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Recent Case: Constitutional Law - Search and Seizure - Administrative Investigations of Welfare Recipients [*Wyman v. James*, 400 U.S. 309 (1971)]

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where cross-examination was allowed could not be admitted if the state was able to secure the presence of the witness at trial, but had failed to do so. Thus, in *Dutton*, if Williams had been cross-examined at a preliminary hearing, his testimony could not have been introduced at Evans' trial because the state could have secured Williams' presence at the trial. Yet *Dutton* allows the admission of hearsay where there was absolutely no cross-examination of Williams. The plurality also attempted to distinguish this apparent inconsistency by saying that *Barber* involved the use of a paper transcript,[34] but, as with *Brookhart*, that distinction is spurious.

It is very difficult at this time to prognosticate the future of *Dutton* and the right to confrontation. *Dutton* could become nothing more than a curious anomaly; but it could just as easily portend a radically different interpretation of the right to confrontation. If *Dutton* is the first case in such a reinterpretation, it poses important questions for the future. Principal among these are whether the hearsay-declarant is judged by a different standard than other witnesses, and when tests of reliability and of the estimated weight of testimony will preclude the right to cross-examination.

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — ADMINISTRATIVE INVESTIGATIONS OF WELFARE RECIPIENTS

Wyman v. James,
400 U.S. 309 (1971).

In the recent case of *Wyman v. James*,[1] the United States Supreme Court declared that no search warrant is necessary for state required home visits by caseworkers to persons receiving benefits under New York's Aid to Families With Dependent Children (AFDC) Program. The case may represent both a curtailment of the expanding area of welfare rights and a retreat from established fourth amendment standards.

Mrs. James was a beneficiary under the New York State AFDC program. State legislation and regulations provided for mandatory periodic visits by caseworkers to the homes of AFDC beneficiaries for purposes of reevaluating need in the light of any changed circumstances.[2] Mrs. James refused to allow such a visit, offering in-

[34] 400 U.S. at 87.

stead to provide any necessary and relevant information through means other than a home visit. Local officials notified Mrs. James that her continued refusal to permit a visit would result in termination of benefits. After a pretermination hearing and a second refusal to permit the visit, Mrs. James' benefits were discontinued.[3]

Mrs. James initiated an action in the United States District Court for the Southern District of New York, alleging the denial by local welfare officials of her rights under the Constitution.[4] A three-judge district court upheld her claim, awarding declaratory and injunctive relief.[5] The court declared that a home visit constitutes a search within the ambit of the fourth amendment to the Constitution and, therefore, when not consented to or authorized by a warrant issued upon grounds of probable cause violates the beneficiary's right to be secure against unreasonable searches and seizures. A direct appeal was taken to the United States Supreme Court, which reversed the findings of the three-judge court.

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[1] 400 U.S. 309 (1971).

[2] N.Y. SOC. WELFARE LAW § 134 (McKinney 1966) provides in part:

> The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. . . . [Persons receiving assistance shall be visited] in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary.

N.Y. POLICIES GOVERNING THE ADMINISTRATION OF PUBLIC ASSISTANCE § 175 provides in part: "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving . . . Aid to Dependent Children."

18 N.Y. CODE OF RULES AND REGULATIONS § 351.10 provides in part:

> *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.
>
> a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly and in accordance with agency policy.

Id. § 351.21 provides:

> *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence, reports on resources and other documentation.

[3] No question of procedural due process was raised concerning Mrs. James' pretermination hearing. In Goldberg v. Kelly, 397 U.S. 254 (1970), and Wheeler v. Montgomery, 397 U.S. 280 (1970), the Supreme Court found that due process required that a pretermination evidentiary hearing be held when public assistance payments to a welfare recipient are to be discontinued.

[4] Mrs. James brought the action under 42 U.S.C. § 1983 (1964), which creates a cause of action for the deprivation of constitutional rights under color of law.

