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INTRODUCTION

THE legal community, and to a surprising extent the American public, await each decision of the Burger Court with fear or hopeful expectancy, depending upon individual ideological stance. Will the recent personnel changes spell the end of the personal liberties which the Warren Court so courageously forged from the unyielding metal of precedent? Will the right of the state to protect society be freed from the albatross of "defendant's rights" which the Warren Court created? The emotional tone of these questions is intentional, illustrating the primary obstacle to rational analysis of the decisions being handed down. Each is examined for consonance with personal philosophy and condemned or applauded on that basis alone. It is the thesis of this note, and its format, that no such personal reaction can make any claim to validity unless it is supported by a sound analysis of the legal background against which a given case appears.

The case to be discussed is *Wyman v. James*.[1] It concerned the widespread practice of caseworker visits to the homes of welfare recipients. The general area of law involved is the fourth amendment's prohibition against unreasonable search and seizure as applied to administrative action. Pursuant to the thesis stated above, the history of the area is analyzed at some length before the principal case is even considered. It is hoped that *Wyman* will stand in clear relief against this background.

One word of caution, since the Burger Court is indeed new and is applying its constitutional concepts to a body of precedent which may well reflect a very different view, any decision should be looked upon only as an intermediate statement. The Supreme Court has traditionally moved by evolution rather than sudden departure. These early cases are of value more for what they presage than for what they establish.

I. CASE ANALYSIS

The fourth amendment itself must be the starting point of any discussion of search and seizure law:

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

> 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.

Early cases faced with applying this prohibition relied heavily on its history to give it meaning. The amendment was largely a reaction to the hated general warrants issued prior to the Revolution which authorized unrestricted searches for evidence of crime.[2] Although no such limitation appears in the language, it was assumed that the protection applied only to searches for such evidence, and not to administrative inspections. Even cases extending coverage to proceedings not strictly criminal were careful to state that the action in preparation for which the search was made must be criminal in essence or effect. *Boyd v. United States*[3] is the hallmark here. The fourth amendment prohibition against unreasonable search and seizure was held applicable to a forfeiture proceeding. The inclusion was accomplished not by extending the boundaries of the amendment, but rather by bringing within the established area of its protection a form of action spiritually akin to those criminal actions to which it had traditionally been applied. Although seemingly expansive, the case served to reaffirm the criminal/civil distinction in search and seizure cases.[4]

The Court also found a close connection between the fourth and fifth amendments.

> [T]he "unreasonable searches and seizures" condemned by the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned by the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[5]

This guideline of reasonableness, coupled with the assumption that the fourth amendment applied only to cases criminal in essence, left administrative searches virtually ungoverned. If the purpose or possible result of the search is a legitimate criterion for judging its conformity with constitutional stand-

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[2] *See* Weeks v. United States, 232 U.S. 383, 390 (1914); Boyd v. United States, 116 U.S. 616, 625-26 (1886).

[3] 116 U.S. 616 (1886).

[4] The *Boyd* case is perhaps unjustifiably maligned in later references back to its holding. The opinion itself rings with protective sentiment, and a passage therefrom is quoted at the conclusion of this comment as the most appropriate attitude for modern courts. However, the case does preserve a boundary of fourth amendment coverage, and it is to that concept that later references are made.

[5] 116 U.S. 616, 633 (1886).

ards, only the most severe administrative penalty will suffice to trigger the fourth amendment. Indeed, it must amount to a criminal punishment.

For many years after *Boyd* the Court did not consider the criminal/civil border of the fourth amendment. There was, however, a steady flow of criminal cases involving search and seizure doctrine. The opinions evidenced increasing concern with the right of citizens to privacy in their homes. Such a right was seen as "basic to a free society."[6] Absent extreme circumstances, it could not lawfully be abridged without interposing the independent judgment of a magistrate between the zeal of the law enforcement officer and the privacy of the individual.[7]

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[6] Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[7] The effort here is to portray the "feel" of the opinions rather than the specific points of law for which they stand. In aid of that effort, rather lengthy portions of several cases representative of the period are reproduced here.

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

> The protection of the Fourth Amendment extends to all equally, — to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. *Id.* at 32.
>
> Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. *Id.* at 33.

McDonald v. United States, 335 U.S. 451 (1948):

> We are not dealing with formalities. The presence of a search warrant serves a high function. 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 of 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 455-56.

Wolf v. Colorado, 338 U.S. 25 (1949):

> The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. *Id.* at 27-28.

The language of these cases was pitched in broad terms which focused on the intrusiveness rather than the purpose of the search. True, all the searches considered were designed to uncover evidence of crime. But the wording of the opinions, and the spirit behind them, expressed a solicitude for personal privacy which made the purpose or result of the intrusion seem secondary. It was the intrusion itself which was offensive to the fourth amendment.

This trend had developed sufficiently by 1949 to lead the Court of Appeals for the District of Columbia to assume that the protection of the fourth amendment was not conditioned on the purpose of the search. In *District of Columbia v. Little*,[8] Judge Prettyman reversed the defendant's criminal conviction for failure to allow a health inspector access to his home. He expressly rejected the criminal/civil distinction in phrases that echoed the protective attitude of the criminal cases mentioned above.

> 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. If an officer is pursuing a felon who runs into a house and hides, the officer may follow and arrest him. But this is because under the exigencies of circumstance the law of pursuit supersedes the rule as to search. There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not. Moreover, except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer.[9]
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> . . . .
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> . . . 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 not related to crime or to suspicion of crime. . . . 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.[10]
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> . . . .
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> We emphasize that no matter who the officer is or what his mission, a government 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 affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective,

[8] 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).
[9] *Id.* at 16.
[10] *Id.* at 16-17.

> the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite.[11]

This language is clearly consistent with the principle of protection of personal privacy from official intrusion established in the criminal cases upon which Judge Prettyman relied. Just as clearly, it represents the application of that principle to a context foreign to its birth. The apparent conclusion in *Little* was that the protection was so fundamental to our society as to transcend the purpose of the official intrusion. It was a general tenet of the citizen's relationship to his government, rather than a mere limit on officers of criminal law enforcement.

On appeal, the Supreme Court did not consider the constitutional issue.[12] They affirmed the decision on the ground that Little's conduct was not covered by the statute under which he was charged. It was not until 1959 in *Frank v. Maryland*[13] that the Court squarely confronted the problem of administrative searches.

