Refusal to Comply:

Administrative Inspections and the Fourth and Fifth Amendments

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The Fourth Amendment

- Fourth Amendment:
  - 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.

The Fifth Amendment

- Fifth Amendment:
  - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Incorporation by The Fourteenth Amendment's Due Process Clause

- *Mapp v. Ohio*, 367 U.S. 643 (1961).
  - The Fourth Amendment's "right of privacy" is enforceable against the States through the Due Process Clause of the Fourteenth Amendment.
  - All citizens are protected against unreasonable searches and seizures so that the Fourth Amendment does not become only "a form of words."
- Fifth Amendment is partially incorporated to the States.
  - Right against self-incrimination incorporated in Malloy v. Hogan, 278 U.S. 1 (1964).
  - Right to indictment by a grand jury (not incorporated) *Hurtado v. California*, 110 U.S. 516 (1884); Double jeopardy (incorporated) *Benton v. Maryland*, 395 U.S. 784 (1969); Protection against taking property without due compensation (incorporated) *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

Nelson v. State, 96 Nev. 363 (1980).

- "[W]e emphasize the cardinal principal of search and seizure law: searches conducted outside the judicial process, without prior approval by a magistrate of judge, are *per se* unreasonable under both the Nevada and United States constitutions subject only to 'specifically established and well-delineated exceptions.'" at 365 (quoting *State v. Hardin*, 90 Nev. 10 (1974).
- "A citizen's assertion of her constitutional rights may not be deemed tantamount to a reasonable belief that she had committed a felony."
- *See also Katz v. United States,* 389 U.S. 347 (1967); *Phillips v. State,* 106 Nev. 763 (1990).

Another Consideration

- 42 U.S.C. § 1983
  - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, . . .

What does this mean for State Agencies and Local Governments?

- Generally, getting an administrative warrant avoids any potential problem.
- But this is not always practical.
- So now what?

Camara v. Municipal Ct., 387 U.S. 523 (1967)

- Facts:
  - November 6, 1963: Routine annual inspection of apartment building by an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health. Inspector did not have a warrant.
  - Camara was using the ground floor as a personal residence.
  - Inspector said occupancy permit did not allow that and demanded he be allowed to inspect the premises.
  - Camara refused.
  - Inspector returned again on November 8, 1963 without a warrant.
  - Citation mailed ordering Camara to appear at the DA's Office.
  - Camara failed to appear and two inspectors returned to his apartment on November 22, 1963.
  - Told Camara Section 503 of the Housing Code requires him to permit the inspection.
  - Camara again refused the inspection and criminal complaint was field against him.

Camara Holding and Analysis (1)

- "[E]xcept 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."
- Overruled *Frank v. State of Maryland*, 359 U.S. 360 (1959) (court says facts are different in *Frank*, but given that *Frank* is being used to sanction warrantless inspections, it is overruled.)
- "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."
- "[W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'"

Camara Holding and Analysis (2)

- "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. Finally as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence."
- "The question is not . . . whether these inspections may be made, but whether they may be made without a warrant."
- Instead, the question is does the burden of obtaining a warrant frustrate the government's purpose behind the search?
  - In this case, the Court says "no."

Camara Holding and Analysis (3)

- "Administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual."
- Inspector does not need probable cause that there is a violation of minimum standards prescribed by the code being enforced.
  - Instead, need to show need for periodic inspection of the location.
    - Example: Faulty wiring may not be visible on the outside of the building.

Camara Holding and Analysis (4)

- Time period between inspections may provide appropriate support for probable cause to make inspection.
- Also: Nature of building (multi-family apartment house) or condition of the entire area may support probable cause.
- Emergency situations still okay without a warrant.
- "[A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry."
- "[T]he requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect."

Camara: It's Still About "Reasonableness"

- "Reasonableness is still the ultimate standard."
  - "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest."
  - "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."
- "[G]ives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions or privacy."
  - *See Eaton v. Price*, 364 U.S. 263, 273-74 (1960).

Camara Factors

- Persuasive factors that support reasonableness of area code-enforcement inspections:
  - Long history of judicial and public acceptance.
  - Public interest demands that all dangerous conditions be prevented or abated.
  - Not personal in nature nor aimed at discovery of evidence of a crime, inspections involve a relatively limited invasion of citizen's privacy.
- "'Probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."

Rule in *Camara*

- Camara had a constitutional right to insist that the inspectors obtain a warrant to search and he may not be constitutionally convicted for refusing to consent to the inspection.

