertinency."[39] The Court found that each of those cases, besides embodying a "true search for violations,"[40] differed from *Wyman* because of the threat of criminal prosecution for denial of access to the inspector. In the Court's opinion, this factor placed *Camara* and *See* "in a criminal context"[41] and made their holdings inapplicable to Mrs. James' situation, for she "is not being prosecuted for her refusal to permit the home visit, and is not about to be so prosecuted."[42] By the Court's logic, the very same state action may have been a violation of Mrs. James' Fourth Amendment rights, had a $100.00 fine been imposed for her refusal, rather than the termination of her welfare benefits.

Moreover, the pertinent facts surrounding the welfare visit bear none of the characteristics of the heretofore established exceptions to the general warrant requirement, nor did the Court make clear that it was defining a further exception to the warrant requirement. Rather, Justice Blackmun implied that the Court is considering welfare visits a new class of searches, the reasonableness of which may be determined by balancing the public interest served by the visit against the burden it imposes upon the privacy of the individual. This rationale is similar to that adopted by the Court in *Frank v. Maryland.*[43]

The Court in *Frank* had found that a health inspector's demand for entrance into a home did not constitute an unreasonable search, even

37. In both See and Camara, the petitioners faced fines for refusing entry to the inspector.
38. Wyman, *supra,* note 5, dissenting opinion at 340-41.
39. *Id.,* at 325.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Supra,* note 23.

when the individual's refusal to grant access resulted in a fine. The Court, through Justice Frankfurter, based this decision upon a number of factors, prefaced by the observation that the inspection touched "at most, upon the periphery of the important interests safeguarded" by the Fourth Amendment.[44] The long history of public acceptance of warrantless inspections in the administration of related regulatory schemes was also noted by the Court.[45] The ordinance authorizing such inspections was hedged with safeguards, and justified an inspection only when "valid grounds for suspicion of the existence of a nuisance"[46] were present. But most important, the Court felt that the valid state interest in protecting public health and controlling urban blight which necessitated the inspections, also served to dispense with the need for a warrant.

In considering *Camara* and *See*, the Court was faced with substantially the same question and saw fit to overrule *pro tanto*, the decision of *Frank*, noting that the interests threatened were not "peripheral" to the Fourth Amendment. The Court indicated that while the safeguards created by the ordinance were intended to guide the inspector in his duties, in practice they allowed the very situation the Fourth Amendment sought to prohibit by making the privacy of a man's home subject, not to the decisions of a neutral and detached magistrate, but rather that of the administrator in the field. Finally, the Court noted that while the public interest surely justified such inspections to insure the common welfare, it did not justify a warrantless inspection. The determinative factor is, as stated in *Camara*, "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[47]

In the instant case, the Court cited eleven factors it considered relevant to, and dispositive of the reasonableness of the proposed visit.[48] The state interests served by the visit were emphasized, and arose primarily from a concern for the home environment and general welfare of

44. *Id.*, at 367.
45. *Id.*, note 5. The Court traced similar inspection schemes, in Maryland alone, as far back as 1773.
46. *Id.*, at 367. However, a similar housing inspection case, Eaton v. Price, 364 U.S. 263 (1960), affirmed by an equally divided Court, lacked this particular safeguard.
47. Camara, *supra*, note 8, at 533.
48. Briefly, the factors enumerated by the Court were: (1) the public's interest in the protection of the child, (2) the public's interest in insuring the eligibility of the recipient, (3) the public interest in determining the recipient's proper use of the funds provided, (4) the emphasis of both the state and federal statutes on the strengthening of family life, (5) the rehabilitative opportunities provided by the visit, (6) the considerate means by which the visit is conducted, (7) that Mrs. James' objections were not directed to the visit itself, but rather to the possible question which she considered unnecessary, (8) the lack of an adequate alternative to accomplish the purposes of the visit, (9) the visit is performed by trained caseworkers and not police, (10) the visit is neither a criminal investigation nor in aid of one, (11) the objectionable features which would accompany a warrant requirement.

the child, and the proper use of public funds. Also deemed significant by the Court, was the rehabilitative rather than investigative nature of the visit and the considerate manner in which the visit is scheduled and performed.[49] Upon considering these characteristics, the Court felt that "all this minimizes any 'burden' upon the homeowner's right against unreasonable intrusion."[50] However, it would seem that in light of the Court's past protection of the home through the Fourth Amendment, neither the courtesy of the intruder, nor the amount of the enticement offered, can mitigate the degree to which an unconsented visit burdens and invades privacy.