A Baltimore health inspector, acting pursuant to statutory authority and with probable cause to suspect violation of the health code, requested and was denied permission to inspect defendant's house for evidence of rodent infestation. Refusal to allow inspection was a misdemeanor under Maryland law. The Supreme Court declined to follow the direction taken in *Little*. Rather than regarding all official intrusions as unreasonable unless supported *in the particular instance* by a warrant or extenuating facts, they undertook a balancing of the interests involved to determine the reasonableness *in general* of this type of intrusion.[14]

In arriving at a balance, the Court considered four factors. First, the history of the fourth amendment indicates that it was primarily concerned with searches for evidence of crime. *Boyd* was cited for the proposition that the self-incrimination clause of the fifth amendment is the usual measure of unreasonableness under the fourth. Although this historical alliance was not an unyielding limit on the fourth amendment, it did indicate that the rights invaded here were, at best, on the

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[11] *Id.* at 17.
[12] District of Columbia v. Little, 339 U.S. 1 (1950).
[13] 359 U.S. 360 (1959).
[14] *Id.* "Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests." *Id.* at 363.

"periphery" of the area protected. Second, the inspections contemplated by the statute in question were hedged about with safeguards. The inspector must have valid grounds to suspect that a nuisance exists; inspection must be made in the day time; the inspector cannot force entry if permission to inspect is denied. These requirements tended to minimize the intrusion involved. Third, the power to inspect in connection with enforcement of health codes had a long history in Maryland. Two hundred years of acceptance by a free people would make any practice seem reasonable. Fourth, the importance of efficient health code enforcement has grown apace with the mushrooming cities and their inevitable slums. To deprive local goverment of the power to inspect would cripple enforcement efforts.

These considerations tipped the balance in favor of the constitutionality of warrantless health inspections. The outcome was predetermined by the approach. The factors considered are, for the most part, those which make *the warrant procedure* a permissible exception, embodied in the fourth amendment, to the general prohibition against governmental intrusion, *i.e., e.g.,* society has a paramount interest in preventing and punishing crime and therefore searches necessary to the vindication of that interest are reasonable. But the Constitution not only allows this exception, it provides certain controls on its exercise. Those who would use it must demonstrate, by showing probable cause in support of a warrant, that *this particular search* will truly serve the interest which is the basis of the exception.

Case law has created several exceptions to the exception.[15] For example, a warrantless search is reasonable if made incident to a valid arrest,[16] in hot pursuit of a criminal,[17] under

[15] These exceptions prove troublesome to consistent analysis throughout the paper. They are undeniably searches which can be made without a warrant. No claim is made that they are absolutely reconcilable with the fourth amendment. However, it is felt that these exceptions to the warrant requirement are of a different magnitude than the broad power given in *Frank* to search without considering the need for a warrant. Each recognizes the right of privacy of the person searched but allows a warrantless intrusion either because the exigencies of the situation demand it or because in that situation the right of privacy no longer exists. No such claim can be made for the *Frank* holding.

[16] *E.g.,* Chimel v. California, 395 U.S. 752 (1969). This exception is perhaps the most troublesome of all. Without undertaking an elaborate analysis, it would seem that one's right to privacy is something of a nullity once he has been validly arrested. In *Chimel* the Court greatly narrowed the permissible scope of a search made incident to arrest. Officers can search the area within the reach of the person arrested to protect themselves and to prevent destruction of evidence. No further search is allowed. Thus, privacy is invaded only to the extent to which it is lost by virtue of the arrest.

[17] *E.g.,* Warden v. Hayden, 387 U.S. 294 (1967).

valid consent,[18] to prevent loss of evidence,[19] to protect the life of the officer,[20] etc. It might appear that *Frank* has merely added another to this list — administrative searches. But notice that the holding in *Frank* is on another level altogether. The exceptions to the warrant requirement listed above are just that — searches which, but for the special circumstances in that particular case, would have required a warrant. *Frank* created not another exception *to* the warrant requirement, but an exception *coequal with* the warrant requirement. To wit: An official invasion of personal privacy is unreasonable unless (1) it is supported by a warrant or justified by one of the exceptions to the warrant requirement or, (2) it is an administrative search. Stated differently, a criminal search, if reasonable in particular, is reasonable in general, and therefore reasonable as a whole. An administrative search is reasonable.

The Court apparently felt justified in this holding by the safeguards which the statute imposed upon the search. They closely resemble those which are supplied by a warrant. A warrant will issue only on a showing of probable cause; the inspector must have reasonable grounds to suspect that a nuisance exists. But here is the crucial difference, in a search requiring a warrant, an impartial magistrate must review the facts adduced in support of the proposed search to guard against the possibility that improper considerations will play a part in the decision; in an administrative search, the inspector on the street decides. The former is the only effective way to prevent misuse of power. Manifestly, the fourth amendment was to guard against, rather than to punish for, violations of personal privacy. Even accepting the Court's definition of reasonable, *Frank* withholds from potential victims of *unreasonable* administrative searches their only real protection.

Justice Douglas, writing for a group of four dissenters, proposed a more flexible solution. He favored requiring a warrant, but adjusting the standard of probable cause to fit the situation. The factors justifying an administrative investigation are clearly distinguishable from those which sup-

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[18] *E.g.*, Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 225 U.S. 313 (1921).

[19] *E.g.*, Schmerber v. California, 384 U.S. 757 (1966).

[20] *E.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

port a criminal search. Probable cause for the issuance of an administrative warrant should therefore be tailored to reflect these differences.

> Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of "probable cause" required by the Fourth Amendment can take into account the nature of the search that is sought.[21]

The Douglas approach provides a mutual accommodation which attempts to serve both the interest of the people and that of the state. A warrant is required, thus protecting personal privacy, but the special level of probable cause allows a warrant to be simply obtained given administrative regularity. Both majority and dissenting opinions balance interests, but the effort of the latter is to adjust so as to bring the balance to equilibrium. The majority weighs, judges one more weighty, and gives it vent over the other.