Similar Case in Nevada

- *Owens v. City of North Las Vegas*, 85 Nev. 105 (1969).
  - Facts:
    - Owens refused to allow city building inspector to enter his home to check for violations of the city building code.
    - In October 1966, the City sent a registered letter to Owens indicating that an inspector from the City would come to inspect for structural deficiencies in violation of the city building code.
    - Inspector arrived on October 25, 1966 and Owens' wife refused permission to inspect the home.
    - Inspection attempted again on June 20, 1967, and not permitted by homeowner.
    - On June 30, 1967, inspector noted violations of the building code on the exterior of the home and report them to the city attorney.
    - City attorney told inspector to get a search warrant and Justice of the Peace gave inspector the search warrant.

Owens Facts Continued

- Owens called chief of police and told him that he would not honor the warrant.
- Search warrant was served and executed.
- Inspection done and 27 violations of city building code found.
- Owen charged with assault and battery and obstructing a police officer in an attempt to serve the search warrant.
- Owens found guilty of assault and battery on a peace officer by a jury and fined $100.
- Owens filed a petition for a writ of habeas corpus, challenging the legality of his conviction.

Owens Holding and Analysis (1)

- "It is now the law of the land that administrative searches and inspections, such as in this case, are significant intrusions upon the interests protected by the Fourth Amendment and that such inspections and searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to every individual."
- Probable cause standard in criminal investigations differs than the standard required in administrative inspection programs. (*See Camara*).
- "[P]rimary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures." (quoting *Camara*).

Owens Holding and Analysis (2)

- "Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are different from those that would justify an inference when a criminal investigation has been undertaken."
- Controlling standard is reasonableness.
- In emergency situations, "the law has always permitted" prompt inspections, even without a warrant.
- Search of Owens' home was reasonable and his jury conviction lawful.

Michigan v. Clifford, 464 U.S. 287 (1984)

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- Facts:
  - Clifford family's private residence was damaged by an early morning fire while they were out of town.
  - Fire extinguished at 7:04 a.m. and all fire officials and police left.
  - Five hours later, a team of arson investigators arrived at the residence to investigate the cause of the fire.
  - Found work crew securing the house sent by insurance agent.
  - Investigators entered the residence and conducted an extensive search without obtaining consent or an administrative warrant.
  - Found two Coleman fuel cans and a crock pot attached to an electrical timer in the basement.
  - Investigators determined fire had been set deliberately.
  - Marked and seized these items as evidence.
  - Found additional evidence of arson in the upper portions of the house.
  - Cliffords charged with arson and moved to suppress all evidence seized in the warrantless search.

Michigan Holdings

- There is a reasonable expectation of privacy in fire-damaged residence because personal belongings remained in the home and the owners attempted to secure house against intrusion via work crew.
- Because investigators left and came back to the home, search directed to cause and origin of a fire is subject to the warrant requirement.
  - Administrative warrant is required if primary object is to determine cause and origin of fire.
  - Criminal warrant is required when primary object of search is to gather evidence of criminal activity.
- Once fire investigators had determined cause of fire, additional search of home was only for the purpose of finding evidence of arson and a criminal warrant was required.

Michigan Summary

- A burning building creates an exigency that justifies a warrantless entry by fire officials to fight the blaze.
  - Once in the building, officials need no warrant to "'remain for a reasonable time to investigate the cause of the blaze after it has been extinguished.'" (quoting *Michigan v. Tyler*, 436 U.S. 499, 510 (1978)).
    - Reasoning: "The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises" and "determining the cause and origin of a fire serves a compelling public interest."
  - Where reasonable expectations of privacy remain in the fire-damaged property (shown by efforts to secure the home), additional investigations begun after the fire is extinguished and fire and police officials have left the scene, generally a warrant would be required or the identification of a new exigency.
- In this case, basement search required administrative warrant, and search of upper portions of house required criminal warrant.
  - <u>Type of warrant required depends on purpose of search.</u>
    - In other words, what is the primary objective of the search?

Palmieri v. Clark County, 367 P.3d 442 (2015)

- Facts:
  - County animal control officer obtained search for Palmieri's home based on information provided by an informant to who gave a false identity.
  - Criminal charges were brought against Palmieri after the search for violations of county code for provisions for health and welfare of animals.
  - Palmieri filed § 1983 action, alleging violations of her Fourth and Fourteenth Amendment rights.

Palmieri Holding and Analysis

- "Probable cause is the standard by which a search's reasonableness is tested, and the type of probable cause necessary to support a search warrant differs depending on the objective of the search."
- "[C]riminal search warrants require a stronger showing of probable cause, whereas administrative search warrants generally are supportable by a lesser showing of probable cause."
  - *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978).
- This case turns on whether the search warrant is an administrative or a criminal search warrant.

