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Constitutional Law - Wyman v. James: New Restrictions Placed upon the Individual's Right to Privacy

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CONSTITUTIONAL LAW—WYMAN V. JAMES: NEW RESTRICTIONS PLACED UPON THE INDIVIDUAL'S RIGHT TO PRIVACY

Barbara James, a resident of New York City, applied for AFDC assistance shortly before the birth of her son, Maurice, in May, 1967. After a caseworker visited her home without any objection on her part, welfare assistance was authorized. Two years later, a caseworker wrote to Mrs. James, informing her that she would visit her home on May 14, 1969. Upon receipt of this notification, Mrs. James telephoned the worker, indicating that although she was willing to supply information which was reasonable and relevant to her need for public assistance, no interview would take place in her home. The caseworker then informed Mrs. James that she was required by state law to visit in her home and that her refusal to permit the visit would result in the termination of assistance. Permission was still denied. On May 13, 1969, the City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance because of the visitation refusal, which advised the aid recipient of her right to a hearing before an administrative review officer. At the requested hearing, Mrs. James reasserted her position, and the review officer ruled that her refusal was a proper ground for the termination of assistance. A notice of termination was issued on June 2, 1969.

Thereupon, without seeking a hearing at the state level, Mrs. James, acting individually and on behalf of her son, and purporting to act on behalf of all other persons similarly situated, filed suit for declaratory and injunctive relief under the Civil Rights Act,[1] alleging a denial of rights guaranteed to her under the first, third, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments to the Constitution and under subchapters IV and XVI of the Social Security Act.[2] She further alleged that she and her son had no income, resources, or support other than the benefits received under the AFDC program. On June 13, 1969, a divided three judge district court held the relevant New York Social Welfare statute

1. 42 U.S.C. § 1983 *et seq.* (1964).

2. Social Security Act, ch. 531, tit. IV, XVI, 49 Stat. 627 (1935), *as amended* 42 U.S.C. §§ 601-10 (1970).

and regulations invalid and unconstitutional in application.[3] The United States Supreme Court reversed, ruling that the "home visit," as structured by the New York statutes and regulations, is a reasonable administrative tool, which serves a valid and proper purpose for the dispensation of the AFDC program and does not present an unwarranted invasion of personal privacy prohibited by the fourth amendment. *Wyman v. James*, 400 U.S. 309 (1971).

This decision is significant because it indicates that the Supreme Court considers the public welfare "home visit" an exception to the general search warrant requirement, which necessitates the securing of a warrant for administrative searches and seizures.[4] The purpose of this casenote is to demonstrate how *Wyman* obscures the development of a prior distinct trend away from a property-criminal law concept in favor of a right of privacy standard, as the primary basis in the adjudication of an individual's right to be free from unreasonable searches and seizures as set forth in the fourth amendment; to evaluate the evolution of the concept which proposes that any search is unreasonable *per se*, if it is conducted prior to securing a warrant from a neutral magistrate; and to analyze critically the apparent resurrection of the "right-privilege" distinction in the welfare area by the *Wyman* decision.

Under the Social Security Act, public welfare assistance is distributed to four major categories: Aid to the Blind,[5] Old Age Assistance,[6] Aid to the Permanently and Totally Disabled,[7] and Aid to Families with Dependent Children.[8] Under the Act, each state has the power to administer its welfare programs, funded in part by grants-in-aid from the federal government. In order to become eligible for the federal grants, a state's welfare plan must be approved by the Secretary of Health, Education, and Welfare.[9] It must also meet certain fundamental requirements under the Social Security Act,[10] and it must conform to the rules and regula-

3. James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969). The New York Social Welfare statute and regulations that were adjudicated unconstitutional in application were: N.Y. SOCIAL WELFARE LAW § 134 (McKinney 1966); N.Y. POLICIES GOVERNING THE ADMINISTRATION OF PUBLIC ASSISTANCE § 175 ( ); and TITLE 18 OF THE NEW YORK CODE OF RULES AND REGULATIONS [hereinafter 18 N.Y.C.R.R. §§ 351.10, 351.21 ( )].

4. Wyman v. James, 400 U.S. 309, 310-26 (1971).

5. 42 U.S.C. §§ 1201-06 (1964).

6. 42 U.S.C. §§ 301-06 (1964).

7. 42 U.S.C. §§ 1351-55 (1964).

8. 42 U.S.C. §§ 601-10 (1970).

9. 42 U.S.C. § 1302 (1964).

10. 42 U.S.C. §§ 602, 604 (1964).

tions promulgated by the Secretary.[11]

The primary purpose or concern of the categorical welfare assistance program, Aid to Families with Dependent Children (AFDC), is the care of the dependent child.[12] Therefore, the maintenance of an appropriate atmosphere in the child's home by his relative (the aid recipient) is very relevant to the proper administration of the AFDC program.[13] The aid recipient must sustain the proper conditions in the child's home in order to preserve his continued eligibility to receive welfare benefits.[14] The "home visit" is one of the primary aids which may be used by the state welfare agency to ascertain whether or not the recipient is maintaining the proper atmosphere in the child's dwelling. The aid recipient, himself, is the primary source of eligibility information during the home interviews.[15] Collateral contacts cannot be made for verification of eligibility without the aid recipient's consent or knowledge.[16] Nor are the case-

11. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, §§ 6200-6400 ( ) [hereinafter cited as HANDBOOK]. *See* Note, *Constitutional Law—Due Process—Evidentiary Hearing Required Prior To Termination of Welfare Benefits*, 19 DEPAUL L. REV. 552, 553 (1970).

12. "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life. . . ." 42 U.S.C. § 601 (1970).

13. "[A]s (it) may be necessary in the light of the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative and individual to attain or retain capability for self-support and care and in order to maintain and strengthen family life and to foster child development." 42 U.S.C. § 602(D) (14) (1970). *Cf.* HANDBOOK, pt. IV, § 3452(10) ( ). This HEW regulation indicates that the assessment of foster care is to be evaluated by viewing "total parental functioning and home conditions upon the child."

14. "Whenever the State agency has reason to believe that any payments of aid . . . made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative . . . in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments *will result in substitution therefore of protective payments* . . . or in seeking appointment of a guardian or legal representative . . . or in the imposition of criminal or civil penalties authorized under State Law. . . ." (emphasis added). 42 U.S.C. § 605 (1970).

15. HANDBOOK, pt. IV, § 2220(E)(1) ( ). *Cf.* 42 U.S.C. § 606(A) (1970). This indicates that there must be verification of the actual residence or actual physical presence of the child in the home.

16. HANDBOOK, pt. IV, § 2300(E)(2) ( ). Collateral contacts include seeking information from schools, family doctors, hospitals, social agencies, and sim-

worker's interviewing procedures to violate the constitutional rights of the aid recipient during the home visit.[17] Further, a case worker may not enter a home by force, without permission, or under false pretenses.[18] The federal regulations require only periodic redeterminations of welfare eligibility,[19] but the regulations also require verification of eligibility by making field investigations, including home visits, in a selected sample of cases.[20] However, neither the Social Security Act nor the HEW rules and regulations require mandatory home visits for the verification of an aid recipient's initial or continuing eligibility for welfare benefits.

Because the establishment of standards for individual need and eligibility of aid recipients is delegated to the states under the federal welfare rules and regulations, many states require obligatory "home visits" for the verification of a recipient's initial and continued welfare eligibility, even though such mandatory investigations are not required by the Social Security Act or the regulations of the Secretary of Health, Education and Welfare.[21] For example, in Wisconsin, whenever the regional state welfare director receives a notification of the dependency of a child or an application for assistance, a prompt investigation, including a home visit,

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ilar resources. 18 N.Y.C.R.R. §§ 351.6, 351.7 ( ). *See* Brief for Appellant, at 28, Wyman v. James, 400 U.S. 309 (1971).

17. HANDBOOK pt. IV, § 2200(A) ( ). "[T]he policies and procedures for taking applications and determining eligibility for assistance or other services . . . will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights."

18. "The (state welfare) agency especially guards against violation of legal rights and common decencies in such areas as entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours and searching in the home, for example, in rooms, closets, drawers or papers, to seek clues to possible deception." HANDBOOK, pt. IV, § 2300(A) ( ).

19. HANDBOOK, pt. IV, § 2200(D) ( ).

20. HANDBOOK, pt. II, § 6200(A) ( ).

21. The "home visit" is an established routine for verification of initial and continuing eligibility in many states. *See, e.g.*, ALA., MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, pt. I-8(B), (1968 rev.); ARIZ., REGULATIONS PROMULGATED PURSUANT TO REVISED STATUTE § 46-203, Reg. 3-203.6 (1968); CAL. STATE DEPT. OF SOCIAL WELFARE HANDBOOK, § C-012.50 (1964); GA. DIVISION OF SOCIAL ADMINISTRATION-PUBLIC ASSISTANCE MANUAL, Part III, § V(D)(2), Part VIII, § (A)(1)(b) (1969); MICH. PUBLIC ASSISTANCE MANUAL, Item 243 (3)(F) (Rev. 1967); MO. PUBLIC ASSISTANCE MANUAL, DEPT. OF WELFARE, § III (1969); NEB., STATE PLAN AND MANUAL REGULATIONS, Part IX, §§ 5760, 5771 ( ); N.J., MANUAL OF ADMINISTRATION, DIVISION OF PUBLIC WELFARE, Part II, §§ 2120, 2122 (1969); N.M., HEALTH AND SOCIAL SERVICES DEPARTMENT MANUAL, §§ 211.5, 272.11 ( ); S.C., DEPT. OF PUBLIC WELFARE MANUAL, Vol. IV(D)(2) ( ); TENN. PUBLIC ASSISTANCE MANUAL, Vol. 2 (1968 rev.); Brief for Appellant, at 24, Wyman v. James, 400 U.S. 309 (1971).

of the circumstances concerning the child must be made before an initial welfare grant can be given.[22] A written report describing this initial home visit is made by the caseworker and it becomes part of the permanent record in the case. In Illinois, a periodic home visit must be made to each aid recipient, every four months, in order to verify continued welfare eligibility.[23] The purpose of this periodic visit is "to ascertain continuing need for such aid and to provide the child and his parents or relatives with such service and guidance as will strengthen family life. . . ."[24]

At the time the suit was filed in *Wyman*, the New York social welfare statutes and regulations conformed to the basic federal guidelines concerning the purpose of the AFDC program and the limitations set upon the scope of the "home visit" investigation.[25] However, the state statutes and regulations dictated that verification of an aid recipient's initial and continuing eligibility for welfare benefits could only be determined by mandatory "home visits."[26] Furthermore, the interview of the recipient

22. WIS. STAT. § 49.19(2) (1957); TENN. CODE ANN. § 14-309 (1955).

23. "The home of each family receiving aid shall be visited at least once in each four month period. . . ." ILL. REV. STAT. ch. 23, § 4-7 (1971); TENN. CODE ANN. § 14-315 (1955). *See* IND. STAT. § 52-1247 (1964).

