

Socioeconomic Discrimination in the Enforcement of Constitutional Rights: The Case of Domestic Privacy under the United States Constitution

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The United States Constitution does not expressly address distributive justice. Moreover, the document's general provisions barring unequal application of the laws have been construed to permit discrimination against the poor in most areas of social and economic policy provided that the discriminatory law in question is rationally related to a permissible governmental objective.² Under this highly permissive standard, nearly any discriminatory provision will be upheld provided that it does not intrude upon an independently protected constitutional interest. Even with respect to the exercise of such independently protected rights, however, American courts have impliedly sanctioned discriminatory burdens imposed upon the indigent³—most notably in the context of procedures governing distribution of statutory benefits to the poor, where uniquely onerous privacy intrusions have repeatedly been upheld against constitutional challenge.⁴ A notable recent example of this phenomenon involves the privacy interest perhaps most celebrated in the American tradition: the right under the U.S. Constitution's Fourth Amendment to be secure in one's home absent good cause for government intrusion.⁵

As a precondition to the provision of welfare assistance to the indigent, various local jurisdictions within the United States presently require that applicants submit to an

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² *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17-29 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

³ See, e.g., Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization Of Poverty Law, Dual Rules Of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 629-36 (2008); James G. Wilson, *Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children*, 38 *CLEV. ST. L. REV.* 391, 402-15 (1990).

⁴ See, e.g., *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 128 S. Ct. 649 (2007); cf. Naomi Cahn, *Models of Family Privacy*, 67 *GEO. WASH. L. REV.* 1225, 1243 (1999) ("The history of aid to poor women is replete with attempts to control their lives by making receipt of public welfare contingent on their compliance with morality requirements that also involve state supervision of their lives."); Jonathan L. Hafetz, "A Man's Home Is His Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 *WM. & MARY J. WOMEN & L.* 175, 240-42 (2002).

⁵ See, e.g., *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); D. Benjamin Barros, *Home as a Legal Concept*, 46 *SANTA CLARA L. REV.* 255, 255 (2006) ("In the United States, home and home ownership are held in high cultural esteem [W]e have developed something of an ideology of home where the protection of home and all it stands for is an American virtue").

unannounced and suspicionless search of their homes by law enforcement officers looking for evidence of ineligibility or fraud.⁶ Under the most aggressive of these eligibility-verification programs, impoverished applicants do not receive an appointment time and are not even told what day the search will occur. Instead, investigators appear at the door, identify themselves as law enforcement officers, and request entry. Applicants are told from the outset that if they do not permit the search, they will receive no aid. Once inside, investigators may spend an hour or more interviewing the applicant regarding eligibility criteria and conducting a “walk through” of the home.⁷ During the interview, investigators ask to see bank statements, pay stubs, tax returns, benefit check stubs, and other documents. In the course of the subsequent walk-through, investigators may search any space within the home that they deem relevant to verification, and an applicant’s refusal to permit inspection of any portion of the home will result in the denial of benefits.⁸ Investigators thus “may request to look at the contents of bedrooms, closets, kitchens, bathrooms, medicine cabinets, and drawers in search of evidence of ineligibility or fraud.”⁹ Focusing primarily on evidence of an undisclosed adult male in the household, investigators count toothbrushes, look for men’s bath products, examine the contents of laundry baskets, open refrigerators, and explore the contents of trash cans and dresser drawers.¹⁰

In sanctioning these extraordinarily invasive practices in the absence of a warrant or suspicion of wrongdoing, American courts have demonstrably failed to address the privacy rights of the poor on shared terms with others. Neither precedent nor the principled extension of existing constitutional doctrine supports such practices or explains why judicial decisions permitting the intrusions should not be applied to authorize a vast expansion of suspicionless search practices directed at the homes of the less destitute.¹¹ In particular, the searches at issue lack all of the essential attributes of the narrow class of suspicionless searches sanctioned in other contexts under the Fourth Amendment’s “special needs” doctrine.¹² Most notably, the searches at issue are designed to advance a need that is not “special” in any respect: the