The philosophy of the *Frank* majority was followed the next year in *Eaton v. Price*.[22] A state court decision[23] was affirmed by an equally divided Court, Mr. Justice Stewart taking no part in the case. Mr. Justice Brennan wrote an extraordinary opinion[24] for the same group which had dissented in *Frank*. The opinion pointed out that the facts in *Eaton* were living proof of the dangers inherent in the *Frank* doctrine. A housing inspector, without a warrant or even proper credentials, had demanded access to Earl Taylor's house.[25] He failed to offer any justification for the inspection at the time and in court relying instead on his naked statutory authority to enter any dwelling he chose. The probable cause in *Frank* was glaringly absent.[26] For all that appeared in the record, the inspector could have been acting on purely personal considerations.

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[21] 359 U.S. 360, 383 (1959).

[22] 364 U.S. 263 (1960).

[23] Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958).

[24] In cases involving an evenly divided Court, no opinion or voting breakdown is usually given.

[25] The opinion quoted at length the conversations between Mr. Taylor and the inspector. Mr. Taylor's folksy defense of his right to preserve his home inviolate was enough to bring visions of the Fathers to judicial heads.

[26] Both facts sufficient to constitute probable cause and statutory language that would require it were missing in this case, so also were the other safeguards found in *Frank*.

Justice Brennan looked to *Little* as the proper treatment of administrative investigations and renewed the insistence on a warrant supported by an adjusted standard of probable cause. With this factual demonstration that the protections supposed to exist in *Frank* were wholly illusory, further adherence to that case could not be comprehended.

After *Frank* and *Eaton* the law of administrative searches lay dormant for almost a decade.[27] However, the period was far from unimportant.[28] Justices Whittaker and Frankfurter, the authors of the concurring and majority opinions in *Frank*, left the Court and were replaced by Justices White and Fortas.[29] This change in personnel, and in personality, was telling when next the Court considered the constitutionality of warrantless inspections. In 1967 the minority view in *Frank*

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[27] While it is true that the Supreme Court took no action in this area, the California Supreme Court handed down a case in 1967 which deserves consideration, if only in a footnote. Parrish v. Civil Service Comm'n, 66 Cal. App. 2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967), involved the infamous midnight welfare raid. Plaintiff, an employee of the welfare agency, was dismissed for insubordination after he refused to participate in a planned raid known as "Operation Weekend." The object was to swoop down on the homes of welfare recipients during sleeping hours to see if unauthorized males were occupying fatherly positions in supposedly fatherless families. The plaintiff's contention was that these raids were illegal, and that he could not be dismissed for refusing to take part. The California court agreed. They assumed that *Frank* had created an exception to the warrant requirement based on "a distinction between searches directed to the procurement of evidence of crime and searches aimed toward the advancement of the general welfare by means other than criminal prosecutions (footnote omitted)." *Id.* at 264, 57 Cal. Rptr. at 627, 425 P.2d at 227. But *Frank* was distinguished on four grounds which are especially interesting when compared to the holding in *Eaton* and that in Wyman v. James, 400 U.S. 309 (1971), discussed later in the text (see text p. 103 *infra*). First, the court found that these midnight raids were more nearly criminal searches than that in *Frank* since the latter could only result in punishment if the nuisance discovered by the search was not abated after issuance of a court order. Welfare raids could uncover evidence of fraud which without more forms the basis of a criminal prosecution. Second, the loss of benefits which was the consequence of discovered fraud is a forfeiture, criminal in nature, and therefore not within the *Frank* exception. Third, the statutory requirement of valid grounds to suspect a violation was not present here — houses were raided indiscriminately. Fourth, the procedural safeguards were also absent.

The third and fourth of these considerations had been equally true in *Eaton*. The first and second are discussed, with exactly the opposite conclusion, in *Wyman*. The California court, obviously no fan of the *Frank* doctrine, used all four in combination to escape its effect. In all probability, the severity of this case would have driven even the *Frank* majority past the limit of their doctrine.

[28] In addition to the personnel changes described in the text, this period saw the decision of Griswold v. Connecticut, 381 U.S. 479 (1965). That now famous case elevated the right of privacy to constitutional status not dependent on any invasion of purely fourth amendment rights. The continuing advancement of privacy in the judicial scale of values could not help but carry over into search and seizure law.

[29] To be true to chronology, Justice Frankfurter was replaced by Justice Goldberg in 1962 and Justice Goldberg, in turn, by Justice Fortas in 1965.

carried the day in the companion cases of *Camara v. Municipal Court*[30] and *See v. Seattle*.[31]

In *Camara*, appellant had repeatedly refused to permit a housing inspector, acting pursuant to statutory authority but without a warrant, to enter his home. He was charged with violating the inspection statute, and unsuccessfully sought a writ of prohibition in the state courts. The District Court of Appeals of California,[32] in conformity with *Frank*, "held that [the municipal statute authorizing inspection] does not violate fourth amendment rights because it 'is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as this section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions.' "[33] The Supreme Court reversed.

Mr. Justice White's opinion reflects a basic departure from the *Frank* approach.

> Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: 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.[34]

The outcome is predictable. Prime importance is to be placed on the warrant requirement rather than on some far-reaching judicial notion of the reasonableness of a whole class of searches.

The Court proceeded to reexamine the factors which had persuaded the *Frank* majority. The first is the most important. *Frank* had held that because of the close historical connection between the fourth and fifth amendments, the rights affected by administrative inspections were only "peripheral." Since the object was not to uncover evidence of crime, the interest of "self-protection" embodied in the two amendments was not involved, but only the "less intense" right to be secure from intrusion into personal privacy. Justice White agreed that inspections represent a less hostile intrusion; nevertheless, he

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[30] 387 U.S. 523 (1967).

[31] *Id.* at 541.

[32] Camara v. Municipal Court, 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (Dist. Ct. App. 1965).

[33] 387 U.S. 523, 528 (1967).

[34] *Id.* at 528-29.

could not subscribe to the view that only "peripheral" rights were affected. Every citizen has a real interest in limiting the occasions upon which official intrusion is permissible. "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."[35]

Compare the view of the fourth amendment taken here to those found in past cases. We have seen an evolution in judicial attitude. Throughout, the fourth has been acknowledged to have a dual purpose: (1) to protect fifth amendment rights against self-incrimination from being compromised through violation of fourth amendment rights, and (2) to protect the rights of the individual to be free of unwarranted official invasion of privacy. But the relative weight given each of these factors has varied. In *Boyd,* the first was considered the limit of the second. In *Frank,* the first, though not an absolute limit, was clearly ascendant. The second was only peripheral. *Camara,* echoing *Little,* gave independent status to the personal privacy aspect. For the first time, an invasion of either of the interests protected by the fourth amendment was held sufficient to condemn a warrantless search.

