Volume 50 | Number 3 Article 11

4-1-1972

Constitutional Law -- Wyman v. James: The Fourth Amendment in The Balance

George R. Hodges

Constitutional Law—Wyman v. James: The Fourth Amendment in The Balance

Throughout American history the fourth amendment[1] has stood as the basic safeguard of the privacy and security of individuals in our free society against arbitrary invasions by agents of the national government. Because this protection is implicit in the "concept of ordered liberty,"[2] its explicit terms were held applicable through the fourteenth amendment to acts of state officials as well.[3] The fourth amendment has been applied in three distinct situations: (1) traditional criminal cases,[4] (2) civil forfeiture cases,[5] and (3) criminal actions for refusal to permit an administrative investigation.[6] Recently, in *Wyman v. James*,[7] the Supreme Court eschewed the opportunity to enlarge this third category to include non-criminal state sanctions for an individual's refusal to consent to administrative intrusions into his home.

In May, 1967, shortly before her son was born, Barbara James applied for Aid to Families with Dependent Children (AFDC),[8] and after a caseworker visited her in her apartment, assistance was authorized. Two years later, upon being notified that a caseworker would again visit her home, Mrs. James refused to permit the visit, offering instead to meet elsewhere to give all pertinent information. She was warned that her refusal would, under the New York welfare laws,[9] result in termination of the assistance, but permission to visit was still denied. Assistance was terminated after a Department of Social Services hearing, but Mrs. James sought and received a temporary restraining order[10] and, later, a

---

[1]The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.

[2]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[3]Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). In Mapp v. Ohio, 367 U.S. 643 (1961), the exclusionary rule was also held to be applicable to the states.

[4]*E.g.*, Johnson v. United States, 333 U.S. 10 (1948).

[5]Boyd v. United States, 116 U.S. 616 (1886). Because of their quasi-criminal nature civil forfeiture cases have been treated as criminal cases and, therefore, this category will not be separately discussed.

[6]Camara v. Municipal Court, 387 U.S. 523 (1967).

[7]400 U.S. 309 (1971).

[8]AFDC is embodied in Social Security Act §§ 401-10, 42 U.S.C. §§ 601-10 (1970); N.Y. SOC. WELFARE LAW, §§ 343-62 (McKinney 1966) (now N.Y. SOC. SERVICES LAW).

[9]N.Y. SOC. WELFARE Law § 134 (McKinney 1966) (now N.Y. SOC. SERVICES LAW).

[10]James v. Goldberg, 302 F. Supp. 478 (S.D.N.Y. 1969).

permanent injunction from a divided three-judge district court.[11] On appeal, the Supreme Court reversed the district court, holding that the authorized home visit was not a search,[12] and even if it were it would not be unreasonable within the meaning of the fourth amendment.[13] This note will examine the Court's latter determination[14] after first developing general fourth amendment theory, especially in the realm of the administrative search.

For analytical purposes, the fourth amendment has frequently been broken down into two clauses: the guarantee against unreasonable searches and seizures and the requirement of a warrant based on probable cause.[15] The Supreme Court has debated for some years the relationship between the clauses. One position is that the warrant clause states an independent constitutional requirement that "law enforcement agents must secure and use a search warrant whenever reasonably practicable";[16] the other is that the existence of a search warrant is only one factor among many to be considered in assessing whether the search in question was reasonable.[17] In recent years the trend has been in the direction of requiring a warrant, so that "searches conducted outside the judicial process, without prior approval by judge or magistrate are unreasonable *per se* under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[18] Searches have been exempted from warrant requirements when they are (1) of vehicles,[19] (2) to prevent destruction of the evidence, such as taking a blood sample from a man suspected of drunken driving,[20] (3) in hot pursuit of a suspected criminal,[21] (4) incident to a lawful arrest,[22] (5) at interna-

---

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

[12]400 U.S. at 317.

[13]*Id.* at 318.

[14]This note will not discuss whether the authorized visit constituted a "search," *id.* at 317, and whether the required termination of assistance for refusal to permit a home visit was an unconstitutional condition, *id.* at 326-37 (Douglas, J., dissenting). The reader should note that the precise holding of *James* is that the home visit does not constitute a "search", *id.* at 317-18, and therefore, the point this note explores is technically dictum. Because it is felt that the major importance of the case lies in its importation of the balancing technique into fourth amendment analysis, the scope of this note is limited to that point.

[15]*See* note 1 *supra.*

[16]Trupiano v. United States, 334 U.S. 699, 705 (1948). This case was overruled in United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950).