The Court also found that the warrant requirement "is not without its seriously objectionable features in the welfare context."[51] The question of "probable cause" also troubled the Court as it had in *Frank v. Maryland*.[52] Justice Frankfurter had noted in *Frank*, that the objectives of a housing inspection program could not be achieved under a warrant system that adhered to the strict constitutional and historical standard of probable cause. He also expressed the view that this standard could not, and should not, be relaxed to make the warrant system more adaptable to the regulatory scheme.[53] These views were rejected in *Camara*, where the Court recognized that the standard upon which the warrant for housing inspections should issue need not be the strict "probable cause" standard of searches for criminal evidence. Rather, the standard could be molded to the particular regulatory program to insure that the search was reasonable. The Court, in the instant case, made no reference to this adaptation of the warrant for use outside of the scope of criminal investigations. But the logic of the decision of *Camara* indicates that many of the characteristics of a criminal warrant process can be adapted to the noncriminal or administrative warrants. By adapting the service of the warrant to the particular needs of AFDC programs, for example, most of these objectional features inherent in the criminal war-

49. In this regard, the Court cites such factors as written notice well in advance of the visit, lack of forcible entry, the professional training of the caseworker, and the emphasis on privacy required by N.Y. Soc. Welfare Law § 134(a) (McKinney), and H.E.W. Handbook of Public Assistance, Part IV, § 2200(a). The Court also acknowledged, however, that these considerate characteristics are not always present. Wyman, *supra*, note 5, at 320, n.8.

50. Wyman, *supra*, note 5, at 321.

51. Wyman, *supra*, note 5, at 323. Mr. Justice Blackmun enumerated as some of the undesirable characteristics of a warrant system the ex parte proceeding to obtain a warrant, the possible lack of notice and use of force, less restriction upon the hours of execution, and the implication of criminal conduct. He cited the New York Code of Criminal Procedure as the basis of his warning.

52. Frank, *supra*, note 23, at 373.

53. In See, supra, note 32, at 547-48, Justice Clark, dissenting, warned that the result of a relaxed standard of probable cause would be the use of "rubber stamp" warrants and a general diminution of the protection of the Fourth Amendment.

rant process can be eliminated and the reasonableness of the welfare visit can be insured.

The Court did recognize one objectionable feature of imposing a warrant requirement upon the welfare visit, which could not be cured by a flexible warrant system: the implication of criminal conduct. Judge McLean, dissenting from the District Court opinion, recognized this potential harm, and condemned the use of a warrant as "introducing a hostile arms length element into the relationship between the workers and the mother."[54] The use of a warrant to secure the visit would undoubtedly create an aura of supicion in the mind of the recipient towards both the visit and the visitor. With such a tense and distrustful atmosphere permeating the contact between the caseworker and the mother, it becomes highly doubtful whether the rehabilitative and counseling aspect of the AFDC program can achieve even minimal implementation. It is this factor, a burden "likely to frustrate the governmental purpose,"[55] which could possibly exempt the welfare visit from the general warrant requirement under the rationale of *Camara.*

However, this view seems to ignore two practical considerations. First, as the Court directed in *Camara,*[56] there would be no reason to seek a warrant unless consent to the visit were refused. Second, if consent has been refused, it would appear likely that the relationship between the mother and welfare worker has already deteriorated to a point where little further harm could possibly result by the use of a warrant. The Court, however, chose not to dwell at length upon this objectionable feature of the warrant procedure, nor did it appear that it constituted the Court's primary objection to the warrant requirement.[57]

Waiver of Constitutional Rights

Although the Court did not reach the question of whether, by accepting welfare benefits, Mrs. James had waived her rights under the Fourth Amendment, both dissenting Justices inferred that this result followed from the decision of the Court. Justice Douglas believed that this result allowed the government "to 'buy up' rights guaranteed by

54. James, *supra,* note 7, at 946 (dissenting opinion).
55. Camara, *supra,* note 8, at 533; see *supra,* note 39 and accompanying text.
56. *Id.,* at 539.
57. The number and duration of the visits under the present Welfare system raises serious questions as to whether the rehabilitative functions of the program can be effective. The New York program requires quarterly visits, and while there is no indication as to their length, a survey of the AFDC program in Wisconsin indicated the average length of welfare visits to be one-half hour. Handler and Hollingsworth, *Stigma, Privacy and Other Attitudes of Welfare Recipients,* 22 Stan. L. Rev. 1 (1969). It is doubtful whether a meaningful and productive relationship between the caseworker and the mother can be achieved and maintained with such limited contact.

the Constitution."[58] Justice Marshall found that in the decision "We are told . . . that even if this were an unreasonable search, a welfare recipient waives her right to object by accepting benefits."[59]

It is difficult, however, to find justification for Justice Marshall's interpretation of the majority opinion. Moreover, such a holding would be directly opposed to existing case law.