[5] James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969), *rev'd sub nom.* Wyman v. James, 400 U.S. 309 (1971).

In the companion cases of *Camara v. Municipal Court*[6] and *See v. City of Seattle*,[7] decided in 1967, the Supreme Court declared that the search and seizure clause of the fourth amendment barred the imposition of sanctions for refusal to allow warrantless inspections by officials of administrative agencies. In *Camara*, appellant brought an action for a writ of prohibition to prevent prosecution under the San Francisco Housing Code for his refusals to allow a housing inspector to enter his residence. The Court declared that such an inspection, although for civil purposes, must be governed by the rule applied to searches for criminal evidence, and that a prosecution for refusal to allow a warrantless inspection could not stand.

See v. City of Seattle applied the *Camara* ruling to routine fire inspections of nonpublic portions of business premises. The Court reversed the conviction of a warehouse owner who was prosecuted for his refusal to allow a warrantless fire inspection of his warehouse. Once again the Court held that administrative searches for primarily civil purposes must be governed by the same rule that has been applied to searches for criminal evidence. A warrant procedure, the Court said, would serve as a check upon the agency decision to inspect and would provide the inhabitant with a written statement of the scope and authority of the search being conducted.[8]

Although both *Camara* and *See* held that a warrant must be obtained prior to administrative searches, the Court in *Camara* established a less rigorous probable cause standard for issuance of such a warrant than the traditional standard for criminal warrants.[9] The Court said that a valid public interest would suffice for probable cause, and implied that in each case a balancing process should be undertaken in which the need for a particular search is weighed against the seriousness of the invasion of an individual's privacy.

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[6] 387 U.S. 523 (1967).

[7] 387 U.S. 541 (1967).

[8] For excellent discussions of *Camara* and *See*, as well as background material in the area of administrative searches, see Sonnenreich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under An Expanded Fourth Amendment*, 24 SW. L.J. 418 (1970); *Developments In the Law — Search and Seizure*, 79 HARV. L. REV. 187 (1967); Comment, *Search and Seizure — Warrant Requirement for Welfare Searches*, 22 S. CAR. L. REV. 241 (1970).

[9] "Probable cause" in the traditional criminal context exists where the facts and circumstances known to the investigating officer are sufficient to cause a man of reasonable caution to believe seizable evidence will be found on the premises. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969). *See also* Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

The Court based its conclusion upon the relatively limited intrusion involved in civil inspections and the great public interest in the successful completion of those inspections.

Mr. Justice Blackmun, writing for the majority in *James*, found no inconsistency between the present holding and past precedent. In the first place, he stated that a home visit by caseworkers is not a "search" within the ambit of the fourth amendment. Mr. Justice Blackmun observed that although the governing statute and regulations make home visits mandatory,[10] the purpose of the visit is not investigative in the sense of a search within the traditional criminal law context, and therefore the fourth amendment cannot be invoked. He noted also that the visit is not forced and that the beneficiary's denial of permission is not a criminal act. The only repercussion of a refusal to permit a home visit is that aid will be terminated or will never begin, as the case may be. No entry is made and no search takes place.

As an alternative approach to the *James* question, Mr. Justice Blackmun asserted that even if the home visit were in fact a search within the ambit of the fourth amendment, as interpreted in *Camara* and *See*, it is a reasonable one, not violative of the welfare recipient's fourth amendment rights, and therefore does not require a search warrant. The majority supported the reasonableness of the home visit by impliedly relying upon the balancing of important public policy considerations against infringement of the right of privacy of a welfare recipient. Mr. Justice Blackmun was unable to discover any infringement of the right to privacy in *James* sufficient to outweight the significant public policy factors favoring home visits.[11]

Mr. Justice Blackmun distinguished *Camara* and *See* upon their facts. He noted that both cases involved a search for violations and