[17]United States v. Rabinowitz, 339 U.S. 56 (1950).

[18]Katz v. United States, 389 U.S. 347, 357 (1967).

[19]Carroll v. United States, 267 U.S. 132 (1925).

[20]Schmerber v. California, 384 U.S. 757, 766-72 (1966).

[21]Warden v. Hayden, 387 U.S. 294, 298-99 (1967). *But see* Vale v. Louisiana, 399 U.S. 30

tional borders,[23] and (6) of those suspected of criminal conduct for the protection of the police officer ("stop and frisk" situations).[24]

In 1967 the Supreme Court, in *Camara v. Municipal Court*,[25] brought the area of administrative code enforcement inspections involving criminal sanctions for refusal of permission to inspect under the warrant requirement, but reduced the standard of probable cause to something less than that required in a criminal case. The Court held that area inspections were reasonable when the need to search outweighed the invasion the search entailed, but whenever he owner of a particular dwelling would not consent to the inspection, a warrant must be obtained to enter the premises.[26] The Court noted that "the warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest,"[27] by requiring a prior determination of reasonableness rather than *post hoc* judicial review.

Although *Camara* would seem to control *James*, the Court distinguished *Camara* on the ground that Mrs. James had not been subjected to criminal prosecution for denying the visit and, in fact, no criminal prosecution was even authorized.[28] The *James* case presented four alternative resolutions for the Court: (1) that mere time and place notice satisfied the reasonableness test, (2) that closely regulated inspections are reasonable, (3) that a warrant is required, but on a lesser standard of probable cause, or (4) that a warrant obtained on a traditional showing of probable cause is required. Of these, the Court chose the second alternative and thereby created another exception to the warrant requirement.

The reasoning behind this choice is significant because it is somewhat foreign to traditional fourth amendment analysis. By creating the

---

(1969); Johnson v. United States, 333 U.S. 10 (1948).

[22]Chimel v. California, 395 U.S. 752, 762-63 (1969).

[23]Carroll v. United States, 267 U.S. 132, 153-54 (1925) (dictum).

[24]Terry v. Ohio, 392 U.S. 1 (1968).

[25]387 U.S. 523 (1967). *Camara* overruled Frank v. Maryland, 359 U.S. 360 (1959), which had held, based on the reasonableness clause, that so long as administrative investigations were statutorily limited as to time and manner, they were not unreasonable. The Court in *Frank* had reasoned that of the two interests it found protected by the fourth amendment—privacy and self-protection—the latter was more intense, thus making the reach of the fourth amendment depend, to a large extent on whether the search was part of a criminal investigation.

[26]In a companion case to *Camara*, See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the same rationale to administrative searches of business premises.

[27]387 U.S. at 539.

[28]400 U.S. at 325. Mr. Justice Marshall, in dissent, argued that there should be no such distinction. *Id.* at 340-41.

new exception the Court, in its determination of the reasonableness of the "visit" in *James*, eliminated both the need for a warrant and the necessity of probable cause to search. This has been before only in the border search[29] and "stop and frisk"[30] exceptions. Since the enactment of the first border search statute in 1789,[31] customs officers have been authorized to carry out such searches on the mere suspicion that illegal or dutiable goods are being concealed. The basis of this exemption is threefold. First, this type of search historically has not been considered to be controlled by the fourth amendment because the first border search statute was enacted by the same Congress that proposed the Bill of Rights.[32] Secondly, the occasion for the search arises quickly. Thirdly, there is a strong national interest in prevention of smuggling, especially of narcotics.[33] *Terry v. Ohio*[34] eliminated the need for either a warrant or probable cause in police "stop and frisk" encounters with individuals who may be armed and dangerous on the ground that such police conduct as a practical matter could not be subjected to the warrant procedure. In that situation the exclusionary rule is ineffective because the police are not interested in prosecuting or are willing to forego successful prosecution to achieve some other goal such as self-protection.[35] Welfare "visits," however, would not seem to qualify for exception from warrant and probable cause requirements on any of the above bases, and other reasons which can support such an exception are insubstantial. The governmental interest in the administration of AFDC is not as important as the national interest in stemming the international narcotics traffic as in border searches; the occasion for the search does not arise quickly as in border searches or "stop and frisk" situations; and, unlike the "stop and frisk" situation, the warrant procedure would be effective to prevent unjustified invasions of the homes of welfare recipients because the caseworker has no "other goals" to further by an unwarranted "visit." Thus the Court in *James* has made a significant departure from past fourth amendment analysis.

