

DEFENSE IN WELFARE FRAUD

I. INTRODUCTION

Ruby Recipient is 24, a Negro mother of four, living on welfare (AFDC)¹ in the Negro section of a California city. She began receiving aid shortly before the birth of her youngest child, now age 2. Her marriage had been as unstable as her husband's employment. He went to Chicago without the family, sought work there, and has not returned. Through nonsupport prosecution by Illinois authorities he began making payments, and has sent occasional small sums to the California welfare agency administering the Recipient family's aid, as partial reimbursement of the funds dispensed. There is no divorce. Ruby has a boyfriend, Marty Mars, who has been visiting her for over a year. He has a steady job as trash crewman with the city, earning more than \$400 monthly. Two or three evenings a week he comes for dinner, having brought with him a ham or other groceries. Sexual intimacy usually occurs after the children have been put to bed. On an occasional weekend, Marty has watched television late and has stayed overnight. But normally he sleeps at his sister's home eight blocks away, where he pays room and board. He supports two children living in Louisiana with their mother, to whom he sends \$100 a month.

Recently Ruby and Marty were arrested on charges of welfare fraud.² The eight-count information included petty theft, two counts

¹ AFDC is the Aid to Families With Dependent Children program, one of the five categories of aid (to the blind, disabled, aged, medically needy, and dependent children) for which the federal government provides grants-in-aid to the states under the Social Security Act, 42 U.S.C. § 601 (1962). The state plan for AFDC must meet certain standards to qualify for these grants. 42 U.S.C. § 602 (1962), *as amended*, (Supp. I, 1966). The essentials of the California plan are set out in the WELFARE AND INSTITUTIONS CODE §§ 11250-11266 (West 1965) [hereinafter cited as W&IC. Comprehensive revisions of the entire Welfare Code were enacted in 1965, which is the date of all sections hereinafter cited, unless otherwise indicated.]

² The ineligible recipient may be prosecuted for a misdemeanor under one or more of the following Welfare Code sections: W&IC § 11054 (perjury), W&IC § 11265 (false state on the annual redetermination of eligibility for AFDC), W&IC § 11482 (false statement or failure to disclose a material fact to obtain aid). However, prosecution under the Penal Code theft statutes is more likely. The funds alleged to be falsely obtained usually total more than \$200, thus classing the crime as a felony. CAL. PEN. CODE § 487 (West 1955), *as amended*, (Supp. I, 1966). The nature of the crime is false pretenses, in the generic theft statute:

Every person who . . . shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money . . . is guilty of theft.

CAL. PEN. CODE § 484 (West 1955), *as amended*, (Supp. I, 1966). This section has been held applicable to welfare fraud. *People v. Ryerson*, 199 Cal. App. 2d 646, 650, 19 Cal. Rptr. 22, 24 (1962).

of grand theft under false pretenses, conspiracy, and four counts of perjury—one for each “Affirmation of Eligibility” sworn to by Ruby every six months. A newspaper account quotes a deputy district attorney’s statement charging the defendants with taking over \$5000 in public funds, the total aid disbursed to the family. The welfare department had referred the case to the district attorney for prosecution. It had concluded that Marty’s relationship with Ruby was “spouse-like.” Welfare law and departmental regulations require inclusion of the boyfriend’s income in calculating the entitlement to benefits if a spouse-like relationship exists.³

In applying this Penal Code section the common law elements of false pretenses must be shown. *People v. Ashley*, 42 Cal. 2d 246, 258, 267 P.2d 271, 276 (1954) (non-welfare case); *People v. Darling*, 230 Cal. App. 2d 615, 41 Cal. Rptr. 219 (1964) (welfare case). They are:

1. *false representation*

This includes the failure to report information affecting welfare eligibility. *People v. Martin*, 237 Cal. App. 2d 770, 47 Cal. Rptr. 337 (1965). But the information must have been requested of the recipient either verbally by the welfare caseworker, by application or by oath. *People v. Martin*, *supra* at 772, 47 Cal. Rptr. at 338; *People v. Samuel*, 245 Cal. App. 2d 210, 227, 53 Cal. Rptr. 887, 898 (1966). A promise without intent to perform is a false representation within section 484. *People v. de Casaus*, 194 Cal. App. 2d 666, 671, 15 Cal. Rptr. 521, 525 (1961); *People v. Phipps*, 191 Cal. App. 2d 448, 453, 12 Cal. Rptr. 681, 684 (1961).

2. *intent to defraud*

This is inferred from evidence showing that the recipient’s situation is in fact different from her reporting of it. Examples are: defendant’s visiting her husband in Mexico several days at a time, while representing that his whereabouts was unknown (*People v. de Casaus*, *supra* at 671, 15 Cal. Rptr. at 524-25), the repeated reappearance of a former cohabitant in the recipient’s home (*People v. Ford*, 236 Cal. App. 2d 438, 440-41, 46 Cal. Rptr. 144, 146 (1965)). Intent by a codefendant may be inferred from his participation in the AFDC family life knowing his presence affects aid eligibility. *People v. Phipps*, *supra* at 453-54, 12 Cal. Rptr. at 684; *People v. Flores*, 197 Cal. App. 2d 611, 17 Cal. Rptr. 382 (1961). Intent is the ground on which a finding of grand theft is based, as opposed to finding a series of petty thefts—for each welfare check received or for each oath of poverty taken. Evidence of a general design, rather than of distinct petty intents, will sustain a grand theft conviction. *People v. Bailey*, 55 Cal. 2d 514, 518-19, 360 P.2d 39, 42, 11 Cal. Rptr. 543, 546 (1961).