24. ILL. REV. STAT. ch. 23, § 4-7 (1971).

25. New York State has adopted federal policy by making the dependent child the primary concern of its social welfare program. "A child or minor shall be considered to be eligible for ADC if his home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected. . . . In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation. Where appropriate, consultation or direct service shall be requested. . . ." 18 N.Y. C.R.R. § 369.2(C) ( ); N.Y. SOCIAL WELFARE LAW §§ 348-350, 353-354 (McKinney 1966). The importance of the well-being of the child is indicated by: "The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility. . . ." 18 N.Y.C.R.R. § 369.4(B)(1) ( ). Like the federal guidelines, the aid recipient is also the primary source of information during the "home visit" in New York. 18 N.Y.C.R.R. § 351.6 ( ). In addition, collateral contacts cannot be made without the consent or knowledge of the recipient in New York. 18 N.Y.C.R.R. §§ 351.6, 351.7 ( ). The caseworker also may not violate the aid recipient's constitutional rights during the home interview. 18 N.Y. C.R.R. § 351.7 ( ). Finally, the New York caseworker cannot enter a home by force or without permission. 18 N.Y.C.R.R. § 351.1(d) ( ).

26. "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. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to

by the caseworker had to take place in the child's home and could not be conducted elsewhere. Also, the home visit had to be made periodically every three months to verify continued welfare eligibility.[27] Finally, the caseworker was bound to report any act of welfare fraud or misrepresentation that he observed during the home visit.[28] Therefore, under New York Social Welfare law, an aid recipient's refusal to allow a caseworker into his house to conduct a home visit, would result in the automatic termination of his welfare benefits.

The central issue raised in *Wyman* is the constitutionality of the state's requirement of a mandatory home visit to verify initial and continued welfare eligibility under the fourth amendment. This fundamental issue can be resolved only after the determination of three controlling questions: (1) Are the home visits required by the Department of Social Services in connection with the investigation of initial and continuing welfare eligibility searches within the meaning of the fourth amendment; (2) if the home visits are searches, does the failure on the part of the caseworker to secure a search warrant from a judicial magistrate, prior to conducting the investigation, render the home visit an unreasonable search

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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. . . . The circumstances of a person receiving continued care shall be reinvestigated as frequently as the rules of the board or regulations of the department may require." N.Y. SOCIAL WELFARE LAW § 134 (McKinney 1966). *"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 in accordance with agency policy. . . ." 18 N.Y.C.R.R. § 351.10 ( ).

27. "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 Home Relief, Veterans Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind." Policies Governing the Administration of Public Assistance § 175 ( ).

28. "Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, . . . public assistance or care to which he is not entitled, . . . shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law. . . . *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official."* N.Y. SOCIAL WELFARE LAW § 145 (McKinney 1966); (emphasis added). *See* People v. Green, 36 Misc. 2d 888, 232 N.Y.S.2d 928 (Oneida County Ct. 1962); People v. LaFace, 148 Misc. 238, 266 N.Y.S. 458 (Westchester County Ct. 1933).

under the fourth amendment; and (3) if (1) and (2) are answered in the affirmative, may the state condition the initial and continuing receipt of AFDC benefits upon a waiver of the right to be free from an unreasonable search as embodied in the fourth amendment?[29]

In determining whether the home visit is a search within the meaning of the fourth amendment, one must first determine whether the adjudication of a person's right to be free from unreasonable searches and seizures should be viewed from the old property-criminal law standard or the modern framework of the right of privacy. In 1765, the English case,[30] *Entick v. Carrington*,[31] signaled the first development in English law of a right which protects a person from unreasonable searches and seizures. Under the authorization of a general warrant issued by the secretary of state, the defendants broke into Entick's home without his permission and remained there for four hours.[32] During their intrusion, they broke open

29. U. S. Const. amend. IV. "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." (emphasis added).

30. Mr. Justice Bradley pointed out the impact of this case on the development of American law: "Lord Camden pronounced the judgment . . . and the law as expounded by him, has been regarded . . . as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the mother country . . . as every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, . . . it may be confidently asserted that *its propositions were in the minds of those who framed the Fourth Amendment to the Constitution*, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." Boyd v. United States, 116 U.S. 616, 626-27 (1886). (emphasis added).

31. [1765] 19 Howell State Trials 1029.

32. During the period of 1762 to 1766, when the House of Commons passed resolutions condemning the general warrants, John Wilkes attacked these abuses through his pamphlet, *The North Briton*. Number 45 was very defiant in its denunciation of the government and was declared libelous. By the authority of the secretary of state's general warrant, Wilkes' house was searched and his papers were indescriminately seized. For this violation of his right to privacy, he sued the perpetrators. Wilkes obtained a judgment of £4,000 in damages against the secretary of state, Lord Halifax and £1,000 in damages against Wood, one of the searchers. Wilkes' Case [1763] 19 Howell State Trials 982. *See* Leach v. Money [1765] 19 Howell State Trials 1001.

In this case, Entick was suspected of being one of the authors of *The North Briton* and once again Lord Halifax issued the warrant. In America, the counterpoint to the general warrants in England, were the Writs of Assistance, which empowered revenue officers to search suspected places for smuggled goods at their discretion. James Otis described the Writs of Assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and fundamental principles of law, . . ." because they placed "the liberty of every man in the hands of every petty

and examined the plaintiff's chests, drawers and private papers. In condemning this general search the court stated:

> A power to issue such a warrant as this is contrary to the genius of the law of England; . . . It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers . . . to come at evidence against him is like racking his body to come at his secret thoughts.[33]

However, Lord Camden described Entick's right to be free from unreasonable searches and seizures in terms of a property concept:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole . . . By the laws of England, every invasion of private property be it ever so minute, is a trespass.[34]

Thus, in England, constitutional protection was given to the individual's right against unreasonable searches and seizures of person or property, but was granted in terms of a property concept, e.g., as protection against trespass.[35]

In 1886, *Boyd v. United States*[36] began a similar trend in American law towards the use of property-criminal law standard in the determination of an individual's right to be free from unreasonable searches and

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officer." The famous Boston debate in February, 1761, which denounced the Writs of Assistance was probably the most significant occurrence in a series of events that initiated the resistance of the colonies against England. In describing the debate, John Adams asserted: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was Born." Boyd v. United States, 116 U.S. 616, 625 (1886); TUDOR LIFE OF JAMES OTIS 61, 66 (1823).

33. [1765] 19 Howell State Trials at 1038. The elder Pitt also protested against invasion of privacy by the police: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 1307 (1753-1765).

34. [1765] 19 Howell State Trials at 1066. Lord Camden, also introduced a criminal law concept in his description of the plaintiff's right of privacy: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle." *Id.* at 1073.

35. McKay, *The Right of Privacy: Emanations And Intimations,* 64 MICH. L. REV. 259, 272 (1965).

36. 116 U.S. 616 (1886).

seizures.[37] The defendants imported thirty-five cases of plate glass into the United States at the port of New York. Under a customs law, which prohibited the use of any invoice to defraud the United States government of its just duties, the District Attorney procured a subpoena for the defendants' records. The law also provided that if any defendant failed to produce the records, named in the subpoena, judgment was confessed against them. The defendants contended that the customs law was unconstitutional because it required the mandatory production of the invoices, which might be self-incriminating. In describing the defendants' right of privacy, Mr. Justice Bradley referred to Lord Camden's decision in *Entick*.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . They apply to *all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors, . . . that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, . . . it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[38]

However, in analyzing the defendants' right of privacy in connection with the compulsory production of self-incriminating records, the Court introduced a criminal law rationale:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.[39]

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37. The first American case to recognize privacy as a legally protected interest was DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881). The state court allowed recovery against a physician who permitted a non-professional man to assist him at childbirth. The plaintiff granted permission for the assistant to enter her home on the false assumption that he was a medical doctor. In describing the plaintiff's right to privacy, the court stated: "To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. *The plaintiff had a legal right to the privacy of her apartment* at such time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation." 46 Mich. at 165-66, 9 N.W. at 149 (1881) (emphasis added). *See* BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 393 (1969).

38. 116 U.S. at 630. (emphasis added). It should be noted that this description seems to be based on an abstract view of privacy, rather than a property rationale. Mr. Justice Bradley develops the idea more extensively: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." *Id.* at 635. *See* Entick V. Carrington, [1765] 19 Howell State Trials at 1067.

39. 116 U.S. at 630.

Therefore, prior to 1900 in the United States, the individual's right of privacy had been successfully invoked although only in the context of protection against unreasonable search and seizure of persons or tangible property.[40] But, because of the intermingling of the fourth and fifth amendments in *Boyd*, an additional limitation on the scope of the right to privacy began to develop. This limitation was that the fourth amendment prohibited unreasonable searches and seizures only when the object of the search was criminal evidence.[41] Therefore, there was no individual right of privacy to protect a person from a purely administrative search, which was unreasonable. Although subsequent cases discredited this limitation on the right of privacy,[42] it persisted until 1967.

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40. *See* notes 33, 35. However, in 1890 the Warren-Brandeis Law Review article on privacy was published. The authors examined the problem of the unwarranted publishing of private matters and discussed various cases in which relief was granted on the grounds of implied contract, defamation, property right or breach of trust. They concluded that these remedies were inadequate and that a new abstract concept of privacy should be developed to replace them.

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights. . . . Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. . . . Liberty meant freedom from actual restraint; and the right to property secured to the individual. . . . Later, there came a recognition of man's spiritual nature, of his feelings and his intellect . . . gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible." Warren and Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). *See* Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948); BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 393-94 (1969).

41. Frank v. Maryland, 359 U.S. 360 (1959), *overruled*, Camara v. Municipal Court, 387 U.S. 523 (1967).

42. *See* Weeks v. United States, 232 U.S. 383, 392 (1914); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). The Court in Hale v. Henkel, 201 U.S. 43 (1906), declared that "Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions." 201 U.S. at 72 (1906). In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), the Court held that rights of a corporation against unlawful search and seizure are to be protected even if it be not protected by the Fifth Amendment from compulsory production of incriminating documents. In Nueslin v. District of Columbia, 115 F. 2d 690 (C.A.D.C. 1940), Associate Justice Vinson gave the clearest answer as to how to treat the problem: "Although the IVth Amendment was written against the background of the general warrants in England and the writs of assistance in the American colonies . . . history is replete with instances of hasty overgeneralizations, thought to be fundamental truths, drawn from the solution of a particular problem, we must regard CONSTITUTIONAL provisions as more generic and more organic than other law with which we deal.

"The IVth and Vth Amendments relate to different issues, but cases can present

The evolution of this theory has been most evident in the wiretapping and eavesdropping cases. In *Olmstead v. United States*,[43] the Supreme Court held that "intangible" messages, concerning a conspiracy to violate the National Prohibition Act, were not within the fourth amendment's protection against unreasonable searches and seizures. In reaching this decision, Mr. Justice Taft emphasized the property characteristics of the amendment's protective reach:

> The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized. . . . The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.[44]

Although the majority of the Court decided to adhere to a property rationale in adjudicating an individual's right to be free from unreasonable searches and seizures in wiretapping cases, Mr. Justice Brandeis objected strongly to this limited doctrine in his dissent:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.*[45]

Mr. Justice Brandeis thus propounded a more abstract standard for the

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facts which make the considerations behind these Amendments overlap." 115 F.2d at 692-93 (C.A.D.C. 1940).

Some of the cases which produce the overlapping effect are: Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298, 311 (1921); Agnello v. United States, 269 U.S. 20, 33 (1925). *See also* I. J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (2d ed. 1937); 3 J. ELLIOT, DEBATES, *Id.* at 244 (2d ed. 1937); MASS. CONST. art. XIV (1932); VA. CONST. art. X (1814). *See generally* Breard v. City of Alexandria, La., 341 U.S. 622, 649 (1951) (Black and Douglas, J.J., dissenting); Uphaus v. Wyman, 360 U.S. 72, 107 (1959) (Brennan, J., dissenting); Skinner v. Oklahoma, 316 U.S. 535 (1942).

43. 277 U.S. 438 (1928), *overruled*, Katz v. United States, 389 U.S. 347, 352 (1967).