The most important aspect of this departure is the Court's use of "balancing of interests" to determine the reasonableness of the "visit."

---

[29]Carroll v. United States, 267 U.S. 132, 153-54 (1925) (dictum).

[30]Terry v. Ohio, 392 U.S. 1 (1968).

[31]Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43 (1789).

[32]Boyd v. United States, 116 U.S. 616, 623 (1886).

[33]Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1011-12 (1968).

[34]392 U.S. 1 (1968).

[35]*Id.* at 14.

Camara introduced balancing in the area of administrative inspections. Though the warrant clause was clearly at issue there, the Court said that the reasonableness of the inspection was to be determined by "balancing he need to search against the invasion the search entails."[36] *Terry* adopted the *Camara* balancing test, holding that the governmental interests in effective prevention and detection of crime and protection of the officer in the street outweighed the brief, limited intrusion upon individual rights, and therefore, the protective pat-down for weapons was reasonable.[37] The Court in *James* cited *Terry* for the propositions that reasonableness is the fourth amendment's standard and that its specific content is to be determined by the particular context in which it is asserted.[38] The Court concluded that the governmental interests in aiding dependent children, fulfilling the public trust, and administering AFDC outweighed the limited intrusion upon Mrs. James' right of privacy.[39]

The Court apparently borrowed its technique of balancing from a line of first amendment cases. When the balancing test is applied in the first amendment area it introduces substantial flexibility into interpretation of the amendment; the result of the balancing process depends on what factors are fed into the "balance." For example, in *Barenblatt v. United States*[40] where a witness before a Congressional investigation refused to answer questions concerning his political activities, the majority of the Court weighed broadly defined governmental interests—society's interest in preservation of the government and having well informed lawmakers—against the narrowly defined individual interest of the witness in refraining from revealing his political affiliations and found the balance in favor of the government. Mr. Justice Black, in his dissenting opinion, defined the individual interest more broadly, as being the interest of society as a whole in being able to join organizations and advocate causes free from fear of governmental penalties, and reached a conclusion opposite that of the majority of the Court.

In *James,* as in the first amendment cases, the balance came out in favor of the state largely because the state interest was defined broadly while the individual interest was defined narrowly. On the

---

[36]387 U.S. at 537.

[37]392 U.S. at 21-27.

[38]400 U.S. at 318.

[39]*Id.* at 326.

[40]360 U.S. 109 (1959). *See also* Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961).

state's side of the balance was placed the alleged necessity of the home visit as an administrative tool to assure the fulfillment of the public's interest in aiding dependent children, to carry out the public trust, and to know that its tax funds are properly expended.[41] Against this the Court weighed not the social interest in protecting homes from unwarranted invasions of privacy, but Mrs. James' personal interest in the privacy of her own home from the prearranged welfare visit.[42]

The Court's weighing of interests becomes even more questionable upon a closer investigation of the alleged necessity of the home visit. No statutory requirement for home visits exists.[43] The federal regulations require only a periodic redetermination of eligibility,[44] with field investigations required only in a selected sample of cases.[45] Even if one assumes authority for the procedure, it is difficult to see what would be accomplished by a home visit. The child does not have to be present when the caseworker visits,[46] and, when a school-age child is involved, it is unlikely that he would be present. There is no need to visit to see if there is a man in the house since the presence of a "substitute father"—one cohabiting with the mother, but owing no duty of support to the child—has been held to be immaterial in establishing eligibility for AFDC.[47] Moreover, a congressional committee has found that the home visit is ineffective as a means of veryfying eligibility,[48] while it has been reported that the incidence of ineligibility has not increased when the affidavit system is used.[49] It should also be noted that the public interest in aiding dependent children is undercut by termination of all AFDC

---

[41]400 U.S. at 318-24.

[42]*Id.* at 321-22.

[43]*Id.* at 319 n.6; *id.* at 345-47 (Marshall, J., dissenting). In other areas of social welfare law, state regulations authorizing termination of AFDC benefits because of the mother's refusal to cooperate have been struck down as impositions of additional conditions on eligibility not *required* by the Social Security Act. *See* Weaver v. Doe, 92 S.Ct. 537, *aff'g mem.* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971). (mother required to name putative father and aid in obtaining child support); Carleson v. Taylor, 92 S. Ct. 446, *aff'g mem.* Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal. 1971) (mother required to sign criminal non-support claim against absent father); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed,* 396 U.S. 488 (1970) (mother required to name father of illegitimate children).

[44]400 U.S. at 319, 342.

[45]400 U.S. at 319 n.6.