Palmieri: Defines Administrative Search Warrant

- "Generally an administrative warrant is a warrant issued by a judge authorizing an administrative agency to conduct a search 'to determine whether physical conditions exists which do not comply with minimum standards prescribed in local regulatory ordinances.'"
  - Quoting *Camara*, 387 U.S. at 530.
- Black's Law Dictionary (10th ed. 2014):
  - "A warrant issued by a judge at the request of an administrative agency that seeks to conduct an administrative search.
- Blacks' Law Dictionary (10th ed. 2014):
  - "The inspection of a facility by one or more officials of an agency with jurisdiction over the facility's fire, health, or safety standards."
- "[A]n administrative search warrant merely authorizes a routine inspection for regulatory compliance."
- "[L]ess hostile intrusion" than a criminal search.

Palmieri Result

- Decision to issue a search warrant is not reviewed *de novo*; instead the Court looks at whether the evidence, taken together, demonstrated a substantial basis for the issuing court's probable cause determination.
- Constitutionality of search is reviewed *de novo.*
- Palmieri failed to make a substantial showing that inspector knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the administrative search warrant affidavit, and Palmieri failed to establish a genuine issue of material fact with regard to whether the administrative search warrant was supported by probable cause to search Palmieri's residence.
- Inspector is entitled to qualified immunity because Palmieri failed to established that he violated her constitutional rights.

Business Inspections: *Burger*

- *New York v. Burger*, 482 U.S. 691 (1987).
- 6 to 3 decision.
- The owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, and
  - Therefore, the warrant and probable cause requirements (which are generally required to make a search "reasonable" under the Fourth Amendment) have lessened application in this context.
    - Not totally gone, though.
  - Court cites to "special needs," as recognized in *New Jersey v. T.L.O.*, 469 U.S. 325, (school locker searches) and recognizes the "closely regulated industry" as another "special situation."
  - Rationale: The privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened.
- Threshold Issue: Business must be a "closely regulated" business.

Burger Analysis for "Closely Regulated" Business

- Here, the business is a junkyard, part of which is devoted to vehicle dismantling.
- Review of statutory scheme.
  - Extensive provisions: License is required prior to engaging in the business; Operator must keep a record of acquisition and disposition of vehicles and vehicle parts; Record is available for inspection by the policy or any agent of the Department of Motor Vehicles; Registration number prominently displayed at business location, business documentation, and vehicle and parts that pass through his business.
  - Failure to comply subjects operator to criminal penalties, loss of license, or civil fines.
  - Review other state laws of the industry (they are similar and not just NY).
  - Duration of regulatory scheme is helpful factor. In this case, laws were added in 1973 and SCOTUS decision is dated 1987.
  - Court looks at similar business and the length of regulations there: general junkyards and secondhand shops (both with regulations to follow for a long time).
- Conclusion: Operator of junkyard engaged in vehicle dismantling has a reduced expectation of privacy in this "closely regulated" business.

Three *Burger* Criteria for a "Pervasively Regulated Business" (1)

- First: There must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.
  - Example: "Substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines." *Donovan v. Dewey*, 452 U.S. 594 (1981).
- Second: The warrantless inspections must be "necessary to further the regulatory scheme."
  - Example: In *Dewey*, the Court recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purpose of the Mine Safety and Health Act--to detect and thus deter safety and health violations.

Three *Burger* Criteria for a "Pervasively Regulated Business" (2)

- Third: The statute's inspection program, in terms of the certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant.
  - In other words, the regulatory statute must perform the two basic functions of a warrant: (1) it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope and (2) it must limit the discretion of the inspecting officers.
    - For First Part: The statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."
    - For Second Part: The statute must limit the discretion of the inspectors by limiting the inspection with regard to "time, place, and scope."
      - *U.S. v. Biswell*, 406 U.S. 311 (1972).

Burger Holding (1)

- All three criteria are met and warrantless inspections are reasonable under the NY laws in this case.
- Court uses statistics to show increase of motor vehicle theft.
- "Regulation of the vehicle-dismantling industry reasonably serves the State's substantial interest in eradicating automobile theft. It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property."
- Warrantless inspections are necessary. No difference here than in *Dewey*.
  - Frequent and unannounced inspections are needed to detect theft.

Burger Holding (2)

- New York law provides a "constitutionally adequate substitute for a warrant."
  - Statute states:
    - Inspections will be regular.
    - Scope of inspection and place of inspection are defined.
    - Who is authorized to conduct an inspection.
  - Time, place, and scope of the inspection is limited:
    - Only "during the regular and usual business hours."
    - Only may examine the records and "any vehicles or parts of vehicles which are subject to the record-keeping requirements of this section and which are on the premises."

What About Criminal Ramifications?

- The *Burger* Court says the administrative scheme is not unconstitutional "simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself."
  - See *U.S. v. Biswell*, 406 U.S. 311 (1972) and *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983).
- In this case, police officers were conducting inspections, not administrative agents.
  - The Court says this is okay, even though, the police officers have the power to arrest. Police officers have "numerous duties" in addition to those associated with traditional police work.