The Court then considered, in light of this view, the other justifications offered in support of the inspection statute. First, the inspections are "designed to make the least possible demand on the individual occupant." They are hedged with procedural safeguards (similar to those in *Frank*) and the inspector's decision to enter must be reasonable even though he need not obtain a warrant. Second, the warrant procedure could not function effectively here since the decision to inspect an area is based on legislative consideration of broad factors not properly reviewable by a magistrate. The most stringent requirement of an administrative warrant would be obtaining the judge's rubber stamp.

These are the arguments of the *Frank* majority. They are rejected.

> In our opinion these arguments unduly discount the purpose behind the warrant requirement contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by

[35] *Id.* at 530.

> a neutral magistrate without any reassessment of the basic agency decision to canvass an area. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. . . . We simply cannot say that the protections provided by the warrent procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.[36]

Finally, it was argued that the public interest in effective enforcement of health and safety laws demands that such inspections be permitted. The Court agreed. But, "[i]n assessing whether the public interest demands creation of a general exception to the fourth amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[37]

The Court adopted the warrant requirement urged by the *Frank* dissent. Probable cause could be supplied by a showing of adminstrative regularity. The *Frank* exception was gone and along with it went its asymmetrical view of the fourth amendment — in *Boyd* at least there had been theoretical purity. The fourth amendment applied only to searches made in aid of proceedings criminal in essence. *Frank* extended half of the fourth amendment to administrative investigations. They were required to be reasonable in general, which the Court said they were, but no advance showing had to be made that they were reasonable in particular. This position was totally inconsistent with the constitutional verbiage. Under the *Camara* view, the fourth amendment either applies or it does not. It will admit to internal adjustment, but not to fragmentation.[38] *Camara* cured the *Frank* imbalance by giving effect

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[36] *Id.* at 532-33.

[37] *Id.* at 533.

[38] Again it must be stressed that such doctrinaire statements are hazarded only because we deal with the most basic element of the fourth amendment — the reasonableness of a search at its inception. Many of the incidents of the fourth amendment can be judicially varied with no loss of purity. But the basic command is that unreasonable searches are not permitted, and reasonableness in a particular instance is a function of the warrant procedure, including its exceptions. There is no way consistent with this basic command to separate and forgive either of these requirements. The only logical exceptions, and these, it must be admitted, have no basis in fourth amendment language, are those which involve

to both halves of the fourth amendment in criminal *and* administrative searches.[39]

One wishes that the story ended here. It does not. We have yet to treat the case which is the occasion of this note, *Wyman v. James*.[40] New York law requires periodic caseworker

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a waiver of the rights which would otherwise be violated or special circumstances in which pause to obtain a warrant would frustrate the purpose of the search. All of these exceptions excuse the need to obtain a warrant in that particular case. They are alternative means of judging reasonableness in particular. They *do not* excuse the need that such a judgment be made in the future. No such claim can be made for the *Frank* holding.

The author is not unaware of Terry v. Ohio, 392 U.S. 1 (1968), which would seem to belie the all or nothing concept of the fourth amendment attributed to the Warren Court. It was there recognized that the problems encountered by policemen on the street are not always so kind as to mold themselves into some convenient constitutional form. Various street encounters call for varied police response. A "stop and frisk" is made for the purpose of preventing crime and is clearly not as intrusive as a full scale arrest and station house search. The two should not be subject to the same rules. Consequently the Court adjusted the probable cause standard downward to reflect the purpose and necessity of the stop and frisk. In regard to the warrant requirement, the Court pointed out that it is completely impractical in this type of situation where the officer is dealing with people he believes to be on the verge of committing a crime. It is very important to keep the exception to the warrant requirement separate from the adjusted probable cause. The former is squarely in line with the other exceptions we have seen. It depends upon an emergency situation which does not allow both the warrant and the search. The latter, to borrow Justice Douglas' words in *Frank*, is an example of probable cause taking "into account the nature of the search that is sought."

Terry represents the intersection of the line of cases creating exceptions to the warrant requirement and the *Camara* principle of adjusted probable cause. Both *Camara* and *Terry* are manifestations of the Warren Court's rejection of the all-or-nothing conception of searches, *i.e.*, an intrusion is either a search requiring traditional probable cause or a nothing requiring nothing, and their adherence to the all-or-nothing application of the fourth amendment. The effort is always to accommodate the interest of the state in law enforcement, civil and criminal, and the interest of the citizenry in being free of official interference.

[39] See v. Seattle, 387 U.S. 541 (1967), billed earlier as *Camara's* companion, is not discussed here. It applied principles much like those in *Camara* to the inspection of commercial facilities. From *See* onward a line of cases developed regarding such inspections, but they are not strictly relevant to this discussion. The rights of privacy involved in commercial facilities are obviously not commensurate with those enjoyed in the home. For an analysis of these cases see Sonnenreich and Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment*, 24 Sw. L. J. 418 (1970).

[40] Before we do, it will be helpful to look briefly at one other case decided by the *Camara* Court. Although it does not deal with administrative inspections, it is indicative of the Court's attitude toward governmental intrusions. Katz v. United States, 389 U.S. 347 (1967), overruled earlier cases which had found some physical invasion of a "constitutionally protected area" necessary to constitute a search. In *Katz*, any situation in which the defendant had a "reasonable expectation of privacy" was sufficient to cloak him with the protection of the fourth amendment. The effect was to divorce the amendment from its former dependence on property rights and notions of trespass. The Constitution protects people, not places. Further, there need not be a physical invasion at all. Scientific devices which project the senses of agents into protected situations are perfectly capable of effecting a search. If electronic eavesdropping in places other than the home can be a search, it is difficult to

visits to the home of each recipient of state aid to families with dependent children (AFDC). Plaintiff, Barbara James, by virtue of her son Maurice, had been receiving AFDC benefits for 2 years prior to the dispute from which this case arose. At the time her eligibility was first established, a caseworker visited her home without objection.