In *Frost Trucking Co. v. Railroad Commissioner*,[60] the California Railroad Commissioner required private carriers for hire to register as, and assume the responsibilities of, common carriers in order to enjoy the use of California highways. The Court found that this registration required the private carrier to surrender its constitutional right of equal protection and stated that:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.[61]

This principle has been most recently applied in the protection of First Amendment freedoms. In *Spieser v. Randall*[62] the Court invalidated a California law requiring a loyalty oath as a condition to a property tax exemption. Similarly, in *Sherbert v. Verner*,[63] the Court held that it was a denial of First Amendment freedom to refuse unemployment compensation to a woman whose religion prohibited work on Saturday.

Furthermore, as the Court made clear in *Goldberg v. Kelly*,[64] the mere characterization of welfare benefits as a privilege or gratuity is not dispositive of a constitutional challenge of the means by which it is granted to the citizen. It was upon this general principle that the District Court granted injunctive relief, requiring the state to continue AFDC payments to Mrs. James. The court stated:

> To deny the plaintiff a gratuitous benefit because of an exercise of a constitutional right effectively impedes the exercise of that right.[65]

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58. Wyman, *supra*, note 5, at 328 (dissenting opinion). See also Bendich, *Privacy, Poverty and the Constitution*, 54 Cal. L. Rev. 407 (1966).
59. Wyman, *supra*, note 5, at 338 (dissenting opinion).
60. 271 U.S. 583 (1926).
61. *Id.*, at 593.
62. 357 U.S. 513 (1958).
63. 374 U.S. 398 (1963). See also O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 Cal. L. Rev. 443 (1966).
64. *Supra*, note 4.
65. James, *supra*, note 7, at 942.

One question which neither the District Court, nor the Supreme Court, explicitly answered, however, was whether the welfare visit and questioning incident to it constitued a violation of the right to privacy[66] as defined by the Supreme Court in *Griswold v. Connecticut*.[67] While the actual presence of the caseworker in the home has been analyzed in terms of traditional Fourth Amendment principles, the state's inquiry by the AFDC program is not limited to material effects. The protection of the child's welfare and use of public funds requires an inquiry into "the ability of a parent or relative to care for the child"[68] and the "child's relationship with his mother."[69]

It would not seem to be much of an extension of the doctrine of *Griswold*[70] to embrace a mother-child relationship within the penumbra of privacy which that case found surrounding the marital relationship. Only further Supreme Court definition of this novel concept in constitutional law will determine its applicability in the welfare context.

CONCLUSION

Justice Blackmun's opinion provides two alternative theories by which the judgment in *Wyman* may be reached. Neither theory, however, when applied to the facts of the *Wyman* case, appears consistent with the Court's previous decisions interpreting the Fourth Amendment.

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66. It apears that in Mrs. James' original complaint she alleged a violation of, not only her Fourth, Fifth and Fourteenth Amendment Rights, but also the First and Ninth Amendments as well. Wyman, *supra*, note 5, at 314. These allegations would be the basis upon which a violation of the right of privacy would be founded. See Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U. of Penn. L. Rev. 1188 (1970).

67. 381 U.S. 479 (1965).

68. Brief for Appellant at 21, Wyman, *supra*, note 5.

69. *Id.*, at 23. Mrs. James stated in her complaint that "questions concerning personal relationship, beliefs, and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Wyman, *supra*, note 5, at 321. See Handler and Hollingsworth, *Stigma, Privacy and Other Attitudes of Welfare Recipients*, 22 Stan. L. Rev. 1 (1969) for an indication of the specific questions mothers object to, their feelings on the welfare visit, and what they consider their rights to be in regard to the visit. See also Kuter, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 Marq. L. Rev. 121 (1967); Beany, *The Constitutional Right to Privacy in the Supreme Court*, 1962 S. Ct. Rev. 212. The state's interest in the questioning is not merely to obtain statistical information. In that respect, it differs from U.S. v. Rickenbacker, 309 F.2d 462 (2nd Cir. 1962), cert. denied, 371 U.S. 962 (1962), where the defendant's conviction for refusing to answer a census form was upheld. Inherent in the Welfare Agency's inquiry into the family relationships of the recipient is the implication that there is a standard, against which each family is measured. Coupled with the Agency's power to withhold funds, the standard is not without effect on the mother.