Some Question (Perhaps) in 2015

- City of Los Angeles v. Patel, 135 S.Ct. 2443 (2015).
  - 5 to 4 decision.
  - Hotel operator challenged municipal code requiring hotel operators to provide police officers with specified information concerning guests upon demand.
  - Court reminds us that searches without a warrant are the exception and not the rule, i.e., well delineated and "special needs."
  - The Court classified this as an "administrative search."

Some Question (Perhaps) in 2015 (cont.)

- "Absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."
- Facts not as detailed as *Burger*; municipal code not as specific. For example, provide information "upon demand."
- Holding: "[H]otel owner must be afforded an opportunity to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply."
- Administrative subpoena is an option.
  - But still no probable cause required and may be issued by officers in the field seeking the record.

Patel Addresses *Burger*

- In 45 years, only four industries that "have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." Cites to *Marshall v. Barlow's*, 436 U.S. 307 (1978).
  - Liquor sales (*Colonnade Catering Corp.* v. U.S., 397 U.S. 72 (1970)),
  - Firearms dealing (*U.S. v. Biswell*, 406 U.S. 311 (1972)),
  - Mining (*Donovan v. Dewey*, 452 U.S. 594 (1981)), and
  - Automobile junkyard (*New York v. Burger*, 482 U.S. 691 (1987)).
- "Nothing inherent in the operation of hotels poses a clear and significant risk to public welfare."

Patel Addresses *Burger*

- "To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule."
- Requirements for hotels with regard to licensure are the same as for all business in Los Angeles.
- Historical record does not support that hotels are "closely regulated."
  - This is still an important factor in the analysis of whether a business is "closely regulated."
  - Even if historical record supports it, the three Burger criteria need to be satisfied. Here, only the first is established not the second or third.
- Ex parte warrant allows a surprise inspection.

What about State Licensing Boards?

- No U.S. Supreme Court decisions yet.
- *Burger* is still good law, but statutes need to meet all the requirements.
  - Threshold question (yes, closely regulated so less expectation of privacy) PLUS three *Burger* criteria.
- Prior to a sanction, is an opportunity to obtain pre-compliance review required after *Patel*?
  - No, if in one of the four recognized industries and all *Burger* requirements met.
  - If not, in one of the four recognized industries, it depends. If *Patel* had met all *Burger* requirements, result would have likely been different.
  - For licensing boards, generally we have a hearing before a sanction, so maybe this is not a necessary question.
  - What about citations?
  - What are we "proving" in our hearing?

Stogner v. Commonwealth of KY, 638 F.Supp. 1 (W.D. Ky. 1985)

- Kentucky Board of Barbering revoked the licenses of a barber shop because the owner failed to allow inspections of the shop. Barber alleged violation of the Fourth Amendment.
- Owner filed suit under 42 U.S.C. § 1983 alleging constitutional violations.
- District Judge held:
  - Barbering and barber shops are regulated and licensed industries such that the Board may conduct routine inspections of barbershops without a search warrant.
  - Barbering is "closely regulated, supervised, and inspected by the state" and it is "not unreasonable for the Board to conduct warrantless inspections to protect the health and safety of the public."
  - Private booths are subject to inspection as well as the barbershop, itself.

Luzzi v. Com., State Horse Racing Com'n, 548 A.2d 659 (Pa. Ct. App. 1988)

- Search of jockey's person revealed cocaine straws. His jockey license was subsequently revoked. Jockey alleged violation of the Fourth Amendment.
- Court rules:
  - "Warrantless searches in closely regulated industries are permissible when such searches are authorized by statute or by a duly promulgated regulation."
    - *Commonwealth v. Black*, 530 A.2d 423 (Pa. 1987).
- Former jockey argued that he thought that "the search permitted by this regulation was limited to a search 'for drug devices or drugs that would-could affect the speed or racing conditions of a horse only.'"
- Court was not persuaded. Relevant laws prohibit a licensee from being under the influence of alcohol or drugs while on the grounds of a racetrack and being in the possession of any unlawful drug. "Clearly, jockeys under the influence of alcohol or drugs could affect the 'speed or racing condition of a horse.'"

Hansen v. Illinois Racing Board, 534 N.E.2d 658 (Ill. Ct. App. 1989)

- Licensed driver, trainer, and owner of standard bred horses appealed decision of Racing Board suspending his occupational license for refusing to consent to search of his pick-up truck in violation of a Racing Board rule. Licensee alleged violations of the Fourth Amendment.
- Here, statute was not detailed enough.
  - First *Burger* criteria met: Substantial government interest in regulating the horse-racing industry in order to protect the public.
  - Second *Burger* criteria semi-met: Some justification for allowing warrantless searches.
  - Third *Burger* criteria not met: Discretion of inspecting officers was not limited—no time limit or procedure delineated.
- Racing Board rule declared unconstitutional.