On May 8, 1969, Mrs. James was notified that another visit would be made on May 14. She telephoned the worker that she would be willing to supply any information reasonable and relevant to her continued receipt of assistance but that any such meeting could not take place at her home. The worker informed her that home visits were required by law and refusal to allow the visit would mean termination of assistance. Mrs. James was adamant.

The agency then notified plaintiff of its intent to discontinue assistance. Mrs. James requested and received a hearing at which she had benefit of counsel. The review officer upheld the decision to terminate. Plaintiff thereupon instituted a civil rights suit under 42 U.S.C. § 1983 on behalf of herself, her son, and all other persons similarly situated. She sought both declaratory and injunctive relief.

Two opinions need to be considered: *James v. Goldberg*[41] (hereinafter *James*) in the district court, and *Wyman v. James*[42] (hereinafter *Wyman*) on appeal to the Supreme Court.

The *James* court found for the plaintiff. Their opinion was a routine and very much to be expected application of *Camara*. The court saw three issues, which for present purposes can be condensed to two: (1) are warrantless home visits "unreasonable searches" so as to fall under the fourth amendment, and (2) "assuming that [(1) is] answered in the affirmative, may the State condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the fourth amendment?"[43]

For convenience, we can dispose of (2) first. It is taken as settled law, for the moment at least, that the state cannot require the waiver of a constitutional right as a condition to

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imagine a situation in which the actual physical entry into a home would not be so classified.

[41] 303 F. Supp. 935 (S.D.N.Y. 1969), *prob. juris. noted*, 397 U.S. 904 (1970).

[42] 400 U.S. 309 (1971).

[43] 303 F. Supp. 935, 940 (S.D.N.Y. 1969).

the receipt of any benefit — be it right or privilege.[44] Therefore, the answer to (1) will automatically decide (2). If warrantless home visits are unreasonable searches, then the receipt of AFDC benefits cannot be conditioned upon waiver of the rights violated. If they are not, then there is no constitutional right to be waived.

The first issue may be further distilled. It has two elements which were not separated in the *James* opinion. First, are home visits "searches," and second, if so, are such searches when made without a warrant "unreasonable."[45] These "subissues" offer the Court the opportunity to find for the defense in either of two ways: (1) to find, as under *Boyd,* that the fourth amendment does not apply at all to this type of intrusion, or (2) to apply only half of the amendment to home visits, *i.e.,* to find, as in *Frank,* that they are reasonable and then not impose the warrant requirement.

As to the applicability of the fourth amendment, the state argued that the home visit could not be called a "search." Its purpose is to verify information as to eligibility and to assure that all needed services are being provided, not to search for evidence of crime or fraud. Besides, continued the argument, there may have been fraud in the procurement of benefits which could not otherwise be uncovered. The contradiction in the last two statements was not lost on the court.

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[44] No thorough attempt is made to document this proposition, not for lack of belief in its accuracy, but because it can have no real effect on the central issue. Before it can come into play, there must be a determination that constitutional rights are involved. It is upon this determination that the discussion is focused. For discussions of the unconstitutional condition issue see French, *Comments: Unconstitutional Conditions: An Analysis,* 50 GEO. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 COLUM. L. REV. 321 (1935); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); O'Neill, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CALIF. L. REV. 443 (1966).

[45] Since the two "subissues" are not separately considered in the opinion, efforts to choose judicial language sufficient to dispose cleanly of one or the other are somewhat strained. Many defense arguments which the court refers to in considering whether home visits are searches look very much like those offered in *Frank* and *Camara* to support the reasonableness of an admitted search. Others deal more explicitly with the "searchness" of the intrusion. The combination of these two types of argument under a single question may reflect trial tactics. After *Camara* it would seem futile to argue, in the lower court at least, that an intrusion, though covered by the fourth amendment, was reasonable without a warrant. The more promising attack would be to attempt to qualitatively differentiate welfare home visits from administrative inspections and all other intrusions heretofore labeled "search." For if the warrant requirement is the inevitable concomitant of fourth amendment applicability, the only way to avoid the former is to escape the latter. Whatever the reason for unified treatment, there are present two distinct types of argument, and they are treated separately in the text. It is felt that what is lost in precision is compensated for by increased convenience in comparison to past cases.

> The Fourth Amendment . . . governs all intrusions by agents of the public upon personal privacy and security. Terry v. Ohio, 392 U.S. 1, 18, 88 S.Ct. 1868, 20 L.Ed. 2d 889, n.15 (1968). Any unauthorized physical penetration into the premises occupied by plaintiff is a search. In view of the fact that recent cases have expanded the scope of the Amendment so as to eliminate the necessity for a finding of an actual physical trespass upon a constitutionally protected area, Berger v. New York, 388 U.S. 41, 50-53, 87 S.Ct. 1873, L.Ed. 2d 1040 (1967) and cases cited therein, defendant's restrictive argument [that home visits are not searches] would appear frivolous.[46]
>
> Like most of the Bill of Rights, the Fourth Amendment was not designed to be a shelter for criminals, but a basic protection for everyone. . . . "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers." Abel v. United States, [362 U.S. 217, 255 (1960)].[47]

Similar treatment was afforded arguments designed to show that these visits, even without a warrant, were reasonable and therefore not condemned by the fourth amendment. In addition to the "purpose" arguments given above, the attorney general pointed to the procedural safeguards which surrounded the search[48] and the public importance of home visits for effective administration of the welfare laws. The court was unimpressed.

"Except in certain carefully defined classes of cases (footnote omitted), a search of a private dwelling without a warrant or proper consent is presumptively 'unreasonable.' "[49] "[G]overnmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity."[50] *Camara* was cited for the proposition that the community interest in "inspection programs [is] not superior to the important interests safeguarded by the fourth amendment's protection against official intrusion."[51]

After discussing the question of unconstitutional conditions the court turned more explicitly to the warrant requirement.

> The public interest may demand creation of a general exception to the Fourth Amendment's warrant requirement

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[46] 303 F. Supp. 935, 940 (S.D.N.Y. 1969).

[47] *Id.* at 941. The Court quoted passages from *Little* to the same effect.