44. *Id.* at 464-65. Similarly in Goldman v. United States, 316 U.S. 129 (1942), *overruled*, Katz v. United States, 389 U.S. 347, 352 (1967), the Supreme Court held that the placing of a detectophone outside an individual's office did not violate the fourth amendment because there was no physical invasion of the defendant's property. Because there was no physical trespass committed by the police officer, there was no violation of the defendant's right of privacy.

45. 277 U.S. at 478-79 (Brandeis, J., dissenting) (emphasis added).

individual's right of privacy in order to eliminate the strict limitation of the property rationale. Even though his view was not accepted by the Supreme Court until the latter part of the 1960's, it was often asserted in the dissenting opinions of many important decisions.[46] As late as 1961,[47] the Supreme Court clung to a property concept as the primary standard in the determination of whether or not an unreasonable search and seizure

46. Mr. Justice Douglas, dissenting in Public Utilities Commission v. Pollak, 343 U.S. 451, 467 (1952), stated: "Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. . . . It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people." 343 U.S. at 467 (1952) (Douglas, J., dissenting). Mr. Justice Harlan also proposed a more abstract privacy standard in Poe v. Ullman, 367 U.S. 497 (1961): "This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." 367 U.S. at 543 (1961) (Harlan, J., dissenting). *See generally* Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539, 570 (1963) (Douglas, J., concurring).

47. In On Lee v. United States, 343 U.S. 747 (1952), the Supreme Court held that evidence obtained by having an undercover agent, rigged with a secret microphone, engage the defendant in incriminating conversation was not obtained by unreasonable search and seizure and was admissible. Mr. Justice Jackson gave the Court's rationale: "The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window." 343 U.S. at 753-754. Mr. Justice Jackson's comparison of the agent's act of concealing a microphone on his person so that he could transmit the defendant's incriminating conversation to the act of eavesdropping outside the defendant's window indicates that the Court used a property concept as the standard in determining whether or not the defendant's fourth amendment rights had been violated. If a person is eavesdropping outside some person's window, there is no physical trespass committed. If there was no physical trespass, then according to the property rationale, there is no violation of fourth amendment rights.

Once again the dissenting Justices raised strong objections to the use of the property concept as a standard. Mr. Justice Frankfurter asserted: "The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . The circumstances of the present case show how the rapid advances of science are made available for that police intrusion into our private lives against which the Fourth Amendment of the Constitution was set on guard." 343 U.S. at 759 (Frankfurter, J., dissenting).

Mr. Justice Burton, also dissenting: "The Fourth Amendment's protection against unreasonable searches and seizures is not limited to the seizure of tangible things. It extends to intangibles, such as spoken words." 343 U.S. at 765 (Burton, J., dissenting). *See* Osborn v. United States, 385 U.S. 323 (1966).

had taken place in the "intangible" area of wiretapping and eavesdropping. In *Silverman v. United States*,[48] the Court ruled that the actions of law enforcement officers in attaching an electronic device, called a "spike mike," to the heating duct of the defendants' house, constituted a violation of the fourth amendment, and hence, conversations that were overheard were inadmissible as evidence. Mr. Justice Stewart indicated that the Court's decision was based in part on the physical trespass of the "spike mike" into the defendants' home:

> The record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners . . . . Here, . . . the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge or consent.[49]

But, part of the Court's opinion contained references to a more abstract standard to be used in the adjudication of the right of privacy:

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion . . . . The decision here *does not turn* upon the technicality of a *trespass* upon a party wall . . . it is *based upon* the reality of an *actual intrusion into a constitutionally protected area.*[50]

As expressed in *Silverman*, the Supreme Court indicated dissatisfaction with the limitations of the property rationale.

Prior to the Supreme Court's rejection of the property standard in *Katz v. United States*[51] in 1967, several cases continued the development of the right of privacy rationale. In *Jones v. United States*,[52] the Supreme Court held that the defendant, who had been convicted of violating federal narcotics laws, had standing to contend that law enforcement officers' entry and seizure of evidence were unreasonable notwithstanding the fact that he testified that the property seized was not his and that the place of the arrest was not his home. In rejecting the view that the de-

48. 365 U.S. 505 (1961).

49. *Id.* at 509-11.

50. 365 U.S. at 512. Mr. Justice Douglas, concurring, develops this concept: "The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed. . . . Our concern should not be with the trivialities of the local law of trespass, . . . But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of eletcronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded. 365 U.S. at 513 (Douglas, J., concurring).

51. 389 U.S. 347 (1967).

52. 362 U.S. 257 (1960).

fendant must assert proprietary interests in the evidence seized in order to claim a violation of his fourth amendment rights, Mr. Justice Frankfurter asserted:

> We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law.[53]

Thus, one more property characteristic had been removed from the right of privacy.

The most significant case in the development of an abstract privacy standard is *Griswold v. State of Connecticut*,[54] in which the Court held that the state law forbiding the use of contraceptives unconstitutionally intrudes upon the right of marital privacy. In reversing the defendants' conviction for disseminating contraceptive information, Mr. Justice Douglas declared:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. . . . Yet the First Amendment has been construed to include certain of those rights. . . . The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry . . . . Without those peripheral rights the specific rights would be less secure. . . . In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[55]

Griswold is important because for the first time, the Court recognized the right of privacy as an independent, constitutional doctrine, and thereby

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53. *Id.* at 266. In Wong Sun v. United States, 371 U.S. 471, 485 (1963), the Supreme Court held that the exclusionary rule barred the use of intangible as well as tangible evidence. *See* Hoffa v. United States, 385 U.S. 293 (1966); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304 (1967).

54. 381 U.S. 479 (1965).

55. *Id.* at 482-484. Mr. Justice Goldberg concurring: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional Amendments." 381 U.S. at 488 (Goldberg, J., concurring). *See also* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197 (1965); Mc Kay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259 (1965).

laid the foundation for the Supreme Court's rejection of the property rationale in *Katz v. United States.*[55a]

In *Katz*, the Court ruled that the government's activities in electronically listening to and recording the defendant's words spoken in a public phone violated the privacy upon which the defendant had justifiably relied and thus constituted an unreasonable search and seizure within the meaning of the fourth amendment, notwithstanding the fact that the electronic eavesdropping device did not penetrate the physical wall of the phone booth. Mr. Justice Stewart's statement of the Court's opinion clearly rejects the property standard:

> [We] have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under local property law'. . . . Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.[56]

Because electronic eavesdropping devices had been developed, which were so sensitive that they did not require a physical trespass to be effective, the property rationale in the area of privacy simply had become outdated.[57] In order to protect an individual's right to be free from unreasonable searches and seizures in the area of wiretapping and eavesdropping, the Supreme Court rejected the old standard and adopted a more abstract view of the fourth amendment guarantees.

In the area of administrative searches and seizures, a similar trend in case law began to discredit the second theory which evolved from *Boyd*—that is, the fourth amendment prohibited unreasonable searches and seizures only when the object of the search was evidence of a crime. The criminal law approach to the fourth amendment was first undermined in a federal court of appeals decision, *District of Columbia v. Little.*[58]

55a. 389 U.S. 347 (1967).

56. Katz v. United States, 389 U.S. at 353.

57. Law enforcement officers could invade a person's privacy by eavesdropping, yet not violate the physical intrusion concept by using a very sensitive instrument. Therefore, the property rationale only limited the type of eavesdropping device used, not the invasions of one's privacy. BASSIOUNI, *supra* note 37, at 396 (1969).

58. 178 F. 2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). There have only been eight cases which have decided the question of whether or not the imposition of penal sanctions for refusing entry to an inspector who lacks a warrant is a violation of the individual's right to be free from unreasonable searches and seizures. Holding no constitutional violation: Frank v. Maryland, 359

Therein the defendant had been convicted of interfering with an inspector of the Health Department by refusing to unlock the door of her home at the command of the inspector, who was without a warrant. The court held that the fourth amendment prohibited the inspector from entering the defendant's home without her consent and without a warrant. In refuting the proposed argument that the fourth amendment applied only to criminal searches and seizures Judge Prettyman stated:

> It is said to us that the regulations sought to be enforced by this search only incidentally involved criminal charges, that their purpose is to protect the public health. It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. It is said to us that therefore there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime. . . . The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history . . . . It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.[59]

Although the federal court had ruled that a warrantless administrative search violated the fourth amendment's prohibition against unreasonable searches and seizures, this precedent was not immediately accepted by the Supreme Court.

In *Frank v. State of Maryland*,[60] the Court refused to invoke the re-

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U.S. 360 (1959); Camara v. Municipal Court, 237 Cal. App. 2d 128 (1965) *reversed*, 387 U.S. 523 (1967); See v. City of Seattle, 67 Wash. 2d 465 (1965), *reversed*, 387 U.S. 541 (1967); State *ex rel.* Eaton v. Price, 364 U.S. 541 (1967); Commonwealth v. Hadley, 351 Mass. 439, 222 N.E. 2d 681 (1966), *per curiam*, Hadley v. Massachusetts, 388 U.S. 464 (1967); Givner v. State, 210 Md. 484, 124 A. 2d 764 (C.A. 1956); City of St. Louis v. Evans, 337 S.W. 2d 948 (Mo. 1960). *Contra*, District of Columbia v. Little, 178 F. 2d 13 (D.C. Cir. 1950), *aff'd on other grounds*, 339 U.S. 1 (1950). *See* Abel v. United States, 362 U.S. 217 (1960). Lafave, *Administrative Searches and the Fourth Amendment: The Camera and See Cases*, S. CT. REV. 1, 4 n. 10 (1967). *See generally* DePass v. City of Spartanburg, 234 S.C. 198, 107 S.E. 2d 350 (1959); State v. Rees, 139 N.W. 2d 406 (1966).

59. 178 F. 2d 13, 16-17. *See* United States v. Eighteen Cases of Tuna Fish, 5 F. 2d 979 (W.D. Va. 1925); United States v. 62 Packages, 48 F. Supp. 878 (W.D. Wis. 1943), *as affirmed*, 142 F.2d 107 (7th Cir. 1944). *See generally* Schenk v. United States, 249 U.S. 47, 52 (1919); Reynolds v. United States, 98 U.S. 145 (1878).

60. 359 U.S. 360 (1959), *overruled*, Camara v. Municipal Court, 387 U.S. 523 (1967).

strictions of the fourth amendment against a warrantless health inspection that was based on probable cause. The defendant was convicted of violating a provision of the Baltimore City Code for refusing to allow the Commissioner of Health into his home without a warrant. The Commissioner wanted to investigate a suspected health "nuisance." Consequently, the defendant was fined twenty dollars. The Supreme Court held that in light of the long history of warrantless health inspections and of modern health needs, a city ordinance that provides penal sanctions for refusal to allow a warrantless health inspection, based on probable cause, is not violative of the fourth amendment.[61] Mr. Justice Frankfurter outlined the criminal search rationale in the Court's opinion:

> But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. . . . No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection . . . . Appellant's resistance can only be based, not on admissible self-protection, but on a rarely voiced denial of any official justification for seeking to enter his home. . . . Thus, not only does the inspection touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion, but it is hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy.[62]

Therefore, in its first decision involving a warrantless administrative search, the Supreme Court found no violation of the defendant's Fourth Amendment Rights.[63]

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61. It should be noted that Frank was decided in the years of uncertainty between Wolf v. Colorado, 338 U.S. 25 (1949) and Mapp v. Ohio, 367 U.S. 642 (1961) as to the precise scope of the fourth amendment's application to state officials. Lafave, *Administrative Searches and the Fourth Amendment: The Camera and See Cases*, S. CT. REV. 1, 6 (1967).