Humenansky v. Minn. Bd. of Medical Exam., 525 N.W. 2d 559 (Mn. Ct. App. 1995)

- Psychiatrist brought action against the Minnesota State Board of Medical Practice seeking to enjoin the Board's order that she submit to mental and physical examination and seeking to declare statute authorizing mental examination and access to medical data unconstitutional. Dr. H. alleged violations of the Fourth Amendment.
- Board received twelve disciplinary complaints against Dr. H alleging nine different grounds for disciplinary action.
- Board needs "probable cause" to order this examination under Minnesota law.
- Court upheld the statute because:
  - Board made probable cause finding prior to ordering the examination.
  - Dr. H can refuse to participate in any part of the examination; no coercion is present. (Would this be effective?)
  - Examination was scheduled to be conducted in a professional medical environment at a hospital (not intrusive).
  - Dr. H is deemed to have consented to such an examination as a condition of licensure.

Let's Compare a Similar Law from Nevada

- NRS 641.272 (Board of Psychological Examiners)
  - Notwithstanding the provisions of chapter 622A of NRS, the Board may require the person named in a complaint to submit to a mental examination conducted by a panel of three psychologists designated by the Board or a physical examination conducted by a physician designated by the Board.
  - Every psychologist licensed under this chapter who accepts the privilege of practicing psychology in this State shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the Board. The testimony or reports of the examining psychologists or physician are privileged communications, except as to proceedings conducted pursuant to this chapter.
  - Except in extraordinary circumstances, as determined by the Board, the failure of a psychologist to submit to an examination as provided in this section constitutes grounds for the immediate suspension of the psychologist's license.
- What do you think?
  - Only a person named in a complaint. No probable cause requirement.
  - Deemed to consent. Okay—similar to Minnesota. (But is this true "consent"?)
  - Sanction is immediate suspension without a hearing.
  - Verdict: Constitutional or Not?

Medical Society of New Jersey v. Robins, M.D., 321 N.J. Super. 586 (N.J. Ct. App.1999)

- Physician sought review of Board of Medical Examiners'' order imposing stayed sanctions for violation of duty to cooperate regulation, and upon amendment, requiring physician to cooperate with Attorney General's demand for inspection of office and records. Dr. Robins alleged Fourth Amendment violations.
- Court dismisses as moot given Board's vacation of administrative sanctions.
- Court addresses the underlying issue, though, in a published decision, and says that the State can delegate authority to an administrative agency to adopt regulations regarding inspections that are consistent with Burger.
- The Court notes that the Legislature has "expressly authorized 'inspection of any premises' of a licensed professional for 'any act or practice declared unlawful by a statute or regulation administered by such board.'"
- Note: The Board's procedure here seems to be presenting an administrative warrant to the licensed professional.
  - "A sufficiently detailed administrative demand (or warrant) specifying the legal authority for the demand and its limitations as to time, place and scope."
  - Does anyone else solely rely on administrative warrants?

Beck v. Texas State Board of Dental Examiners, 204 F.3d 629 (5th Cir. 2000)

- Dentist sued the State Board of Dental Examiners alleging § 1983 violations. One alleged violation that the warrantless search of his office violated the Fourth Amendment.
- The Court said that the search in this case did not violate the Fourth Amendment. "[A]dministrative or regulatory searches are exceptions to the warrant requirement." *Burger* criteria must be met.
- There is a substantial state interest in regulating and monitoring the use of controlled substances, particularly in dentistry.
- Inspection conducted pursuant to two co-existing regulatory schemes: the Dental Practice Act and the Texas Controlled Substance Act.
- Dr. B argues that the purpose was really for criminal and not administrative purposes.
- Court says no: "Administrative searches conducted pursuant to valid statutory schemes do not violate the Constitution simply because of the existence of a suspicion of wrongdoing."
- *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983); *U.S. v. Thomas*, 973 F.2d 1152 (5th Cir. 1992).
- Administrative search here was not unreasonable.

Anobile v. Pelligrino, 303 F.3d 107 (2d Cir. 2002)

- Horse owners, drivers, trainers, and groom brought a § 1983 actions against the New York State Racing and Wagering Board (RWB) challenging the lawfulness of warrantless administrative search for unauthorized drugs and drug paraphernalia at racetrack.
- Court said that the searches were lawful and the RWB had the authority to promulgate such a rule.
- Similar analysis to Pennsylvania in the *Luzzi* case and followed *Burger*.

Anobile v. Pelligrino: Waiver Signed by All Licensees

- Interesting point: the RWB requires each licensee to execute a written waiver of the right to object to an administrative search by the RWB.
  - By the acceptance of a license issued pursuant to this application, I waive my rights to object to any search, within the grounds of a licensed racetrack or racing association, of any premises which I occupy or control and of my personal property, including a personal search, and the seizure of any article, the possession of which may forbidden within such grounds.
- The Court did not solely focus on the waiver, but it was an important factor.