[48] 303 F. Supp. 935 (S.D.N.Y. 1969). "[C]aseworkers are instructed not to enter the home of an applicant for or recipient of benefits 'without permission by force, or under false pretenses, and not to make a search of the home by looking into closets and drawers.' " *Id.* at 940 (footnotes omitted).

[49] *Id.* at 940.

[50] *Id.* at 942.

[51] *Id.* at 941.

> only when it can be demonstrated "that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit." Parrish v. Civil Service Comm'n of the County of Alameda [66 Cal. 2d 260, 425 P.2d 223 (1967)]. . . . 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 that course imperative.[52]

Several alternative means of obtaining the information supposedly sought in home visits were listed, and if these failed, a warrant based on a *Camara*-like standard of probable cause was authorized.

Notice what the court is saying. As long as alternatives are available, no visit can be made (a warrant should not issue). Such a visit would be unreasonable because unnecessary. Only when the alternatives have been exhausted is any intrusion justified. This puts the welfare agency to the test. If the purpose is really to determine eligibility, then a home visit will rarely be indispensable. If, on the other hand, the motive is discovery of fraud, the agency will not be able to hide behind an administrative warrant. The opinion noted that since caseworkers are under a statutory duty to report suspected fraud, the latter element is not completely absent from any home visit.

In all, *James* reached a result which, given *Camara*, was entirely predictable. On appeal, the Supreme Court reversed. But this was not the same Supreme Court which had heard *Camara*. In 1967 Mr. Justice Clark retired and was replaced by Mr. Justice Marshall, a man of more liberal leanings. However, in 1969 Justice Fortas and Chief Justice Warren retired, being replaced by Chief Justice Burger and, after protracted wranglings, Justice Blackmun. The personality of the Court had changed by the time the *Wyman* decision was rendered.

The issues in *Wyman* are, of course, the same as in *James*. Are home visits searches; if so, are they unreasonable; and, if so, may AFDC benefits be terminated upon refusal to allow a visit? *James* answered the first two in the affirmative and the third in the negative. In alternative holdings, *Wyman* answered both the first and second in the negative and therefore did not reach the third.

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[52] *Id.* at 943.

The *Wyman* opinion begins with a strong statement of the judicial tradition of jealous protection for fourth amendment rights.[53] We see again the *Camara* language that, except in carefully defined classes of cases, any search without a warrant or consent is unreasonable. Further, one's fourth amendment rights do not depend upon suspicion of criminal behavior.

Up to this point, all is as it was in *James*. Indeed, these propositions alone would have supported affirmance. But the opinion goes on to say that the traditional protective attitude is not a factor here "for the seemingly obvious and simple reason" that no search as contemplated by the fourth amendment is involved.[54] Lest the import of this holding slip past, let it be repeated: A caseworker home visit — an "unauthorized physical penetration into"[55] the AFDC recipient's home by an agent of the government — is not a search, and therefore not covered by the fourth amendment. After *Camara* and *Katz* (see note 40 *supra*) it is surprising to learn that any intrusion into personal privacy, let alone the privacy of the home, is not a search. Perhaps the biggest surprise is that what few reasons the Court gives in support of its conclusion smack more of *Boyd* even than of *Frank*. For although a *Frank*-type determination of the reasonableness of home visits is later given, it is clearly an alternative ground of decision. The primary holding centers, as in *Boyd*, on the criminal law concept of searches. "It is . . . true that the caseworker's posture 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."[56]

It is not difficult to quarrel with the Court's conception of home visits. If caseworkers have a statutory duty to report evidence of fraud in obtaining benefits, and state laws make such fraud a crime, then a home visit is more than "perhaps, in a sense" investigative. At the same time, it is easy to see what the Court is driving at. There is a distinction, not in a legal theory but in common sense, between a search or inspec-

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[53] Even making a sincere effort to ignore personal predilection, it must be said that the *Wyman* opinion defies rational analysis. The best that can be had is a presentation of the opinion as it appears, coupled with efforts to assess the effect of each section.

[54] This is the same "seemingly obvious and simple" argument that was characterized as "frivolous" in *James*.

[55] The quoted phrase is from *James*, and was there used to describe that which is always a search.

[56] 400 U.S. at 309, 317 (1971).

tion of a house and the friendly visit of a concerned family counselor. Based on this distinction, the fourth amendment was held inapplicable to welfare visits. But the friendly visit of a counselor is not what the *Wyman* facts portray. Constitutional rights come into play when the visit and the counseling are unwanted. The picture then is conflict, not friendship.

Whatever the merit of the Court's reasoning, the fact remains that the coverage of the fourth amendment has been limited. It applies only to intrusions which are searches. The "searchness" of an intrusion depends upon the posture of the intruder. If he is looking for statutory violations, civil or criminal, his posture is investigative and he is conducting a search. If, on the other hand, his sole, or even primary, objective is to counsel, his posture is rehabilitative and no search is involved. The scale by which posture is measured is a search in the traditional criminal law context. It will be recalled that in *Camara* the purpose of the agent, for which posture is surely just another word, was deemed irrelevant.

Almost as startling as the holding is the aplomb with which it is given. The entire matter takes but a paragraph. Not a single authority is cited. It rests solely on a policy decision that the fourth amendment should not apply because these visits are not really searches.

The Court touches two other factors in its primary holding which are also used later to distinguish *Camara* and *See*. These two cases, it is said, involved "true searches," presumably because of the investigative posture of the inspector. Further, they arose out of criminal prosecutions for refusal to permit inspections. Mrs. James faced no such threat. When she denied permission to visit, there was no entry of her home and therefore no search. The sole consequence was termination of AFDC benefits. If Mrs. James were being prosecuted criminally for her action, these cases "would have conceivable pertinency."

To be frank, the logic and relevance of this argument escapes the author. Once *Camara* has been distinguished on the basis of posture, of what moment are the other facts given? Just as in *Wyman*, when permission to inspect was denied in *Camara*, no inspection was made. The only concrete difference is the penalty attached. If the Court is saying that an intrusion is a search because of the consequences of refusing to allow it, they are announcing a novel doctrine indeed. Even assuming that they are, the relative gravity of the loss of

one's sole source of income as compared to a municipal fine would not seem to support such a doctrine in this case. What they are probably saying is that although home visits are not searches and do not violate fourth amendment rights, refusal to allow a visit cannot be made a crime. If no constitutional rights are involved, why not? There is no satisfactory answer. The criminal penalty/loss of benefits distinction is a convenient way of distinguishing past cases and at the same time giving an idea of the limits of the "true search" doctrine. The presence of these limits betrays a lack of confidence in the flat assertion that the fourth amendment is not a part of the conflict between the individual dual and the state in welfare home visits.