62. 359 U.S. at 366-67. Many authors have been critical of this concept: LANDYNSKI, SEARCH AND SEIZURE IN THE SUPREME COURT 249 (1966); 8 WIGMORE ON EVIDENCE § 2264 (3rd ed. 1940); Barret, *Personal Rights, Property Rights, And The Fourth Amendment*, S. CT. REV. 46 (1960); Comment, *Administrative Searches And the Fourth Amendment*, 30 MO. L. REV. 612, 621 (1965); Comment, *Search And Seizure In The Supreme Court: Shadows on The Fourth Amendment*, 28 U. CHI. L. REV. 664, 669, 674, 687-88 (1961). *See generally* Stahl & Kahn, *Inspections and the Fourth Amendment*, 11 U. PITT. L. REV. 256, 275 (1950); Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288, 291 (1965); Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, S. CT. REV. 1, 41 (1961).

63. However, Mr. Justice Frankfurter alludes to an abstract view of the right of privacy in part of his opinion: "Against this background 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 officials of the state unless their entry is under proper authority of law.

In 1967,[64] the Supreme Court expressly overruled the holding in *Frank*. In *Camara v. Municipal Court*,[65] the Court held that adminis-

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The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual." 359 U.S. at 365.

Mr. Justice Douglas, dissenting, asserted: "The Court now casts a shadow over that guarantee as respects searches and seizures in civil cases. Any such conclusion would require considerable editing and revision of the Fourth Amendment. For by its terms it protects the citizen against unreasonable searches and seizures by government, whaetver may be the complaint." 359 U.S. at 374 (Douglas, J., dissenting). Mr. Justice Douglas' main criticism of the majority opinion centered on Mr. Justice Frankfurter's analysis of the development of fourth amendment case law. In analyzing Entick v. Carrington, [1765] 19 Howell State Trials 1029, Mr. Justice Frankfurter points out that Entick was guilty of libel, which is a criminal offense. With the support of Boyd, 116 U.S. 616 (1886), he concludes that the fourth amendment prohibits unreasonable search and seizure only when the object of the search is criminal evidence. Mr. Justice Douglas counters that Entick was in fact only a non-conformist, whom the English government wished to punish for his outspoken views. This supports the contention that the fourth amendment is not limited only to criminal searches, but prohibits all unreasonable searches and seizures. 359 U.S. at 376-77 (Douglas, J., dissenting). Ullman v. United States, 350 U.S. 422, 445-46 (1956) (Douglas, J., dissenting); Feldman v. United States, 322 U.S. 487, 499 (1944) (Black, J., dissenting); TAYLOR, THE AMERICAN CONSTITUTION 234 (1911). Lord Camden's statement in Entick would seem to favor Mr. Douglas' viewpoint: "[W]henever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders." Entick v. Carrington, [1765] 19 Howell State Trials at 1072. "[I]t was criminal at common law, not only to write public seditious papers and false news; but *likewise to publish any news without a license from the king, though it was true and innocent.*" Entick v. Carrington, [1765] 19 Howell State Trials at 1070. (Emphasis added).

64. In Parrish v. Civil Service Comm'n of County of Alameda, 66 Cal. Rptr. 2d 260, 425 P. 2d 223 (1967), the state supreme court held that early morning mass raids, which were conducted without search warrants, for the purpose of determining a recipient's welfare eligibility were violations of his right to privacy. The searches were clearly unreasonable, because they were conducted in the early morning hours and the recipients, who were searched, were not selected on the basis of probable cause. It is interesting to note that Judge Tobriner rejected the welfare agency's argument that the raids did not violate the recipient's fourth amendment rights because of the Supreme Court's decision in Frank. He pointed out that Frank held that the Fourth Amendment applied to searches for criminal evidence or forfeitures. "[I]t was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions *or for forfeitures* that the great battle for fundamental liberty was fought." *Frank* 359 U.S. at 365. (emphasis added). Judge Tobriner then equated the forfeiture language in Frank to the searches for evidence of welfare ineligibility in Parrish. "Since the Court thus declared that a search directed at securing evidence in aid of a forfeiture should be treated in the same manner as a search for evidence of crime, the Frank decision affords no support. . . ." *Supra* at 266, 425 P. 2d at 227. Therefore, Judge Tobriner concluded that the fourth amendment protected an aid recipient from unreasonable searches for welfare ineligibility even though Frank had not been overruled.

65. 387 U.S. 523 (1967).

trative searches by municipal health and safety inspectors constitute significant intrusions upon privacy to be protected by the fourth amendment; and such searches, when authorized and conducted without the warrant procedure, lack traditional fourth amendment safeguards. Mr. Justice White described the extension of the fourth amendment's protection to administrative searches and seizures.

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. But, we cannot agree that the Fourth Amendment interests at stake are merely 'peripheral.' 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 . . . . [E]ven the most law abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . .[66]

Like its rejection of the limitations of the property rationale in *Katz*, the Supreme Court, in *Camara*, eliminated the criminal search restriction on the fourth amendment and extended its protection to warrantless administrative searches.

It is clear then that the Supreme Court was at the crossroads of the fourth amendment in deciding *Wyman*. It could return to the criminal investigation rationale of *Frank* with the result that the scope of the fourth amendment's protection would be limited to unreasonable criminal searches and seizures. Or the Court could follow *Camara* and extend the fourth amendment's protection to warrantless administrative searches. Unpredictably, *Wyman* rejected the rationales of both *Frank* and *Camara*. The Court asserted that the welfare interview did not qualify as a search under the meaning of the fourth amendment.[67] Therefore, the aid recipient did not have any right of privacy to protect him from this administrative intrusion.

Justice Blackmun attempted to distinguish *Frank* and *Camara* from *Wyman* on the ground that in the former two cases refusal to allow war-

66. *Id.* at 530-31. In See v. City of Seattle, 387 U.S. 541 (1967), Camara's holding that the fourth amendment bars prosecution of a person who has refused to permit a warrantless code enforcement inspection of his personal residence was extended to similar inspections of commercial structures.

67. Mr. Justice Blackmun asserted: "In *Camara* Mr. Justice White, . . . pointed out, . . . that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior. . . . This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. . . . It is also true that the caseworker's posture in the home visit is, perhaps, in a sense both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context." 400 U.S. 309, 317 (1971).

rantless, administrative searches resulted in criminal prosecutions, while in the present case refusal resulted *only* in termination of welfare benefits.[68] However, this analysis seems to resurrect *Frank*'s criminal search rationale, which had been expressly rejected by the Court in *Camara*.[69] The result of Justice Blackmun's analysis in *Wyman* is confusion as to whether or not the fourth amendment protects an individual from warrantless, administrative searches.

Mr. Justice Marshall, dissatisfied with this analysis, expressed his belief that the fourth amendment applies to each and every governmental intrusion and that the nature of the welfare home visit is investigative.[70] He also objected to Justice Blackmun's theory that the scope of the fourth amendment is determined by the nature of the penalty imposed by the government, not by the character of the governmental intrusion.[71] Mr.

68. Mr. Justice Blackmun asserted: "*Frank* was a criminal prosecution for the owner's refusal to permit entry. So, too, was *See*. *Camara* had to do with a writ of prohibition sought to prevent an already pending criminal prosecution. The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed. In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. . . . We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The *only consequence of her refusal is that the payment of benefits ceases*." 400 U.S. 309, 325 (1971) (emphasis added).

69. Mr. Justice Blackmun states: "The home visit is not a criminal investigation, and does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, it is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a by-product of that visit does not impress upon the visit itself a dominant criminal investigative aspect." 400 U.S. 309, 323 (1971). Even though the Court uses a criminal prosecution standard for the purpose of including refusals of warrantless, administrative searches that result in quasi-criminal fines, rather than the Frank criminal search rationale, the two tests are so similar that it is very difficult to distinguish them.

70. "The Court's assertion that this case concerns no search 'in the Fourth Amendment meaning of the term' is neither 'obvious' nor 'simple.' I should have thought that the Fourth Amendment governs all intrusions by agents of the public upon personal security. . . . In an era of rapidly burgeoning governmental activities and their concomitant inspectors, caseworkers, and researchers, a restriction of the Fourth Amendment to 'the traditional criminal law context' tramples the ancient concept that a man's home is his castle." 400 U.S. 309, — (1971) (Marshall and Brennan, J.J., dissenting). He further states: "[T]he welfare visit is not some sort of purely benevolent inspection. No one questions the motives of the dedicated welfare caseworker. Of course, caseworkers seek to be friends, but the point is that they are also required to be sleuths. . . . Time and again, in briefs and at oral argument, appellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies." 400 U.S. at — (Marshall and Brennan, J.J., dissenting).

71. "[T]here is neither logic in, nor precedent for, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion

Justice Douglas, dissenting, also, described the abstract foundations of the fourth amendment, for the purposes of demonstrating that the amendment applied to the social welfare home visit.[72]

The dissenting Justices in *Wyman* raised valid objections to the majority holding. Presently, an individual cannot be certain whether the fourth amendment protects against all warrantless administrative searches or whether the amendment prohibits only specific government invasions supported by criminal sanctions. In the future, a person will be unable to rely on the assurance that other types of warrantless administrative intrusions will be prohibited by the fourth amendment. The decision in *Wyman* causes confusion as to the exact breadth of the protections of the fourth amendment in the area of administrative searches and seizures.

If the holding in *Wyman* creates confusion as to the scope of the protections of the fourth amendment, does this decision undermine the developing trend that requires prior judicial supervision of any governmental invasion of an individual's right to privacy, except in a narrowly defined set of circumstances? That is, how great is the right possessed and when is the search unreasonable? This is where the second inquiry becomes important. Is a search warrant, obtained from a "neutral and detached" magistrate prior to entry, necessary to the reasonableness of an administrative investigation?

Historically, the right to be free from unreasonable governmental searches and seizures has been deemed to be a personal right.[73] It has been held that these individual rights do not extend to investigations into matters of a public or quasi-public nature.[74] Also, the scope of the

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but on the size of the club that the State wields against a resisting citizen. Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a $100 suspended fine." 400 U.S. 309, — (1971). (Marshall and Brennan, J.J., dissenting).

72. "The Fourth, of course, speaks of 'unreasonable' searches and seizures, while the First is written in absolute terms. But the right of privacy which the Fourth protects is perhaps as vivid in our lives as the right of expression sponsored by the First." 400 U.S. 309, — (1971). (Douglas, J., dissenting).

73. *See* Simmons v. United States, 390 U.S. 377 (1968); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952). *Cf.* Jones v. United States, 362 U.S. 257 (1960).