Shell v. Ohio Veterinary Med. Licensing Bd., 827 N.E.2d 766 (Ohio 2005)

- After an investigation, the Ohio Veterinary Licensing Board conditionally suspended the licenses of two veterinarians.
- Statute in Ohio required the Board to provide five days' written notice prior to conducting an inspection.
- The statute "clearly" provides that when conducting an investigation, the Board need not provide notice.
- The words "investigation' and "inspection" are not defined.
- The issue here: as part of an investigation, the Board conducted an inspection. No notice was given.
- The Court held that the notice must be given in the instant case.

Williams v. Kentucky, 213 S.W.3d 671 (Ky. 2007)

- This is a criminal case. Physician was convicted of unlawfully prescribing a controlled substance. Dr. alleges that search of his office was unlawful and the evidence obtained should not have been used in his criminal case.
- Sheriff received complaints about traffic problems at Dr.'s medical clinic. A large number of out-of-state vehicles were parked in the clinic's lot and people loitering in and about the clinic. Sheriff observed numerous people coming out of the clinic who appeared to be under the influence of intoxicants.
- Sheriff arrested people on Dr.'s premises. Requested AG's assistance and pharmacy prescribing report for Dr. reviewed.
- Joint sting set up between the Sheriff and the Office of Drug Control.
- A search ensued and many patient files and other evidence was seized.

Williams v. Kentucky (cont.)

- State argued search was permissible under *Burger*.
- Court stated: "In *Burger*, the U.S. Supreme Court held that a warrant was not required for 'administrative inspections' of 'commercial property employed in 'closely regulated' industries."
- Search in instant case fails second of two threshold questions that: (1) the medical profession is a "closely regulated industry" and (2) this search was conducted for administrative, rather than law enforcement purposes.
- Court says the State "failed to make any credible showing that the search in this case was conducted for an administrative rather than law enforcement purpose. Accordingly, the *Burger* exception is not applicable."
- How can we change the facts so that this might have passed muster under the Fourth Amendment and *Burger*?

Knoblet v. Alabama Bd. of Massage Therapy, 963 So.2d 640 (Al. Ct. App. 2007)

- Massage therapist sought review of decision by Board of Massage Therapy, revoking license to practice massage therapy and assessing an administrative fine totaling $10,000.
- T.D. is hired by the Board to receive massages from licensee.
- She reports that licensee illegally massaged portions of her body (breasts, buttocks, and genitalia) and failed to follow proper draping procedures.
- Licensee asserts that T.D.'s massage, which she was hired by the Board to receive, was a warrantless administrative search and was unlawful under the Fourth Amendment.
- Court says licensee has not established that he had a reasonable expectation of privacy when conducting typical business with the public in the massage therapy establishment.
- "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. U.S.*, 389 U.S. 347 (1967).
- Court says here: No search.

Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014)

- Licensed funeral directors, funeral services corporations, and cemeteries filed § 1983 action against PA Board of Funeral Directors alleging the law regarding Funeral Directors violated the Fourth Amendment because it authorized warrantless searches of "any place where the business or profession of funeral directing is carried on or advertised as being carried on, for the purposes of inspection and for the investigation of complaints coming before the Board, and other such matters as the Board may direct."

Heffner v. Murphy (cont.)

- Court used *Burger* in its analysis.
  - Threshold Question: Funeral industry is closely regulated due to extensive regulations at the state and federal levels.
  - "Factors to consider when determining whether a particular industry is closely regulated include: duration of the regulation's existence, pervasiveness of the regulatory scheme, and regularity of the regulation's application."

Heffner v. Murphy: *Burger* Criteria Applied

- First: PA has a substantial interest in public health, safety, and consumer protection.
- Second: Warrantless searches prevent unscrupulous funeral practitioners from bringing establishments into compliance prior to an inspection and then let them fall below standard when threat of detection passes.
  - Court also notes that warrantless searches need not be only necessary or most necessary way, but the standard is "whether the government's objectives would be frustrated by requiring a warrant or notice." *Contreras v. City of Chicago*, 119 F.3d 1286 (7th Cir. 1997).
- Third: Law provides adequate substitute for a warrant by limiting inspector's discretion.
  - Here, the scope is limited to property where business is occurring or held out to occur.
  - "Such matters as the Board may direct" is limited to funeral directing business. Not fully open-ended
- Would another Court reach a different result?