70. Griswold, *supra*, note 67. In Griswold, two Connecticut statutes which made it a crime to use, or to advise married persons in the use of, contraceptives were held unconstitutional. The Court, through Justice Douglas, found the marital relationship protected by the "penumbral" right of privacy surrounding the First, Third, Fourth,

The holding that the visit of the caseworker did not constitute a search is not only a very limited interpretation of the Amendment, but also ignores the very real, and very apparent, dual purposes of the visit.

Moreover, in order to find that the visit, even if it were a search, was reasonable, the Court enumerated eleven factors as dispositive of the issue of reasonableness. They provide, perhaps, the elements which dictated the Court's decision. Justice Blackmun's opinion, however, gave no indication of the factors, if any, to which the Court attributed greatest significance. Three of the eleven cited, may form the true justification for the Court's judgment—the welfare of the child paramount to the mother's rights, the lack of an adequate alternative to the home visit, and the difficulty in defining a standard of probable cause for a welfare visit. But the Court merely mentioned these aspects, providing no greater explanation or emphasis for them than any of the other eight factors.

The most difficult aspect of the Court's decision is its apparent conflict with the *Camara* decision. The Court distinguished *Camara* by emphasizing that it involved a criminal prosecution for refusal to allow a search, while, in the instant case, Mrs. James merely forfeited her welfare benefits, as a result of a similar refusal. It has been previously noted that the criminal sanction for a violation of an ordinance of the type in question in *Camara* is generally a fine, indeed a smaller fine than the amount Mrs. James stands to lose in this case. Thus, distinction on this gound is questionable. On a broader basis, however, this approach to *Camara* merely supports the first aspect of the Court's opinion—that the visit did not constitute a search. It provides no basis to distinguish *Camara* if the visit were to be considered a search.

It is thus necessary to examine how the Court's conclusion, that even if the visit were a search it would be reasonable, can be reconciled with the *Camara* decision.

In *See v. City of Seattle*[71] the Court characterized its holding in *Camara* as follows:

> As we explained in *Camara* a search of private houses is presumptively unreasonable, if conducted without a warrant.[72]

Camara, itself, limited these situations which would rebut this presump-

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Fifth, and Ninth Amendments. See Beany, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979. In Reich, *Individual Rights and Social Welfare: The Emerging Social Issues*, 74 Yale L.J. 1245 (1965), the Griswold case is recognized as a possible important factor in developing future welfare rights.

71. *Supra*, note 32.

72. *Id.*, at 543.

tion to those where the time necessary to obtain a warrant would frustrate the purposes of the search.[73] In this aspect *Wyman* clearly departs from *Camara.*

If the absence of criminal sanctions in *Wyman* is the factor which rebuts that presumption, the Amendment no longer provides protection against searches with civil sanctions. More logically, the absence of criminal sanctions must only be considered with the other factors to determine the search's reasonableness.

Thus, *Wyman* can be interpreted as either eliminating the presumption established by *Camara* that all warrantless searches of private homes are unreasonable, or as allowing it to be rebutted by factors other than those mentioned in *Camara.*

By so doing, it expands the permissible scope of warrantless administrative searches and lessens the protection of the individual under the Fourth Amendment. Indeed it borders on a return to the view expressed by Justice Frankfurter in *Frank v. Maryland,* that:

> Two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry, entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.[74]

Measured against these two "rights" provided by the Fourth Amendment, Mrs. James has no basis on which to invoke the Amendment's right of "self-protection," since she is not threatened by criminal prosecution either by allowing or denying access to the state. Mrs. James does enjoy the right "to shut the door on the state," although the state is then justified in cutting off further state aid. Therefore, she enjoys protection which is somewhat less than full, in contrast to a suspected criminal who has benefit of both "rights". The broader question remains, however, whether, and to what extent, a citizen who voluntarily accepts aid from the state may refuse to submit to reasonable investigation limited to how that aid is utilized.

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73. Camara, *supra,* note 8, at 539.

74. Frank, *supra,* note 23, at 365; see also Beany, *supra,* note 69, and Barratt, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 S. Ct. Rev. 46, where Edward Barratt finds fault with this analysis, noting "It is only the person who actually has the narcotics secreted in his bedroom who finds the invasion of his privacy by the policeman more offensive than that of the immigration inspector or the health officer." *Id.,* at p. 73-4.