74. For example, the personal right to immunity from unreasonable searches and seizures has been held not to apply to the following public interest situations: (A) Orders issued under statutory authority requiring common carriers to furnish information concerning their operations. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937). *See generally* Davis v. United States, 328 U.S. 582 (1946); Interstate Commerce Commission v. Baird, 194 U.S. 25 (1904); (B) Searches and

fourth amendment does not extend to the rules and regulations adopted in the exercise of police power for the protection of public good, health and morals.[75] However, a public inspection must be conducted in a reason-

seizures, under statutory authority, providing for collection of the public revenue. Flint v. Stone Tracy Co., 220 U.S. 107 (1911); authorization, under city ordinance, for a city tax collector to examine cigarette and vending machines and receptacles located on the premises of the seller. *See generally* Ploch v. City of St. Louis, 345 Mo. 1069, 138 S.W. 2d 1020 (1940); (C) Selective Service Acts providing for compulsory military training and service. *See* O'Connell v. United States, 253 U.S. 142 (1920). *Cf.* United States v. MacIntosh, 283 U.S. 605 (1931), *overruled*, Girouard v. United States, 328 U.S. 61, 69 (1946); (D) Attachments of the contents of safe deposit boxes. *See* Carples v. Cumberland Coal and Iron Co., 240 N.Y. 187, 148 N.E. 185 (1925); (E) The provisional seizure, in connection with contempt proceedings, of property for the purpose of satisfying any fine to be imposed on the owner. Camden County Beverage Co. v. Blair, 46 F. 2d 648 (D.C.D. N.J. 1930); (F) The seizure of prisoners' letters in the possession of prison officials under established prison procedure. Stroud v. United States, 251 U.S. 15 (1919). *See generally* Hoffa v. United States, 385 U.S. 293 (1966); and (G) pursuant to the general rule that authorizes officers to arrest without an arrest warrant for misdemeanors committed in their presence, when a person commits any act which a liquor law declares to be a misdemeanor in the presence of an officer, the officer may arrest such offender. United States v. Haskins, 213 F. Supp. 551 (E.D. Tenn. 1962). *See generally* Carroll v. United States, 267 U.S. 132 (1925).

75. Camden County Beverage Co. v. Blair, 46 F. 2d 648 (D.C.D. N.J. 1930); Elliott v. Haskins, 20 Cal. App. 2d 591, 67 P. 2d 698 (1937). *Contra*, Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); District of Columbia v. Little, 178 F. 2d 13 (11th Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

For example, the personal right to privacy has been held not to apply in the following circumstances: (A) Requiring automobiles to carry license numbers. People v. Schneider, 139 Mich. 673, 103 N.W. 172 (1905); (B) Premises licensed for the sale of liquor. Law enforcement officer has the right to inspect without a warrant. ILL. REV. STAT. ch. 43, §§ 109, 11, 112 (2), 190 (1965). *See* United States v. Duffy, 282 F. Supp. 777 (S.D. N.Y. 1968); People v. Allen, 407 Ill. 596, 96 N.E. 2d 446 (1950); State of Tennessee v. Nolan, 161 Tenn. 298, 30 S.W. 2d 601 (1930); Vairada v. State of Wisconsin, 182 Wis. 309, 195 N.W. 937 (1923); State of Wisconsin v. Kollat, 190 Wis. 255, 208 N.W. 900 (1926); Walsh v. State of Wisconsin, 183 Wis. 93, 197 N.W. 192 (1924); *Cf.* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (indicates officers cannot break into a storeroom). *See generally* State of Wisconsin v. Hoffman, 245 Wis. 367, 14 N.W. 2d 146 (1944); Silber v. Bloodgood, 177 Wis. 608, 188 N.W. 84 (1922) (The breaking of locks may be proper where no other means of access are available); (C) Prescribers and dispensers of Narcotics. ILL. REV. STAT. ch. 38, §§ 22-8, 22-15, 22-18, 22-19, 22-20, 22-38 (1965); (D) Dealers in Deadly Weapons. ILL. REV. STAT. ch. 38, § 24-4(c) (1965); (E) Motor vehicle and vehicle parts dealers. ILL. REV. STAT. ch. 95-1/2, § 5-401 (c) (1965); People v. Levy, 370 Ill. 82, 17 N.E. 2d 967 (1938); (F) Weighing of motor vehicles. ILL. REV. STAT. ch. 95-1/2, §229 (1965); People v. Lafin, 59 Ill. App. 2d 489, 208 N.E. 2d 105 (1965); People v. Munziato, 24 Ill. 2d 432, 182 N.E. 2d 199 (1962); (G) Requiring chattel mortgage, salary loan or small loan brokers to keep records which are subject to inspection. Financial Aid Corp. v. Wallace, 216 Ind. 114, 23 N.E. 2d 472 (1939). *See* Sanning v. City of Cincinnati, 81 Ohio 142, 90 N.E.

able manner, even though most state statutes do not limit the right to investigate by requiring a showing of probable cause.[76]

125 (1909); (H) Requiring food dealers to furnish samples of their products for inspection and analysis and providing for the seizure and destruction of food unfit for human consumption. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). *See* Commonwealth v. Abel, 275 Ky. 802, 122 S.W. 2d 757 (1939); (I) Pawnbrokers—there is a right of investigation because of the facility it furnishes for the commission of crime and its concealment. Provident Loan Soc. v. City and County of Denver, 64 Colo. 400, 172 P. 10 (1918); Epstein v. State, 211 Tenn. 633, 366 S.W. 2d 914 (1963). *See* City of Chicago v. Lowenthal, 242 Ill. 404, 90 N.E. 287 (1909). *See* ILL. REV. STAT. ch. 107-1/2, §5.6 (1965). *See generally* Lafave, *Search and Seizure: "The Course of True Law . . . has not . . . run Smooth,"* 2 Ill. L.F. 323-328 (1966); (K) Subpoenas—courts cannot compel the compulsory production of a person's private books to be used against him in a criminal proceeding because this amounts to unreasonable search and seizure. Boyd v. United States, 116 U.S. 616 (1886); Owens v. State, 133 Miss. 753, 98 So. 233 (1923). *See* Levy v. Superior Court, 105 Cal. 600, 38 P. 965 (1895), *writ of error dismissed*, 167 U.S. 175 (1897); Dalton v. Calhoun County District Court, 164 Iowa 187, 145 N.W. 498 (1912); Boston & M. Consolidated Copper and Silver Mining Co. v. District Court, 27 Mont. 441, 71 P. 602 (1903). *See generally* Garrity v. New Jersey, 385 U.S. 493 (1967). A subpoena cannot be too broad or it amounts to an unreasonable search and seizure. Mc Mann v. Securities and Exchange Commission, 87 F. 2d 377 (2d Cir. 1937), *cert. denied*, 301 U.S. 684 (1937). *See generally* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Also a subpoena for records must be clear. Hale v. Henkel, 201 U.S. 43 (1906). *See* Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); *ex parte* Gould, 60 Tex. Crim. 442, 132 S.W. 364 (1910). *See generally* Adams v. F.T.C. 296 F. 2d 861, 866 (1961). But there are many instances where a subpoena, that meets the requirements of clearness and definiteness, is permitted: (1) A court can compel a person to disclose any property or knowledge concerning a decedent's estate in a remedial proceeding. Levy v. Superior Court, 105 Cal. 600, 38 P. 965 (1895), *writ of error dismissed*, 167 U.S. 175 (1897); (2) with a subpoena duces tecum, a court can compel a person to produce documentary evidence. Southern Pacific Co. v. Superior Court, 15 Cal. 2d 206, 100 P. 2d 302 (1940). *See* Hale v. Henkel, 201 U.S. 43 (1906). *See generally* Wilson v. United States, 221 U.S. 361 (1911); Federal Mining and Smelting Co. v. Public Utilities Commission, 26 Idaho 391, 143 P. 1173 (1914); Carden v. Ensminger, 329 Ill. 612, 161 N.E. 37 (1928). A corporation cannot claim the protection of the fourth amendment because it is not a person and it must be licensed by the state. United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1907). *See* Grant v. United States, 227 U.S. 74 (1913); Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911). *See generally* Grange Lumber Co. v. Henneford, 185 Wash. 180, 53 P. 2d 743 (1936); Davis, ADMINISTRATIVE LAW TREATISE § 3.05-3.06 (1958); and (L) Boarder searches and searches of naval vessels may be made without a warrant. 19 U.S.C. § 1581 (1964) (Boarding vessels); Olson v. United States, 68 F. 2d 8 (2d Cir. 1933) (Search of vessels); United States v. Hayes, 52 F. 2d 977 (E.D. N.Y. 1931); 19 U.S.C. § 1582 (1964) (Customs and border searches). United States v. McGlone, 266 F. Supp. 673 (E.D. Va. 1967). *See* Henderson v. United States, 390 F. 2d 805 (9th Cir. 1967). (Border Searches).

76. Lafave, *supra* note 75, at 255. *See* State v. Nolan, 161 Tenn. 293, 30 S.W. 2d 601 (1930).

In the area of criminal law the test of reasonableness invariably requires a search warrant issued by a neutral and detached magistrate except in a narrowly defined set of exceptions.[77] If a governmental officer enters the home without a valid search warrant, his search is unreasonable *per se*.[78] In *Johnson v. United States*,[79] Mr. Justice Jackson moulded this general rule into a concrete form:

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77. The necessity for a search warrant is not limited to searches of buildings used as homes. It has been extended to: (A) Hotel rooms. United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949); Johnson v. United States, 333 U.S. 10 (1948). *See* Hoffa v. United States, 385 U.S. 293 (1966); (B) Room in a rooming house. McDonald v. United States, 335 U.S. 451 (1948); (C) Business offices. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); (D) Barn was determined to be part of the owners curtillage even though it was 70-80 yards away from the house. Walker v. United States, 225 F. 2d 447 (5th Cir. 1955); and (E) a side alley like a yard or lawn, if used as part of the home, is protected. Harris v. State, 203 Md. 165, 99 A. 2d 725 (1953).

However, searches have been upheld that involved the right to make a warrantless entry into a transiently occupied hotel or motel after it has been vacated. Abel v. United States, 362 U.S. 217 (1960), *reh. denied*, 362 U.S. 984 (1960). *See generally* McShann v. United States, 67 F. 2d 655 (10th Cir. 1933); People v. Martin, 45 Cal. 2d 755, 290 P. 2d 855 (1955); Manchester Press Club v. State Liquor Commission, 89 N.H. 442, 200 A. 407 (1938). Also, searches in open fields and woods, not connected with the curtillage, can be made without a warrant. Hester v. United States, 265 U.S. 57 (1924). Finally, a jail has none of the attributes of a home. Lanza v. State of New York, 370 U.S. 139 (1962). The Court asserted: "But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers or his effects, is at best a novel argument. . . . Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." 370 U.S. at 143.

The most significant part of the conflict that has thwarted the Supreme Court's attempts over the years to develop a coherent body of Fourth Amendment law has been the disagreement concerning the importance of requiring law enforcement officers to secure warrants. One segment of the Court has argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the fourth amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. The other group has argued with equal force that a test of reasonableness, applied after the fact of search or seizure, when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question. Therefore, the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

78. Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Chimel v. California, 395 U.S. 752, 762 (1969); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Katz v. United States, 389 U.S. 347, 357 (1967); Wong Sun v. United States, 371 U.S. 471, 481-482 (1963); Chapman v. United States, 365 U.S. 610, 613-615 (1961); Frank v. Maryland, 359 U.S. 360, 380 (1959) (Douglas, J., dissenting), *overruled*, Camara v. Municipal Court, 387 U.S. 523 (1967); Agnello v. United States, 269 U.S. 20, 32 (1925). In United States v. Lefkowitz, 285 U.S. 452 (1932), Mr. Justice Butler asserted: "Indeed, the informed and deliberate determinations of

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[80]

Lack of a valid search warrant is not excused if the law enforcement officer enters a home on a belief that there is an article concealed there;[81] or if he enters on mere suspicion that a crime has been committed in the home;[82] or where the only reason for failing to get a warrant was inconvenience to the officers.[83]

There are three specific exceptions to the mandatory search warrant requirement that are based on the presence of "exigent circumstances": (1) A police officer may seize evidence of a crime that is in "plain view" in a home without a search warrant, if he has prior justification for being

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magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make the arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *Id.* at 464. In McDonald v. United States, 335 U.S. 451 (1948), Mr. Justice Douglas stated the same general rule: "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. *It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.* Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.* at 455-456. (Emphasis added). *See* De Pater v. United States, 34 F. 2d 275 (4th Cir. 1929).