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[10] *See* note 2 *supra.*

[11] Mr. Justice Blackmun cited 11 factors which led him to the conclusion that the home visit proposed for Mrs. James would have been a reasonable search: (1) the public interest in seeing that dependent children are cared for; (2) the public interest in knowing how public charitable funds are used; (3) the public interest and concern in seeing and assuring that the intended objects of the tax-produced assistance are the ones who benefit from it; (4) the legislative concern for close contact between welfare beneficiaries and agency workers; (5) the public interest in furthering rehabilitative orientation among recipients; (6) that no specific unreasonable intrusion into privacy was presented; (7) that agency officials employed reasonable methods in conducting home visits; (8) the inadequacy of other methods of obtaining necessary information; (9) that visits are made by trained, sympathetic caseworkers; (10) that the visit is not a criminal investigation; and (11) the dubious protection offered by warrants issued under a relaxed standard of probable cause. 400 U.S. at 318-24.

a criminal prosecution for refusal to permit entry. In *James*, he found that no statute made refusal of entry a criminal offense and that the only consequence of a refusal is the termination of benefits.

Mr. Justice Blackmun was careful to point out that termination of benefits upon refusal of a home visit might not be constitutionally upheld in all circumstances. He did not elaborate on future possibilities, but he implied that an early morning mass raid of a recipient's home might be an example of a situation where a warrant would be required.[12]

The *James* case was decided over the dissents of Mr. Justice Douglas and Mr. Justice Marshall. Mr. Justice Douglas thought the primary question in *James* was whether the receipt of governmental largesse "makes the *home* of the beneficiary subject to access by an inspector of the agency of oversight . . . ."[13] Mr. Justice Douglas' analysis of *James* equated the home visits by caseworkers with administrative inspections. Thus, he would hold strictly to the rule of *Camara* and *See*, requiring a proper search warrant. Mr. Justice Douglas further noted that the intrusions into Mrs. James' home in this case may even be discriminatory to the extent of offending notions of equal protection since other classes of recipients of governmental largesse are not subjected to such intrusions. He concluded that: "Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the *home* is such — as marked and defined by the Fourth Amendment . . . . What we do today is to depreciate it."[14]

Mr. Justice Marshall, joined by Mr. Justice Brennan, also dissented, embracing the contention that *James* involved a search within the ambit of the fourth amendment. He sharply criticized the majority's balancing test, which he viewed as totally ad hoc and subjective. He noted that a serious civil penalty is involved in *James* in the form of termination of benefits,[15] and that the possibility of a criminal prosecution arising out of a home visit is ever present.[16]

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[12] *Id.* at 326. State courts may play an important role in delineating the line between permissable administrative action and unconstitutional invasions of privacy. For example, in Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967), warrantless "midnight raids" upon the homes of welfare recipients were condemned as unjustifiable invasions of privacy.

[13] 400 U.S. at 327.

[14] *Id.* at 335 (citation omitted).

[15] Mr. Justice Marshall noted: "The fact that one purpose of the visit is to provide evidence which may lead to an elimination of benefits is sufficient to grant appellee protection since *Camara* stated that the Fourth Amendment applies to inspections which can result in only civil violations . . . ." *Id.* at 340.

[16] Welfare fraud is a criminal offense in most states. *See, e.g.*, N.Y. SOC. WEL-

These two factors, according to Mr. Justice Marshall, make *Camara* and *See* directly applicable to the *James* situation. Accordingly, he would apply the test enunciated by the Court in those cases. Mr. Justice Marshall found no possible state interest in *James* which could make a home visit a reasonable search.