⁶ See, e.g., *Sanchez*, 464 F.3d 916 (San Diego County’s program); cf. *S.L. v. Whitburn*, 67 F.3d 1299, 1301–03 (7th Cir. 1995) (Milwaukee County’s program); *Smith v. Los Angeles County Bd. of Supervisors*, 104 Cal. App. 4th 1104, 1110–12 (Cal. Ct. App. 2002) (Los Angeles County’s program); *Roberson v. Giuliani*, 2000 WL 760300 (S.D.N.Y. June 12, 2000) (New York City’s program); see generally, Hafetz, *supra* note 4, at 228 (“The increased scrutiny of recipients to enforce measures like work requirements has led to a rebirth of unannounced home visits in some states.”).

⁷ 464 F.3d at 918.

⁸ *Sanchez v. County of San Diego*, 2001 WL 1830236, at *2 (S.D. Cal. Dec. 27, 2001).

⁹ 464 F.3d at 936 (Fisher, J., dissenting).

¹⁰ *Sanchez v. County of San Diego*, 2003 WL 25655642, at *2, *8 n.8 (S.D. Cal. March 10, 2003).

¹¹ 464 F.3d at 931-44 (Fisher, J., dissenting); *Sanchez v. County of San Diego*, 483 F.3d 965, 965-69 (9th Cir. 2007) (Pregerson, J., dissenting from denial of en banc review).

¹² See, e.g., *Chandler v. Miller*, 520 U.S. 305, 309, 323 (1997); *Bd. of Educ. v. Earls*, 536 U.S. 822, 836–37 (2002).

government's mundane administrative interest in the fiscal integrity of a benefits program.¹³ If the government is justified in searching, without suspicion, the home of every applicant for public assistance, simply to advance its general interest in preventing the improper expenditure of some of its funds, then it necessarily is justified in searching, again without suspicion, the home of every person claiming a benefit, tax credit, or deduction that depends in part on representations about conditions within the home.¹⁴ For example, the rationale would permit school officials to conduct suspicionless home searches of all students seeking to enroll in a new school district to verify their residency within the specified attendance boundaries.¹⁵ Tax officials likewise could search the homes of all persons claiming a mortgage-interest deduction to verify that the subject property is used for a qualifying purpose.¹⁶

Presuming that the decisions do not represent a new and unparalleled doctrinal assault on the constitutional protections afforded the homes of virtually all Americans—an untenable proposition, given the practical impossibility of its implications—the conclusion is apparent that these cases instead lay bare the dual and discriminatory nature of the contemporary Fourth Amendment. Quite simply, the provision means two very different things, depending on the relative wealth of the person seeking its protection. The decisions thus represent an implicit concession that the poor constitute a subconstitutional class for purposes of the Fourth Amendment privacy right, and a confirmation that judicial bias continues to powerfully burden indigent litigants in the American courts.¹⁷

¹³ 464 F.3d at 919; *see id.* at 935 (Fisher, J., dissenting).

¹⁴ *See, e.g.,* Sanchez 483 F.3d at 969 (Pregerson, J., dissenting from denial of en banc review).

¹⁵ *See, e.g.,* Dunbar v. Hamden Bd. of Educ., 267 F. Supp. 2d 178, 182 (D. Conn. 2003).

¹⁶ *See* 26 C.F.R. § 301.7605-1 (2009); Wyman v. James, 400 U.S. 309, 343 (1971) (Marshall, J., dissenting).

¹⁷ In their dissent from the most recent opinion upholding suspicionless intrusions upon the domestic privacy of welfare applicants, seven appellate judges noted that the developing jurisprudence constitutes “nothing less” than an “assault on our country’s poor.” 483 F.3d at 966, 969 (Pregerson, J., dissenting from the denial of en banc review).