79. 333 U.S. 10 (1948).

80. *Id.* at 13-14.

81. Agnello v. United States, 269 U.S. 20 (1925).

82. District of Columbia v. Little, 178 F. 2d 13 (D.C. Cir. 1950), *aff'd on other grounds*, 339 U.S. 1 (1950) (Felony); Mc Clurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (1904) (Misdemeanor). *Cf.* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967).

83. Chapman v. United States, 365 U.S. 610, 615 (1961); Johnson v. United States, 333 U.S. at 13-15.

in the home and if he discovers the evidence inadvertently;[84] (2) under *Carroll v. United States*,[85] the police may make a warrantless search of an automobile, if they have probable cause and if they do not have time to procure a warrant from a magistrate; and (3) law enforcement officers may make a warrantless search incident to an arrest, if the arrest itself is valid.[86]

The major premise of the "plain view" doctrine is that in each case the police officer had a prior justification for being in the home before he discovered the criminal evidence. Therefore, the "plain view" doctrine may be applied to a situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.[87] It may also be applied to a circumstance where the initial intrusion that brings the police into plain view of the evidence is not supported by a search warrant but by one of the recognized exceptions to the warrant requirement. Therefore, the police may inadvertently discover criminal evidence while making a "search incident to an arrest"[88] that is appropriately limited in scope under the existing law. Finally, the plain view exception has been applied where a law enforcement officer is not searched for criminal evidence against the accused, but nonetheless inadvertently comes across an incriminating article.[89] Because there is a danger of a general search,[90] the scope of the plain view exception is limited by the requirement of inadvertent discovery.[91]

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84. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); United States v. Eisner, 297 F. 2d 595, 597 (6th Cir. 1962); Takahashi v. United States, 143 F. 2d 118 (9th Cir. 1944).

85. Carroll v. United States, 267 U.S. 132 (1925).

86. Chimel v. California, 395 U.S. 752 (1969). *See generally* Coolidge v. New Hampshire, 403 U.S. at 458-462.

87. *Cf.* Stanley v. Georgia, 394 U.S. 557, 571-572 (1969); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Steele v. United States, 267 U.S. 498 (1925).

88. Chimel v. California, 395 U.S. 752, 762-763 (1969). *See* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967); Hester v. United States, 265 U.S. 57 (1924).

89. Ker v. State of California, 374 U.S. 23, 43 (1963). *Cf.* Lewis v. United States, 385 U.S. 206 (1966).

90. Boyd v. United States, 116 U.S. 616, 624-630 (1886). *See* Marron v. United States, 275 U.S. 192, 195-196 (1927).

91. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 299-300 (1967); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559, 563 (1926); Steele v. United States, 267 U.S. 498 (1925). *See* United States v. Rabinowitz, 339 U.S. 56, 78 (1950), *overruled*, Chimel v. California, 395 U.S. 752 (1969); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).

In *Carroll v. United States*,[92] the Supreme Court developed the second exception to the mandatory warrant requirement based on the presence of "exigent circumstances." The defendants' automobile had been stopped and searched on the highway by the police because there was probable cause to believe that they were violating the National Prohibition Act. The law enforcement officers found sixty-eight bottles of illegal alcohol concealed in the car. Mr. Justice Taft stated the reasons for allowing a warrantless search of the automobile on the highway:

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[93]

Therefore the basis of the "exigent circumstance" exception in *Carroll* was the fact that an automobile could be rapidly moved out of the jurisdiction where the warrant had to be obtained.[94] But Mr. Justice Taft applied limitations to the scope of this warrantless search of moveable vehicles:

> In cases where the securing of a warrant is reasonably practicable, *it must be used* . . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.[95]

Thus, a warrantless search of a moving vehicle must be based on probable cause and a search warrant must be obtained if it is reasonably practicable to secure one.

In *Schmerber v. California*,[96] the Supreme Court held that the compulsory testing, by a physician of the petitioner's blood over his objections

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92. 267 U.S. 132 (1925).

93. *Id.* at 153. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); O'Neill v. Central Leather Co., 87 N.J.L. 552, 94 A. 789 (1915) (Military searches under martial law).

94. In Chambers v. Maroney, 399 U.S. 42 (1970), the Supreme Court gives this analysis of the "exigent circumstances" described in Carroll: "[T]he car is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence, an immediate search is constitutionally permissible." 399 U.S. at 51. *See* Cooper v. California, 386 U.S. 58 (1967); Preston v. United States, 376 U.S. 364 (1964); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931). *See generally* Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Meyer v. United States, 386 F. 2d 715 (1967).

95. 267 U.S. at 155-156.

96. 384 U.S. 757 (1966).

did not violate the petitioner's rights under the fourth amendment because of the presence of exigent circumstances.[97] Mr. Justice Brennan described the rationale of the Court's holding:

> We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.[98]

Therefore, the Court again found a particular exigent circumstance under which a valid warrantless search could be made without prior recourse to a magistrate.

In *Warden, Maryland Penitentiary v. Hayden*,[99] the Supreme Court held that police, who are in "hot pursuit" of a fleeing felon, may make a warrantless search of any home which the suspect has entered. The fact that the police are in immediate pursuit of the fleeing suspect and the fact that a felon at large poses a dangerous threat to the public are valid exigent circumstances that justify the warrantless search. Under these conditions, it is obvious that prior recourse to a magistrate is impossible.

The final exception to the mandatory warrant requirement to search for criminal evidence in a home, is a warrantless search incident to a valid arrest.[100] In *Trupiano v. United States*,[101] the Supreme Court held that no searches and seizures could be legitimated by the mere fact of valid entry for purposes of arrest, so long as there was no showing of special difficulties in obtaining a search warrant from a neutral magistrate. Thus, the Court declared that a police officer could not make a

97. The administering of a blood test by a physician in a hospital was deemed a reasonable method for measuring the petitioners blood-alcohol level by the court. *Id.* at 769-771. For an example of an obvious unreasonable search or method for extracting evidence, *see* Rochin v. California, 342 U.S. 165 (1952) (Stomach pumping).

98. 384 U.S. at 770-771. In Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969), the court held that the New York statute that required all employees of member firms of national security exchanges registered with the S.E.C. to be fingerprinted as a condition of employment did not violate the fourth amendment rights of the employees to be free from unreasonable searches and seizures. *See* Davis v. Mississippi, 394 U.S. 721 (1969). In Hernandez v. United States, 353 F. 2d 624 (9th Cir. 1965), the court held that the fact that baggage, suspected of containing illegal narcotics, was about to leave on an airliner, constituted valid "exigent circumstances" and therefore, the bags could be legally seized without a search warrant.

99. 387 U.S. 294 (1967). *See* Davis v. Mississippi, 394 U.S. 721 (1969).

100. Trupiano v. United States, 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950).

101. 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

warrantless search based only on the fact that he had made a valid arrest. In addition, he must show that it was unreasonable for him to secure a search warrant from a magistrate prior to the arrest. Therefore, the relevant test was whether it was *reasonable to procure a search warrant*, not whether the search was itself reasonable *i.e.*, did the officer properly limit the area of his search.[102]

This theory, developed in *Trupiano*, was overruled by the Supreme Court in *United States v. Rabinowitz*,[103] wherein the Court held that a valid entry for purposes of arrest served to legitimate warrantless searches and seizures throughout the premises where the arrest occurred, no matter how spacious those premises were.[104] However, the holding in *Rabinowitz* resulted in far-reaching, warrantless searches that revived the dangers of the general warrants.[105]

This problem was remedied, when the Supreme Court overruled *Rabinowitz*[106] in *Chimel v. California*.[107] In *Chimel*, the Court held that the warrantless search of the defendant's entire house, incident to defendant's valid arrest in his home on a burglary charge, was unreasonable because it extended beyond the defendant's person and area from which he might have obtained a weapon or incriminating evidence. Here, the Court applied the basic rule that the "search incident to an arrest" is an exception to the warrant requirement and that its scope must therefore be strictly defined in terms of the justifying exigent circumstances. The exigency

102. *Trupiano* has been open to criticism because it was absurd to permit the police to make an entry in the dead of night for purposes of seizing the person by force, and then refuse them permission to seize objects lying around in plain sight. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

103. 339 U.S. 56 (1950), *overruled*, Chimel v. California, 395 U.S. 752, 768 (1969). *See* Harris v. United States, 331 U.S. 145 (1947), *overruled*, Chimel v. California, 395 U.S. 752, 768 (1969); People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955). *See generally* Kremen v. United States, 353 U.S. 346 (1957).

104. The approach taken in *Rabinowitz* was open to criticism because it made it so easy for the police to arrange to search a man's premises without a warrant that the fourth amendment's protection became ineffective. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

105. However, even under *Rabinowitz*, the Supreme Court has repeatedly held that: "[A] search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest'. . . ." Vale v. Louisiana, 399 U.S. 30, 33 (1970). *Accord*, Coolidge v. New Hampshire, 403 U.S. 443 (1971). *Cf.* Agnello v. United States, 269 U.S. 20, 32 (1925). Under Preston v. United States, 376 U.S. 364 (1967), the police cannot legally seize a car, remove it, and search it at their leisure without a warrant. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968). *Cf.* Chambers v. Maroney, 399 U.S. 42 (1970); Cooper v. California, 386 U.S. 58 (1967).

106. Harris v. United States, 331 U.S. 145 (1947) was also overruled in *Chimel*.

107. 395 U.S. 752 (1969).

arises from the danger of harm to the arresting officer and the danger of destruction of evidence within the reach of the arrestee.[108] Neither type of exigency can justify the far-ranging searches that were authorized in *Rabinowitz*. Thus, a warrant must be secured from a magistrate for any search outside the person of the arrestee or the area under his immediate control. In *Chimel*, the Supreme Court did not return to the holding of *Trupiano*, which indicated that a police officer must obtain a search warrant to seize any evidence that he anticipates to be in the home. *Chimel* solidifies the trend toward limiting the number of possible exceptions to the mandatory warrant requirement for criminal searches.[109] Therefore, in most instances, a police officer must obtain a search warrant from a magistrate if he wishes to search a suspect's house for criminal evidence.[110]

However, as to other types of intrusions[111] on privacy, there has been some disagreement as to whether they are unreasonable, if begun without the judicial supervision of a magistrate. But a similar trend requiring judicial auspices for any governmental invasion is present. In *Terry v. Ohio*[112] (street search), the Supreme Court held that a police officer without a search warrant could stop and detain a person on the street or public premises for the purposes of briefly questioning him and obtaining personal identification. The officer could also pat the outside clothing of the detained individual for the purpose of detecting any weapon that might be used to harm him. Once again the Court justified the warrantless "search" (frisk) on the presence of exigent circumstances.[113]

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108. *Id.* at 762-763. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

109. *Cf.* Chambers v. Maroney, 399 U.S. 42 (1970); Cooper v. California, 386 U.S. 58 (1967).

110. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court held that a warrant, issued by the State's Attorney General for the search and seizure of the petitioner's automobile did not satisfy the requirements of the fourth amendmen as made applicable to the states by the fourteenth because it was not issued by a "neutral and detached magistrate." Mr. Justice Stewart delivered the opinion of the Court: "We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." 403 U.S. at 452. This holding only emphasizes the importance the Supreme Court attaches to the mandatory warrant requirement in searches for criminal evidence.