Mr. Justice Marshall further suggested that the *James* case could have been decided without reaching the constitutional questions. He pointed to a regulation of the Department of Health, Education, and Welfare, which is binding upon the states participating in the federal program, and which arguably prohibits unconsented home visits by welfare workers. The regulation states, in the form of a principle or objective, that state welfare agencies guard against entering homes by force or without permission.[17]

Evident in both dissenting opinions is the feeling that the majority has approved a double constitutional standard based upon the relative affluence of the recipient of governmental assistance. Both dissents note that businessmen receiving government subsidies would not be subjected to intrusions such as that in *James*. Mr. Justice Douglas stated:

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? . . . [C]onstitutional rights — here the privacy of the *home* — are obviously not dependent on the poverty or affluence of the beneficiary. It is the precincts of the *home* that the Fourth Amendment protects; and their privacy is as important to the lowly as to the mighty.[18]

Narrowly interpreted, the holding in *James* simply illustrates recognition by the Supreme Court that the constitutional doctrine espoused in *Camara* and *See* is not absolute. Such a view has been evidenced in recent lower court decisions which have narrowly interpreted the warrant requirement.[19] The narrowness of the fact situ-

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FARE LAW § 145 (McKinney 1966); OHIO REV. CODE §§ 5107.17, .99 (Page Supp. 1970).

[17] U.S. DEP'T OF HEALTH, EDUC. & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, § 2300(a) (1967). *Id.* § 2200(a) requires that states 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.

[18] 400 U.S. at 332-33.

[19] *See, e.g.*, United States v. Sessions, 283 F. Supp. 746 (N.D. Ga. 1968); United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968); Licerio v. State, 456 S.W.2d 96 (Tex. Crim. App. 1970); Clark v. State, 445 S.W.2d 516 (Tex. Crim. App. 1969). For a comment on *Clark*, see Note, *Warrantless Searches of Licensed Businesses*, 22 BAYLOR L. REV. 268 (1970). All of the above cases permitted warrantless entries upon the premises of state-licensed liquor establishments by agents of administrative

ation in *James*, coupled with Mr. Justice Blackmun's words of limitation,[20] could support the contention that no fundamental change in the position of the Court on administrative searches has been made. The Court, according to such an interpretation, has merely recognized that there are certain exceptions to the warrant requirement based upon administrative necessity.

Under a broader interpretation, the *James* decision could have a severe impact upon the developing notion that welfare rights are protected by the due process clause. For example, in *Goldberg v. Kelly*,[21] the Supreme Court recently held that the due process clause requires that a welfare recipient be given a pretermination hearing before his benefits are cut off. The constitutional requirement of a proper pretermination hearing carries with it the assumption that there is in fact a right of some sort to receive benefits once a state has elected to participate in the federal programs.[22] By characterizing welfare benefits as public charity,[23] the *James* court has cast doubt on the future significance of due process in American welfare law.

A further question raised by *James* is what will happen if during a required and warrantless home visit evidence is discovered which could be used in connection with prosecution for welfare fraud, a criminal offense in most states.[24] In New York, a caseworker is required by law to disclose such evidence.[25] The majority expressly refrained from expressing an opinion on the admissibility of incriminating evidence found during a home visit.[26] But if, as the majority

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agencies. The courts distinguished *Camara* and *See* upon their facts and noted that a state license invites entry upon the licensed premises for inspection purposes.

[20] *See* text accompanying note 12 *supra.*

[21] 397 U.S. 254 (1970).

[22] Clearly the Social Security Act, 42 U.S.C. §§ 601-10 (1964), *as amended*, (Supp. V, 1970), does not confer upon anyone the unqualified right to receive welfare benefits. No state is required to participate in the federal programs or to provide state aid of any kind. The Act can, however, be interpreted to create a right in an individual in a state which has elected to benefit from the federal programs to be considered for public assistance in accordance with the criteria set up in the Act. *See* Graham, *A Poor Person's Right to Life, Liberty and Property*, 17 WELFARE L. BUL. 28 (1969); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM L. REV. 84 (1967).

[23] 400 U.S. at 319.

[24] *See, e.g.*, statutes cited note 16 *supra.*

[25] N.Y. SOC. WELFARE LAW § 145 (McKinney 1966) provides in part: "Any person who . . . by deliberate concealment of any material fact . . . aids or abets any person to obtain public assistance . . . to which he is not entitled . . . shall be guilty of a misdemeanor . . . ."

[26] 400 U.S. at 323.