The most obvious manifestation of insecurity about the primary holding is the fact that the Court went on to supply an independently sufficient alternative ground of decision. It begins with the equivocal statement that even if it is assumed "that a caseworker's home visit . . . somehow . . . 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."[57] Then follows a list of some eleven factors which demonstrate the not unreasonable nature of home visits. Suffice it to say that the list contains all of the justifications offered in *Frank* and *Camara* — public need, procedural safeguards, not for the purpose of uncovering evidence of crime, inappropriateness of the warrant procedure — plus a few more unique to the welfare context — need to protect the child, need to assure proper use of tax funds, must visit to properly counsel, etc. The sum of these factors is reasonableness in the mathematics of the Court, and therefore no warrant is required. Since the assumed search is not unreasonable, no constitutional rights are put on the block as a condition to receipt of benefits, and so AFDC benefits can be terminated if permission to visit is refused. The midnight raid type of welfare operation is specifically exempted, that being "another question for another day."

Rather than quibble with the truth of the "reasonableness factors," the more enlightening effort is to assess what the Court has done by considering them at all, regardless of their

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[57] *Id.* at 318.

merit. Similar arguments in *Camara* were attended by little success. The question was not whether an intrusion could be made, but whether it could be made without a warrant. These reasonableness arguments speak only to what the question was not, *i.e.*, because of these factors a home visit is reasonable in general, but nothing is known about its reasonableness in particular. By allowing satisfaction of the first half of the fourth amendment to suffice for the whole, the Court returned to the *Frank* position on a more narrow plane. Not administrative searches, but only welfare home visits are excepted from the warrant requirement.

Although this second holding is given in the alternative, it is certainly sufficient on its own to dictate the *Wyman* result.[58] For which proposition does *Wyman* stand? Are caseworker visits not searches, or are they reasonable searches? The former is clearly the primary holding, but it is inconceivable, especially in view of the distinction made between criminal penalties and loss of AFDC benefits, that home visits can never involve fourth amendment rights. Perhaps future cases will determine which of the *Wyman* arguments is the "true" view of home visits. From the standpoint of the welfare recipient, the legal theory upon which their benefits are terminated is of little importance.

II. The Fourth Amendment

Two constructs of the fourth amendment can be assembled from the cases examined. Although we have seen more than two distinct results, each falls under one of two conceptions of the amendment's prohibition against unreasonable search and seizure. The dividing line is the view taken of the warrant requirement. For convenience, the reference will be to the *Camara* and *Wyman* views.

In *Camara*, the fourth amendment appears as one of the major tenets of the individuals relationship with the state. As was said in *Little*, the amendment is not a limit imposed on some preexisting power of the state to intrude, but rather an expression of the right, inherent in the people, to be absolutely free from governmental intrusion. A necessary exception to this right is made in the warrant procedure. This is

[58] Support for the independency of the alternative holding is found in the vote of Justice White. He concurred in the decision and with the opinion excluding that portion which contained the primary holding. This is a curious vote for the author of the *Camara* opinion when it is remembered what the question there was not.

a grant of power to intrude pursuant to an established procedure, and, therefore, any intrusion not so made is ultra vires the government. It is absolutely powerless to act outside the warrant procedure.[59] Such an interpretation transcends any consideration of purpose, nature, extent, etc. The fourth amendment embodies a personal right which inheres in every individual and governs all of his contacts with the state. If the state has a reasonable need to intrude, then it is provided for in the warrant exception.

The *Wyman* conception of fourth amendment rights is more difficult to assess. All the traditional statements of reverence are intoned like a liturgy at the first of the opinion, yet the result is to the contrary no matter which holding is chosen. The fundamental difference in the *Camara* and *Wyman* views is that the latter does not regard the warrant procedure as a grant of the only permissible power to intrude. In the primary holding, the warrant requirement is not a factor at all in certain types of intrusions. The boundary of coverage is for the moment unimportant. What is important is that a boundary can be drawn. The alternative holding sees the warrant requirement as a fungible means of control on government power, which may, in appropriate cases, be replaced by an advance judicial determination of reasonableness. The Court is free to decide which intrusions are subject to which control. Again, although the two holdings take different routes to the same result, both reject the grant of power view of the warrant requirement.

It should be emphasized that these constructs are merely judicial attitudes toward the fourth amendment. They are not laws between which a judge must choose and then be bound. Rather, they are descriptions of what a judge with a given attitude feels himself free to consider in reaching a decision. The question becomes which attitude is it more desirable that a majority of the Court adopt.

The *Camara* construct is more restrictive, and more protective of personal freedom. In any given case, the rule would be that all intrusions are searches, and all searches outside the warrant procedure are unreasonable.[59] It is still possible that some opposing interest could overbalance fourth amend-

[59] The established exceptions to the warrant requirement are once again an obstacle. All that can be said is that they must be considered a part of the warrant procedure. Any reference to that procedure is intended to countenance the exceptions.

ment rights, but such an interest would have to be absolutely vital to the performance of an indispensable state function. On the other hand, a judge with the *Wyman* attitude feels free to consider the quality of the intrusion to determine whether it is a search or, alternatively, whether it is a reasonable search.

The effect that this difference in approach can have is tremendous. When a judge considers the quality of an intrusion, his decision is bound to be colored by personal preconceptions about the situation in which it occurred. Evidence of such preconceptions at work in *Wyman* is not difficult to find. In the list of factors given to show the reasonableness of home visits, the Court draws an analogy between the welfare program and the charity of a private philanthropist. The public should have the same right as a private benefactor to see how charitable funds are put to work. Recent literature has thoroughly discredited the charity notion of welfare.[60] Social conditions operating in American society tend to relegate whole classes of citizens to a status of dependency. Those who benefit from these same social forces should compensate those oppressed. No loss of constitutional dignity is involved — it is a purely economic matter.