111. Intrusions other than a warrantless physical search in a suspect's home for criminal evidence. Intrusions such as: automobile searches, street searches, electronic surveillance, and administrative searches.

112. 392 U.S. 1 (1968). *See* Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968).

113. It should be pointed out that the Supreme Court does not distinguish a

We do not retreat from our holdings that the police must, *whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.* . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.[114]

Therefore, the rationale of "stop and frisk" is modeled on the "exigency" foundation of the "search incident to a valid arrest" exception to the search warrant requirement.

In *Katz v. United States*,[115] the Supreme Court did not make all electronic eavesdropping impermissible. Appropriate judicial supervision can authorize the limited use of electronic surveillance.

It is apparant that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.'[116]

"frisk" from a search under the meaning of the fourth amendment: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search'." *Id.* at 16.

114. 392 U.S. at 20. (emphasis added).

115. 389 U.S. 347 (1967). *See* Osborn v. United States, 385 U.S. 323 (1967); Nardone v. United States, 302 U.S. 379 (1937) and 308 U.S. 338 (1939); Benanti v. United States, 355 U.S. 96 (1957); Schwartz v. Texas, 344 U.S. 199 (1952), *overruled*, Lee v. Florida, 391 U.S. 378 (1968). *See generally* Federal Communications Act, 47 U.S.C. § 605 (1964); Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2516(1)-2516(2) (1970).

116. 389 U.S. at 356-357. In Berger v. New York, 388 U.S. 41 (1967), the Supreme Court held that the language of a New York statute authorizing official electronic eavesdropping was too broad in its sweep and therefore was violative of the fourth and fourteenth amendments. Under this statute eavesdropping was authorized without requiring identification of the conversations to be "seized" or of the specific crimes involved. Secondly, the statute authorized eavesdropping for periods of two months. Also, the statute provided for no termination date. Finally, the statute did not require notice as search warrants traditionally do. *Id.* at 58-60. Mr. Justice Clark stated: "The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also 'particularly describing the place to be searched, and the persons or things to be seized.' New York's statute lacks this particularization. It merely says that a war-

Thus, judicial supervision is a precondition for valid electronic eavesdropping.

Although the foregoing cases have generally concerned themselves with searches for criminal evidence there is authority for the premise that administrative searches also require some sort of judicial authorization to meet the test of reasonableness. However, the limits of this judicial authorization have not been precisely defined. In *District of Columbia v. Little*,[117] Judge Prettyman stated the general rule:

> We emphasize that no matter who the officer is or what his mission, a governmental official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty afford neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer.[118]

Administrative searches can be distinguished from "automobile searches" and "street searches" in that they involve an invasion of the home. Because of the intrusion into the home, the same mandatory search warrant procedure that is required in criminal searches of the home has been adopted as a standard for administrative searches.[119]

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rant may issue on reasonable ground to believe that evidence of crime may be obtained by the eavesdrop. It lays down no requirement for particularity. . . ." 388 U.S. at 55-56. *See* N.Y. CODE OF CRIMINAL PROCEDURE § 813(A) (1942); Clinton v. Virginia, 204 Va. 275, 130 S.E. 2d 437 (1963), *rev'd per curiam*, 377 U.S. 158 (1964). *See generally* Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961).

117. 178 F.2d 13 (1950), *aff'd on other grounds*, 339 U.S. 1 (1950).

118. *Id.* at 17. Judge Prettyman also states how the reasonableness of a search is to be determined. "When the Constitution prohibits unreasonable searches, it, of course, by implication, permits reasonable searches. But reasonableness without a warrant is adjudged solely by the extremity of the circumstances of the moment and not by any general characteristic of the officer or his mission." 178 F.2d at 16. Camara v. Municipal Court, 387 U.S. 523, 534 (1967); Frank v. Maryland, 359 U.S. 360, 380 (1959) (Douglas, J., dissenting), *overruled*, Camara v. Municipal Court, 387 U.S. 523 (1967). For a discussion of the probable cause necessary to secure a warrant for an administrative search, *See* Lafave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, S. CT. REV. 1, 11-20 (1967); Camara v. Municipal Court, 387 U.S. 523, 547-548 (Clark, Harlan and Stewart, J.J., dissenting).

119. In United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968), the district court held that where special investigators of the Alcohol and Tobacco Tax Division of I.R.S. seized liquor bottles at the defendant's bar and acted within specific statutory authority, there was no violation of the defendant's fourth amendment rights. The court distinguished this case from *Camara* and *See* on the basis that bars must be licensed by the state. "I venture the opinion that *Camara* and *See* would not apply to the case at bar. No apartment residence is here involved, as in *Camara*, nor locked commercial warehouse, as in *See*. It may also be noted as of importance that defendant must have a license for his bar under the law of New York . . . that his 'retail licensed premises' are 'subject to inspection' by state officers whenever open for business. . . ." 282 F. Supp. at 780.

In *See v. City of Seattle*,[120] the Supreme Court held that under the fourth and fourteenth amendments, a defendant could not be prosecuted for exercising his constitutional right to insist that a fire inspector obtain a search warrant authorizing entry upon the defendant's locked warehouse. To establish the necessity of securing a search warrant for entering a commercial warehouse, Mr. Justice White compared the present case to cases in which an administrative subpoena was used:

> We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.
>
> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.
>
> It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. . . .
>
> We therefore conclude that administrative entry, without consent, upon portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of the warrant procedure.[121]

In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Supreme Court held that under statutes conferring broad authority to the Secretary of the Treasury to enter and inspect premises of retail liquor dealers (and providing for a forfeiture of $500 for refusal to permit the inspection) an imposition of the fine was the exclusive remedy and inspectors could not break and enter a locked storeroom without a search warrant. Mr. Justice Douglas stated: "What was said in *See* reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. We deal here with the liquor industry long subject to close supervision and inspection . . . [B]ut under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant." 397 U.S. at 77. *See* James v. Goldberg, 303 F. Supp. 935, 946 (S.D.N.Y. 1969) for a discussion of the difference between *Colonnade* and the present case, *Wyman*. *See generally* Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910).

120. 387 U.S. 541 (1967).

121. *Id.* at 544-545. *See* United States v. Morton Salt Co., 338 U.S. 632, 652-653 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-209 (1946); United States v. Baush and Lomb Optical Co., 321 U.S. 707, 727-728 (1944); Hale v. Henkel, 201 U.S. 43 (1906). *See generally* United States v. Cardiff, 344 U.S. 174 (1952).

In Abel v. United States, 362 U.S. 217 (1960), the Supreme Court held that immigration officers could seize criminal evidence that they encountered during a

It would appear then that in this limited area, the court feels that some form of due process is necessary to make a search reasonable.

The lower federal court in *James v. Goldberg*, also indicated that prior judicial supervision of the welfare home visit was required to make this investigatory technique a reasonable search under the fourth amendment. The court stated:

> This Court cannot with deference to the Fourth Amendment excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigencies of the situation make the course imperative. . . . Should any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of 'probable cause' will test the particular decision to search against the constitutional mandate of reasonableness. 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.[122]

Therefore, the relevant test to determine the reasonableness of a search even where the circumstances are not criminal in nature, seems to be whether or not prior "judicial sanction" was obtained.

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proper search of defendant's premises without a search warrant, following his arrest under an administrative deportation warrant.

Mr. Justice Douglas, dissenting, stated: "The opening wedge that broadened the power of administrative officers—as distinguished from police—to enter and search peoples' homes was *Frank v. Maryland* . . . . That case allowed a health inspector to enter a home without a warrant, even though he had ample time to get one. The officials of the Immigration and Naturalization Service (I.N.S.) are now added to the preferred list. They are preferred because their duties, being strictly administrative, put them in a separate category from those who enforce the criminal law." 362 U.S. at 242 (Douglas and Black, J.J., dissenting).

In Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968) the district court held that the state university regulation in which the college reserved the right to enter rooms to inspect was not violative of the fourth amendment rights of the students because it was essential to the running of the school as an educational institution.

122. James v. Goldberg, 303 F. Supp. 935, 943-944 (S.D.N.Y. 1969). The Court also points out that there is no validity in trying to distinguish between a search and a welfare home visit.

"To attempt to draw a distinction regarding the applicability of the (Fourth) Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely 'social problem'." 303 F. Supp. at 942. For similar rejections of attempted distinctions between searches and health inspections, *See* District of Columbia v. Little, 178 F.2d 13, 18 (D.C. Cir. 1950), *aff'd on other grounds*, 339 U.S. 1 (1950), McDonald v. United States, 335 U.S. 451, 454 (1948). *See generally*, Note, *Law of Unreasonable Searches and Seizures Applied To Health Inspection*, 44 ILL. L. REV. 845 (1950).

However, in *Wyman*, Mr. Justice Blackmun returned to *Rabinowitz* which held that the relevant test is whether the search itself was reasonable, rather than whether it was practicable to secure a search warrant:

> If however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits, somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard.[123]

The majority seems to ignore the purpose of the test for reasonableness delineated in *Chimel*. Judicial supervision of any invasion of a person's right of privacy is always preferred over the judgment of the law enforcement officer because it is "neutral and detached." The judgment of the governmental officer, who is engaged in the "competitive business of ferreting out crime," is not impartial. Thus, the Supreme Court revives the old test of *Rabinowitz* to justify the failure of the New York welfare agency to secure valid search warrants before making a demand to enter the home to conduct the home visit.

Justice Douglas raises the obvious objection to the majority holding:

> The applicable principle, as stated in *Camara* as 'justified by history and by current experience' is that 'except in certain carefully defined classes of cases,' a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. . . . [I]f inspectors want to enter the precincts of the home against the wishes of the lady of the house, they must get a warrant. The need for exigent action as in cases of 'hot pursuit' is not present for the lady will not disappear; nor will the baby.[124]

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123. Wyman v. James, 400 U.S. 309, 318 (1971). Mr. Justice Blackmun then recites eleven reasons that indicate why the home visit is not unreasonable: (1) The focus of public aid is on the child; (2) because the state welfare agencies are fulfilling a public trust, they have valid concern in seeing that the tax money benefits the proper aid recipients; (3) like an individual that dispenses private charity, the public has the same obligation to see that its funds are used properly; (4) the emphasis of the federal and New York statutes is on "close contact with the beneficiary;" (5) the "home visit" has been recognized as "the heart of welfare administration;" (6) the procedures of the "home visit" are designed to protect the aid recipient's privacy; (7) the aid recipient, Mrs. James, presents no complaint of an unreasonable search; (8) "collateral contacts" are not as efficient in providing information to the welfare agency as the "home visit" is; (9) the visit is not made by the police or uniformed authority; (10) the "home visit" is not a search for criminal evidence; and (11) forcing the welfare agency to secure a search warrant would result in more inequities to the aid recipient than he is subjected to under the present procedure. 400 U.S. at 318-24.

124. *Id.* at 331. (Douglas, J., dissenting). Mr. Justice Marshall raises the same objection: "Of course, the Fourth Amendment test is reasonableness, but in determining whether a search is reasonable, this Court is not free merely to balance,

Thus, Mr. Justice Douglas felt that the Court could not justify the failure of the New York state welfare agency to secure search warrants by reverting back to the *Rabinowitz* test of reasonableness. He felt that the controlling standard was the *Chimel* test. Under that standard, except in a very limited number of circumstances based on the presence of "exigency," a search warrant had to be obtained for any invasion of an individual's right of privacy or the search was unreasonable *per se*. The home visit in *Wyman* involved no exigent circumstances. The state welfare agency had adequate time to procure a valid search warrant because the aid recipient or her child would not leave or disappear. Therefore, Mr. Justice Douglas felt that the home visit in *Wyman* should have been adjudicated unreasonable *per se*.[125]

In addition to the fundamental disagreement among the Supreme Court Justices as to whether the home visit is a search, or if it is a search, whether it is unreasonable, the holding in *Wyman* raises one final, important question. May the State condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the fourth amendment?