Alsager v. Bd. of Osteopathic Medicine and Surgery, 384 P.3d 641 (2016)

- Board of Osteopathic Medicine and Surgery initiated a disciplinary investigation of physician.
- Dr. A alleges Fourth Amendment and Fifth Amendment violations.
- Dr. A alleges the search of his prescription records in the prescription monitoring program database and gathering those records from the database and pharmacies is an unreasonable search and seizure.
- The Court says no.
  - First question: Does Dr. A have a protected privacy interest in the prescription records held by the State or a third party?
  - No. Other cases say only a limited expectation of privacy by a patient. *Murphy v. State*, 62 P.3d 533 (Wa. Ct. App. 2003). Plus, long history of government regulation and oversight.
  - Dr. A should be even more aware than a patient that the gov't exercises tight regulatory oversight of controlled substances.
- Court adopts Murphy holding regarding patient rights of privacy in prescription records and hold that there is no expectation of privacy to these records by physicians, which ends the Fourth Amendment analysis.

Fifth Amendment Issues

- Prevailing rule seems to be that "Taking the Fifth" may occur in an administrative case.
  - Example: Witness refuses to testify or answer a question on the grounds that his answer may tend to incriminate him.
- An administrative body may legitimately draw a negative inference from an individual's invocation of his right to remain silent.
- Usually not enough alone to meet administrative burden.
  - Preponderance of the Evidence? Clear and Convincing? Other?
- *Baxter v. Palmigiano*, 425 U.S. 308 (1976): Decision-maker can consider the evidentiary significance of a party's choice to remain silent in a non-criminal forum. In this case, it was a state prison disciplinary board drawing a negative inference from an inmate's silence at a disciplinary hearing.

Back to Dr. A: *Alsager v. Bd. of Osteopathic Medicine and Surgery*, 384 P.3d 641 (2016)

- Dr. A argues that professional disciplinary proceedings are quasi-criminal in nature and the Board violated his Fifth Amendment right against compelled self-incrimination by requiring him to testify and product testimonial records.
- Court says no: Medical license revocation proceedings are not "sufficiently criminal in nature to require application of the Fifth Amendment protection against self-incrimination."
- Court analysis is under both WA Constitution and U.S. Constitution.
- Court cites *Boyd v. U.S.*, 116 U.S. 616 (1886), *One 1958 Plymouth v. PA*, 380 U.S. 693 (1965), *In re Daley*, 549 F.2d 469 (7th Cir. 1977), and *U.S. v. Ward*, 448 U.S. 242 (1980).

Are Administrative Proceedings "Quasi-Criminal"?

- "A civil action is sufficiently criminal in nature if 'its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.'"
- "Although the 'consequence [of disciplinary sanctions] is unavoidably punitive,' such sanctions are 'not designed entirely for that purpose.'"
  - *In re Kindschi*, 319 P.2d 824 (Wash. 1958); *Nguyen v. State*, 29 P.3d 689 (Wash. 2001).
- Licensure of doctors and the disciplinary procedures used to enforce it are intended not simply to ensure that doctors comply with applicable law, but "to assure the public of the adequacy of professional competence and conduct in healing arts."
- Purpose is public health and confidence, rather than seeking punitive goals like vengeance.

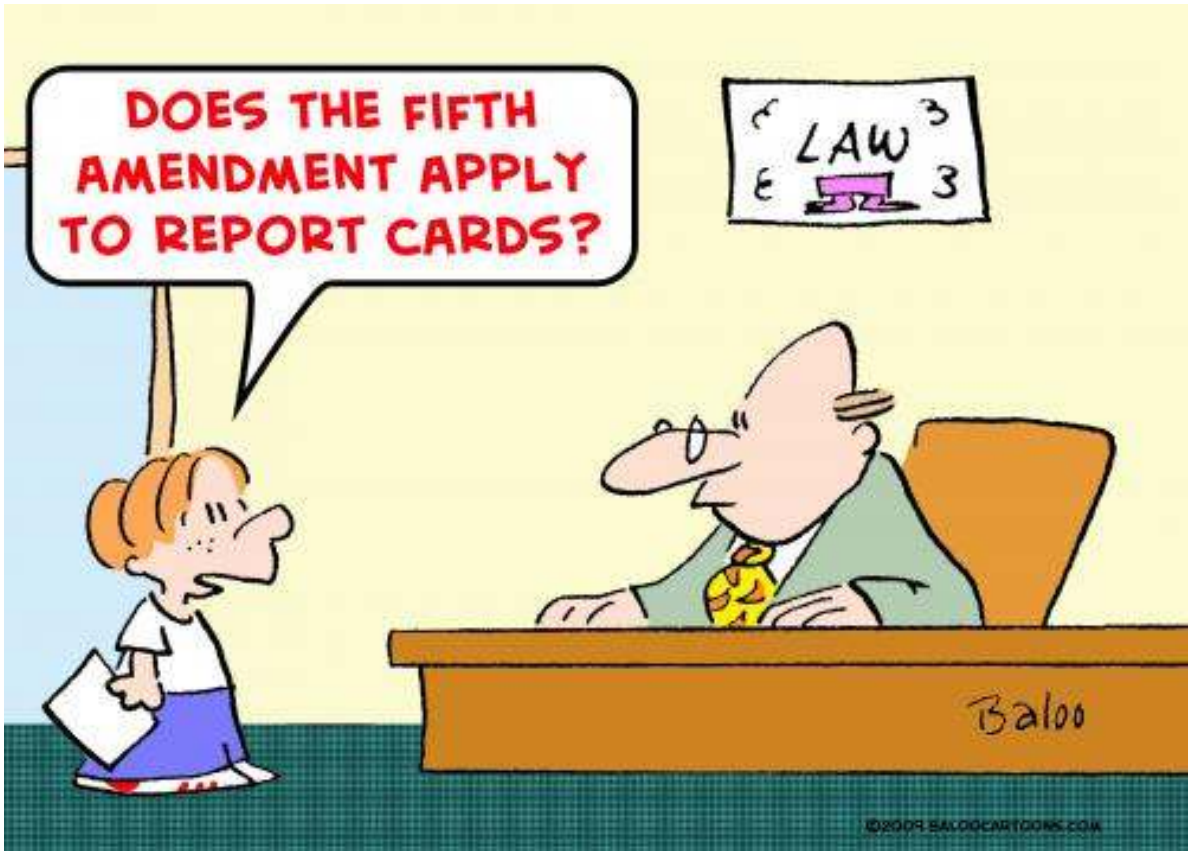
Three Factors from *U.S. v. Ward*, 448 U.S. 242 (1980)