This is not meant to be a debate on the subject of welfare. Many may accept Justice Blackmun's view. But this is an example of the kind of consideration that inevitably creeps in when the *Wyman* conception of the fourth amendment is applied to a set of facts. An even more glaring example appears in one of the Court's footnotes.[61] The Court says that its examination of Mrs. James welfare file discloses that hers is a "sad and unhappy" picture. She has never really satisfied the eligibility requirements; has been uncooperative; has a bad attitude; has made repeated demands; and has occasionally been belligerent. The note broadly implies that she beats her son. All this may be true. But should this report card information affect the constitutional rights of not only Mrs. James, but all other welfare recipients? Suppose, for instance, that the situation were reversed so that the caseworker and not the recipient was of questionable character. After *Wyman*, the receipient has no protection against abuse of welfare agency power so long as that power is exercised through home visits.

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[60] *E.g.*, Reich, *The New Property*, 73 YALE L.J. 733 (1964).
[61] 400 U.S. 309, 322 n. 9 (1971).

In many areas of the law, maximum judicial flexibility to consider various kinds of information is essential if legal norms are to continue to reflect changing social needs and goals. However, when fundamental rights are involved, especially when those rights are a primary source of individual protection from governmental encroachment on personality and dignity, flexibility may be a risk not worth taking. Prior to *Wyman*, the fourth amendment had offered blanket protection. Even if the contraction of protection in *Wyman* is not personally objectionable, the potential for future contraction must be frightening when considerations like those given above can have a significant effect on decisions rendered under the *Wyman* attitude.[62]

III. THE COURT

The furor over the Nixon "strict constructionist" appointments and the widespread curiosity about what their effect will be make a prediction of future Court performance irresistible. We move now into the realm of conjecture and generalization. No specific prediction can be made even in fourth amendment cases. All that can be gauged is the Court's apparent frame of mind.

Wyman indicates that individual rights will not carry the same weight as they did before the recent personnel changes. This is not an hysterical prediction of the total withdrawal of constitutional protections. It is only to say that at the margin, at the very limits of constitutional theory, the possibility that individual liberty may be infringed will not prove the decisive factor. If, for instance, a case involved a conflict between an important state interest and some constitutionally protected individual liberty, and that liberty was only slightly or even speculatively impinged, the Court would be less likely than in the past to attach an almost absolute value to the liberty at the expense of the state interest. Obviously, no court would allow a crucial state interest to be totally frustrated. But this new approach would be more reluctant to consign the state to an alternative means of vindicating its interest which was considerably more burdensome.

All this is very general, perhaps a more concrete example of the same general frame of mind may serve to better illustrate this feeling about the Court. Lawyers sometimes argue

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[62] The "red scare" of the fifties comes to mind.

in terms of a "parade of horrors" which will result from a decision unfavorable to their client. Imagine, if you will, such arguments as they might be made by each attorney in *Wyman*. Counsel for Mrs. James would point to the destructive effects on welfare recipients nationwide of a decision not affording full fourth amendment protection. Second class citizenship in the eyes of the law would, when combined with the handicap of economic deprivation, strip those on welfare of the last traces of human dignity. One who must open his door to the prying eyes of the government in order to retain his only source of funds can make little claim to the primacy implicit in the notion that a man's home is his castle. If the cost of maintaining constitutional dignity is economic death, then the lofty promise of America is but a mocking rumble in the empty stomachs of her less fortunate citizens. A man of even moderate means can protect himself with wealth and community standing. A poor man has only the Constitution. If the courts fail to make that shield adequate, then physical violence is his only available alternative.

Further, the power to use necessarily carries with it the power to abuse. Welfare recipients would be without protection against agency visiting practices in the future which are clearly unreasonable no matter how the Court classifies home visits in general. To allow such a power without providing an advance restraint is to invite its misuse, whether through misanthropy or negligence.

On the other side, counsel for the agency would cite the almost unlimited potential for welfare fraud. The unscrupulous recipient could milk the government of thousands of dollars by fabricating eligibility statistics. Children can be passed from mother to mother, raising the entitlement of all and yet receiving the alloted benefit from none. Separations which never actually occurred will be used to qualify the wife for benefits while her husband is earning a full salary or regularly declining employment for the more luxurious "welfare cadillac" life. The hard earned dollars of the industrious American taxpayer will go down the drain of sloth and deceit.

Further, a major goal of the welfare program is to provide counseling and guidance to the end that families now in poverty will be able to better themselves and move off the welfare roles. Home visits are essential to the attainment of this goal. Those who resist efforts to provide the needed services demonstrate that their only real interest is continued re-

ceipt of funds without effort on their part. It is totally unfair to allow some members of society to demand tax money as of right and all the while thumb their collective noses at the benevolent government agents who seek only to assist them.

These rather lengthy parades will strike different readers in different ways. Both have merit, and the interests contained in each deserve protection. Almost undoubtedly, they would be protected to some extent by either the Burger or the Warren Court. But the difference in terms of the frame of mind lies in which parade would most horrify which Court. It is the author's opinion that the possibility of widespread and defiant welfare fraud would be more offensive to the sensibilities of the Burger Court, while the human consequences of coerced home visits would have been more obnoxious to the Warren Court.

The old adage that hard cases make bad law has special relevance here. There is no solution to the *Wyman* case which would make "good law." The choice must be which solution, according to a particular value structure, would make better law, *i.e.*, prevent the less desirable parade of horrors. Perfect accommodation of diverse interests is always impossible. The question in any hard case is the direction in which it is preferable to err. The Warren Court apparently felt that it was better, if err they must, to be overprotective of individual liberty at the risk of slighting governmental interests. If *Wyman* is a valid indication, the Burger Court is more willing to take the risk of infringing upon personal rights in order to guard against shortchanging the government. A judgment as to the merit of these two positions devolves to the personal question of whether the individual or the state can better afford to be slighted.

IV. AFTERWARD

It seems fitting to close with a piece of judicial language which expresses the author's opinion, and most likely that of the Warren Court, as to the attitude most appropriate for the consideration of cases involving fundamental human liberties. The words are taken from a section of *Boyd* in which the Court was discussing the fact that the type of search in question was at the very limit of fourth amendment protection.

> 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 pro-

> cedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[63]

[63] 116 U.S. 616, 635 (1886).