In *Barsky v. Board of Regents of the University of the State of New York*,[126] the Supreme Court held that due process of law does not apply to a physician whose state license had been suspended without a hearing because of his conviction in federal court of a misdemeanor. Mr. Justice Burton asserted: "The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission."[127] The Court held that due process of law is not applicable unless an individual is being deprived of a right. It adjudged the state medical license to be a privilege. Therefore, constitutional protections were not to be invoked when only a privilege was taken away.

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in a totally *ad hoc* fashion, any number of subjective factors. An unbroken line of cases holds that, subject to a few narrowly drawn exceptions, any search without a warrant is constitutionally unreasonable . . . . In this case, no suggestion that evidence will disappear, that a criminal will escape, or that an officer will be injured, justifies the failure to obtain a warrant." 400 U.S. at 341. (Marshall and Brennan, J.J., dissenting).

125. It should be noted that the federal appeals court, in United States v. Rickenbacker, 309 F.2d 462, (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963), held that penal sanctions for refusal to answer census questions, authorized by 13 U.S.C. § 221(a) (1964), did not violate the fourth amendment rights of the defendant.

126. 347 U.S. 442 (1954).

127. *Id.* at 451.

In *Flemming v. Nestor*,[128] the Supreme Court refused to apply due process of law to the decision of the Secretary of HEW to terminate, without a hearing, the old age insurance benefits of a deported alien who had become eligible under the Social Security Act. In designating the old age insurance benefits to be a privilege, Mr. Justice Harlan stated: "We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment."[129] Therefore, the Court held that Social Security benefits were a privilege, not a right. Under this decision an individual could not invoke the Constitutional protection of due process when these benefits are taken away.[130]

In *Speiser v. Randall*,[131] the Supreme Court held that a provision of a state constitution, making nonadvocacy of overthrow of the government by unlawful means a condition precedent to a tax exemption, was violative of the first amendment. Mr. Justice Douglas asserted:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . (But) To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.[132]

Therefore, the Court held that the state could not condition the granting of a tax exemption on an individual's waiver of his first amendment rights.[133]

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128. 363 U.S. 603 (1960).

129. *Id.* at 611.

130. *Cf.* Meredith v. Allen County War Memorial Hospital Comm'n, 397 F.2d 33 (6th Cir. 1968); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Dixon v. Alabama Board of Education, 294 F.2d 150 (5th Cir. 1961); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1968); Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961). *Contra*, Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969). The District Court held that the state public aid statutes, relating to reduction, suspension, or termination of aid were in violation of the due process of law clause of the fourteenth amendment because they did not require notice or a hearing.

The court stated: "We reach this conclusion by way of our finding that if it is necessary to cast the matter of (the receipt of) public aid . . . to the needy in one or the other of the long-labored-with molds of privileges or rights, we must classify it as a right. . . ." 305 F.Supp. at 1226. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Note, *Constitutional Law-Due Process-Evidentiary Hearing Required Prior to Termination of Welfare Benefits*, 19 DEPAUL L. REV. 552 (1970).

131. 357 U.S. 513 (1958).

132. *Id.* at 518. *See* Wieman v. Updegraff, 344 U.S. 183 (1952).

133. In Hannegan v. Esquire, Inc., 327 U.S. 146 (1946), the Supreme Court held that, while second-class mail rates could be granted or withheld by the Postmaster,

In *Sherbert v. Verner*,[134] the Court held that a state could not constitutionally apply the eligibility provisions of an unemployment statute in such a manner as to deny benefits to a claimant, who had refused employment on Saturday because of her religious beliefs. Mr. Justice Brennan asserted:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[135]

Thus, the Court held that the state cannot precondition the continued eligibility for unemployment compensation on a person's waiver of his first amendment rights. This decision extends the holding of *Speiser* to unemployment benefits, which the Court has designated as a privilege.

Admittedly, the holdings in *Speiser* and *Sherbert* are concerned with a denial of first amendment rights generally considered to have a high priority within the constitutional framework; nevertheless, the decisions do reveal that even where the benefits granted by the state or federal government are considered a privilege the grantor may not predicate the receipt of these benefits upon the waiver of certain "rights."

This trend was continued in *Shapiro v. Thompson*[136] where the Supreme Court held that a state could not precondition initial eligibility for welfare assistance on a one year residency requirement because it created a classification that constituted an invidious discrimination, denying them equal protection of the laws. Mr. Justice Brennan stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. . . . Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for

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he could not grant the rates "on condition that certain economic or political ideas not be disseminated." 327 U.S. at 146. Shelton v. Tucker, 364 U.S. 479 (1960).

134. 374 U.S. 398 (1963).

135. *Id.* at 404. In United States v. Chicago, 282 U.S. 311 (1931), Mr. Justice Sutherland stated: "Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.* at 328-329.

136. 394 U.S. 618 (1969).

the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.'[137]

In this decision, the Court has extended the doctrine of *Speiser* and *Sherbert* to another "privilege," AFDC assistance. Therefore, a state may not set up some arbitrary classification as a mandatory prerequisite for initial eligibility for the receipt of social welfare assistance. Although the right to unhindered travel throughout the United States involves a constitutional right other than the fourth amendment, it would seem logical that the protections of the fourth amendment would also apply to a state's attempt to condition initial eligibility for AFDC benefits on some arbitrary classification of aid recipients.

In the *Parrish* case,[138] the state supreme court applied the protections of the fourth amendment to early morning mass raids to determine continued welfare eligibility:

Our case proceeds far beyond a mere request for admission presented by authorities under color of office. Thus we need not determine here whether a request for entry, voiced by one in a position of authority under circumstances which suggest that some official reprisal might attend a refusal, is itself sufficient to vitiate an affirmative response by an individual who had not been apprised of his Fourth Amendment rights. The person subjected to the instant operation confronted far more than the amorphous threat of official displeasure which necessarily attends any such request. The request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more cer-

137. *Id.* at 629, 631. United States v. Jackson, 390 U.S. 570, 581 (1968). *See generally* Gardner v. Broderick, 392 U.S. 273, 279 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Spevak v. Klein, 385 U.S. 511 (1967). *Cf.* United States v. Chikata, 427 F.2d 385 (9th Cir. 1970). Mr. Jackson also states: "This constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U.S. at 627 n.6 (1969).

In Goldberg v. Kelly, 397 U.S. 254 (1970) the Supreme Court held that procedural due process requires that pretermination evidentiary hearings be held when public assistance payments to the welfare recipient are stopped. In reaffirming *Sherbert* and *Speiser* Mr. Justice Brennan asserted: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." 397 U.S. at 262. *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Greene v. McElroy, 360 U.S. 474 (1959); Londoner v. Denver, 210 U.S. 373, 385 (1908) for cases concerned with the "balancing of interests" test. *Cf.* In Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961), the Supreme Court held that the action of a commander of a military installation in summarily denying a civilian employee access to the installation which was the location of her employment, for security reasons, did not violate the requirements of the due process clause of the fifth amendment.

138. Parrish v. Civil Service Comm'n of County of Alameda, 66 Cal. Rptr. 2d 260, 425 P.2d 223 (1967).

tain, immediate, and substantial. These circumstances nullify the legal effectiveness of the apparent consent secured by the Alameda County searchers. Both this Court and the Supreme Court of the United States have recently emphasized the heavy burden which the government bears when it seeks to rely upon a supposed waiver of constitutional rights. The county has not sustained the burden here.[139]

The lower federal court in *Wyman* also followed this trend:

Even if we assume that AFDC grants are a privilege or governmental gratuity, the power of government to decline to extend these benefits to its citizens does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms. . . . For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right.[140]

Therefore, the evident trend in the courts has been to refuse to allow a state to condition the granting of a privilege upon a waiver of an individual's constitutional rights.[141]

Once again, the Supreme Court refused to follow the developing trend in the lower courts. It is implicit in the majority holding in *Wyman* that

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139. *Id.* at 269-270, 425 P. 2d at 229-230, Charles Reich states: "[T]here is no theory under which it can be said that public assistance recipients consent, expressly or impliedly, to searches of their homes. The official demand for entrance is sufficient to render any apparent consent involuntary and the threat of loss of public assistance underscores the coercive nature of the demand for entry." Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1350 (1963). *See* French, Comment: *Unconstitutional Conditions: An Analysis*, 50 GEO. L. J. 234, 236-239 (1961); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). *See* Brookhart v. Janis, 384 U.S. 1 (1966); Lynumn v. Illinois, 372 U.S. 528 (1963); Shelton v. Tucker, 364 U.S. 479, 486 (1960); Johnson v. United States, 333 U.S. 10 (1948); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963); Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Canida v. United States, 250 F.2d 822 (5th Cir. 1958); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). These cases will indicate that the Courts generally deny the validity of coerced consent. *See generally* Miranda v. Arizona, 384 U.S. 436, 475-476 (1966).

140. James v. Goldberg, 303 F.Supp. 935, 942 (S.D. N.Y. 1969). *Cf.* in Dandridge v. Williams, 397 U.S. 471 (1970), the Supreme Court held that a state Public Welfare regulation placing an absolute limit of $250.00 per month on the amount of the grant under AFDC regardless of the size of the family and its actual need, did not violate the equal protection clause of the Constitution.

Mr. Justice Stewart stated: "Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. . . . It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment." 397 U.S. at 486.

141. This trend has been based on the "balance of the interest test." The results of the test have usually been in favor of the individual as against the government. *But see Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

even if the home visit is an unreasonable search, the appellee cannot constitutionally object because AFDC benefits are a privilege, not a right. Mr. Justice Blackmun states:

> The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.
>
> One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. *It might well expect more*, because of the trust aspect of public funds, and the recipient, as well as the case worker, has not only an interest but an obligation.[142]

By the use of this language, the Court apparently resurrects the "right-privilege" distinction in the area of social welfare assistance.[143]

Mr. Justice Douglas, dissenting, strongly objects to this part of the majority opinion:

> There is not the slightest hint in *See* that the Government could condition a business license on the 'consent' of the licensee to the administrative searches we held violated the Fourth Amendment. It is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her home. Is a search of her *home* without a warrant made 'reasonable' merely because she is dependent on government largesse? . . . 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? Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion. . . . But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the 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.[144]

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142. Wyman v. James, 400 U.S. 309, 318-19 (1971). (emphasis added).

143. *Supra* notes 126, 128.

144. 400 U.S. 309, 331-33 (1971). *See* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-155 (1958).

Mr. Justice Marshall asserts similar objections in *Wyman*: "Appellants offer a third state interest which the Court seems to accept as partial justification for this search. We are told that the visit is designed to rehabilitate, to provide aid. This is strange doctrine indeed. A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy. . . . Had the Court squarely faced the question of whether the State can condition welfare payments on the waiver of clear constitutional rights, the answer would be plain. The decisions of this Court do not support the notion that a State can use welfare benefits as a wedge to coerce 'waiver' of Fourth Amendment rights. . . ." 400 U.S. 309, 343-44 (1971).

The objections of the dissenting Justices are well founded. In the future will aid recipients have to waive more of their constitutional rights in order to remain eligible for continued welfare benefits from the Government? As long ago as 1928, Mr. Justice Brandeis pointed out the dangers to constitutional freedom present in this type of reasoning: "[E]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[145]

Robert D. Shearer, Jr.

145. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).