- One: Whether penalty imposed has a "correlation to any damages sustained by society or to the costs of enforcing the law";
- Two: Whether the available sanctions include traditionally punitive penalties associated with criminal actions, like imprisonment or fines; and
- Three: Whether the proceedings present some anger that the subject practitioner will prejudice himself with respect to possible criminal proceedings.
- The Washington Court of Appeals says *Ward* factors do not support that the Board's disciplinary actions are sufficiently criminal.

Dr. A and the Fifth Amendment

- Ruling: No constitutional right against compelled testimony and evidence production for Dr. A.
- "The Board may sanction noncompliance with its valid questions and requests for documents."
- "The Board is also free to draw adverse inferences from a physician's refusal to testify or produce requested documents, as long as such adverse inferences are supported by some other evidence."
- Court provides small concession to Dr. A with regard to incriminating himself in a criminal proceeding through his answers.
  - Need specific, individual objections, not a blanket invocation to avoid participating in the proceedings.
- Is this case an outlier?
- Currently Petition for Writ of Certiori pending at the Washington State Supreme Court as of June 20, 2017. Conference scheduled for September 25, 2017.

The Fifth Amendment



Other Cases re: Witness Testimony in Administrative Proceedings

- *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977)
  - Medical disciplinary board was entitled to draw an adverse inference from a physician's refusal to testify before the board; he was also subject of a pending criminal indictment.
- *Giampa v. Illinois Civil Service Commission*, 411 N.E.2d 1110 (Ill. Ct. App. 1980)
  - State employee invoked the Fifth Amendment during an disciplinary hearing. Negative inference by hearing officer.
  - "The constitutional guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties, but it does not insulate a witness from every possible detriment resulting from his testimony."

Other Cases re: Witness Testimony in Administrative Proceedings (cont.)

- *Cantor v. Cook County Officers Electoral Board*, 523 N.E.2d 1299 (Ill. Ct. App. 1988)
  - Negative inference on the basis of a non-party witness' refusal to testify upheld.
- *LiButti v. U.S.*, 107 F.3d 110 (2d Cir. 1997)
  - Lengthy discussion of factors to consider before drawing negative inference against a party in a civil action regarding a non-party's failure to testify.
  - Factors are: (1) nature of relationship between the parties, (2) the degree of control the party has over the non-party, (3) the compatibility of interests of the parties in the outcome, and (4) the role of the non-party witness in the case.
  - In this case, daughter was a party and father refused to testify. Court said negative inference regarding daughter was okay.
  - Quotes Justice Brandeis: "Silence is often evidence of the most persuasive character." However, "negative inference alone cannot automatically result in the assessment of a serious penalty against the person who exercises his Fifth Amendment privilege."

Lessons Learned

- What business is your agency/local government regulating?
  - Is it closely regulated?
    - Example: Taxidermy v. Dentistry
- Review your governing statutes and regulations.
  - Do they pass muster under *Burger*?
  - Do you need to define terms?
  - Do you have clear procedures for inspectors/investigators?
    - Inspect all? Opening unlocked doors? Single person or more?
- Are you satisfying *Patel*, i.e., option to show compliance before sanction?
- Have you discussed the Fifth Amendment with your client and/or board members?

Questions?

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