[46]Brief for Social Service Employees' Union Local 371 as Amicus Curiae at 4, Wyman v. James, 400 U.S. 309 (1971).

[47]Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1970).

[48]Brief for Social Service Employees' Union Local 371 as Amicus Curiae at 8-13, Wyman v. James, 400 U.S. 309 (1971).

[49]*Id.* at 12.

benefits to the child as the state did in *James*.

Ad hoc balancing as practiced in *James* enables the Court to make any determination it wishes without regard for consistency and without any assurance of impartiality.[50] Thus the use of balancing in the *James* category of cases, if applied to the fourth amendment generally, would pose a serious threat to the substantive rules governing police conduct that have evolved in the traditional criminal cases as protections of an individual's privacy. If balancing is to be used in the fourth amendment area, the Court should not follow the first amendment technique, but should strive for a proper balance by only weighing interests of the same level.[51] A proper balancing of the interests in *James* would weigh only particular interests in a specific situation: the state's need to go into the home of a welfare recipient to verify eligibility when the recipient has agreed to furnish all relevant information elsewhere against the particular individual's interest in not being bothered by the type of invasion of hr privacy that a home visit would entail.

Even if proper balancing techniques are used, an individual's fourth amendment right to privacy from governmental intrusion should not be diluted through the balancing of competing interests. In an era of increasing government paternalism, protection of an individual's privacy can only be assured through the traditional warrant procedure.[52] This is especially true in personalized welfare administration as opposed to impersonal area inspections for the enforcement of municipal codes. The restrictions of the traditional probable cause standard in area housing inspections are not present in a case such as *James* where the caseworker makes a visit to a specific home. Moreover, because one purpose of a home visit is to guard against violations of the welfare code and child abuse, both of which are felonies,[53] no less than full probable cause to search should be tolerated. One must consider the ease with

---

[50]*See* M. SHAPIRO, FREEDOM OF SPEECH 161-62 (1966); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440-48 (1962).

[51]M. SHAPIRO, FREEDOM OF SPEECH 83-84 (1966). Balancing of interests seems to be derived from Roscoe Pound's theories of social engineering which reasoned that all public or social interests are actually individual interests viewed from different perspectives for purposes of clarity. Therefore, if the system is to work, balances must be struck only by weighing carefully labelled claims of the same level (i.e. social interests v. social interests, not social interests v. individual interests). *Id.*

[52]*See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 37, for a discussion of the inadequacies of the area probable cause warrant procedure.

[53]400 U.S. at 339 (Marshall, J., dissenting).

which the warrant procedure could be carried out. If the recipient refuses to consent upon notice of an upcoming visit, application for a warrant could be made. If the caseworker could articulate facts that suggested that violations or child abuse had been committed the warrant would issue. If not, the home visit would not be necessary. In short, the decision should be for an impartial magistrate, not for the caseworker in the field.

GEORGE R. HODGES

Contracts—Partial Enforcement of Restrictive Covenants†

A restrictive covenant in an employment contract which unduly restricts the covenantor will be closely scrutinized by the courts because it violates the public policy against restraint of trade. According to the traditional view as stated in the *Restatement of Contracts*,[1] if the covenant can be construed to be reasonable it will stand but if not[2] it falls; to do otherwise would be to rewrite the contract for the parties. In *Ehlers v. Iowa Warehouse Co.*[3] the Supreme Court of Iowa has overruled prior cases based on the *Restatement* rule and joined the growing minority of states which have adopted the "partial-enforcement" doctrine long advocated by Professors Williston[4] and Corbin.[5]

The plaintiff in *Ehlers*, a former employee of the defendant truck rental company, sought a declaratory judgment that two restrictive covenants in his employment contract with the defendant were unreasonably broad. The company counterclaimed for an injunction against viola-

---

†The following closely related materials have appeared in this Review: Note, *Covenants Not To Compete*, 38 N.C.L. REV. 395 (1960); Note, *Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States*, 49 N.C.L. REV. 393 (1971); 26 N.C.L. REV. 402 (1948).

[1]Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and not enforceable even for so much of the performance as would be a reasonable restraint. RESTATEMENT OF CONTRACTS § 518 (1932) [hereinafter cited as RESTATEMENT].

[2]*See* RESTATEMENT § 515.

[3]____Iowa ____, 188 N.W.2d 368 (1971).

[4]S. WILLISTON & G. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 1660 (rev. ed. 1937) [hereinafter cited as WILLISTON].

[5]6A A. CORBIN, CORBIN ON CONTRACTS § 1390 (1962) [hereinafter cited as CORBIN].