3. *reliance*

This requirement is satisfied even when the welfare caseworker has some doubts as to the recipient’s veracity, so long as her false statements are relied on *in part*. *People v. de Casaus*, *supra* at 672, 15 Cal. Rptr. 525. A mere recommendation by a caseworker without final administrative authority will suffice. *People v. Ryerson*, *supra* at 651-52, 19 Cal. Rptr. 25. Reliance is not vitiated by the fact that the welfare department requires the information that is found to be false; requiring it does not force conclusions upon the jury. *People v. Wood*, 214 Cal. App. 2d 298, 306, 29 Cal. Rptr. 444, 448-49 (1963). On the other hand, reliance upon information immaterial to welfare eligibility is not sufficient, even though the welfare department erroneously believes such information to be relevant and the recipient has intentionally concealed the truth from welfare officials. *People v. Martin*, *supra* at 771-72, 47 Cal. Rptr. at 338; *People v. Samuel*, *supra* at 231-32, 53 Cal. Rptr. at 901. The rationale for this is that the misrepresentation is only causing the welfare department to perform its legal duty, which cannot amount to a defrauding.

³ W&IC § 11351:

Where a needy child lives with his mother and . . . an adult male . . .

On arraignment, counsel is appointed for the codefendants. He learns that Ruby signed statements amounting to a full confession. The welfare investigator who obtained the statements also has on file Ruby's signed waiver of her rights to remain silent and to have counsel present during her admissions. To defense counsel Ruby admits that she has been "sinning" and states that she is now ready to expiate her wrong. After negotiations he enters a guilty plea for Ruby to one count of grand theft. The other charges, and all the charges against Marty, are dropped. The attorney may feel satisfied that his negotiating skill has achieved a major concession. At sentencing Ruby is granted three years' probation to follow a jail term of 120 days. Restitution is ordered. Marty returns to his job. The children are placed temporarily in a foster home at the expense of the welfare department.

It is this writer's impression that most defenses of welfare fraud follow this stereotyped pattern.⁴ The evidence is overwhelmingly against the defendant. Counsel negotiates a plea without trial. It makes for expedient criminal justice, swift in dealing with those social parasites who would cynically mulct our welfare agencies of precious tax dollars, fully knowing that were their true situation known to the agency no aid would be granted.

But there is another dimension to the prosecution of welfare fraud. It concerns welfare administration of suspected fraud cases before the prosecution stage is reached. The attorney who familiarizes himself with this aspect may find a number of legal issues on which the outcome of the otherwise incontestable case would depend. He might even begin to doubt whether some of those who at first blush appear guilty have really committed a crime. The purpose of this note is to

assuming the role of spouse ['MARS'] to the mother although not legally married to her, the amount of [aid] . . . shall be computed after consideration is given to the income of . . . such adult male

The applicable regulations are in the CAL. DEP'T OF SOCIAL WELFARE, AFDC MANUAL OF POLICIES AND PROCEDURES, § C-155 (April 1, 1965). See note 14, *infra*.

⁴ Nearly all the cases prosecuted are in the AFDC category—a surprising point in light of the fact that over one-half of all welfare cases in California are in the aged category. The average monthly case count during the 1965-66 fiscal years was: aged 299,020, AFDC 146,912 (representing 602,664 children and parents), other categories 116,196. CAL. DEP'T OF SOCIAL WELFARE, PUBLIC WELFARE IN CALIFORNIA 1965-66, RESEARCH AND STATISTICS, table 1 (1967). This case count ratio of two aged cases for every one AFDC case contrasts with the prosecution ratio of one aged for every twenty AFDC. CAL. DEP'T OF SOCIAL WELFARE, RECIPIENT FRAUD REPORT, RESEARCH AND STATISTICS, table 1, Oct. 19, 1967. This contrast cannot be attributed to the district attorney's exercise of discretion not to prosecute. County Welfare officials refer 30% to 40% of all suspected fraud cases in *both* AFDC and aged categories. *Id.* tables 2 & 3.

outline these issues, showing their relation to defense in welfare fraud prosecution.

II. AGENCY INFORMATION

A. *Where and What It Is*

In focusing upon what evidence the prosecutor might have, the defense attorney may tend to overlook the welfare department as the primary source of information about the alleged crime. In some instances a review of welfare files can result in the unearthing of a fully developed defense, for welfare workers may have called on witnesses, summarized interviews, and filed a report showing evidence contrary to the prosecution's later-developed case.⁵

The very nature of our welfare system makes the welfare department a repository of potentially valuable defense information. One tenet underlying the administration of this system is a belief in the efficacy of the casework rehabilitative process. Casework is a method of systematic investigation and particularization of each case; it identifies the impediments to improved functioning and assists the client in their removal.⁶

⁵ If a recipient feels he has been unfairly dealt with by welfare officials, he may request a "fair hearing," which is an appeal for a ruling by a state administrative hearing officer, deciding in the name of the Director of the Department of Social Welfare. The findings of these hearings may conflict with those of a court trying the fraud prosecution. (The ludicrous result can be an award of wrongly suspended benefits to a recipient who has been convicted of fraud in obtaining those benefits.) This emphasizes for defense counsel the possibility of opposite interpretations of the same facts, regulations, and law involved. The following two news reports will illustrate.

State welfare officials found only two cases of welfare fraud in the entire state in 1963, [San Diego Deputy District Attorney] Wells added. At the same time, in San Diego County alone, there were 200 cases prosecuted and convicted.

[Concerning five cases in 1965, he said] . . . "The recipients appealed to the state and the state welfare review officer could find no fraud." . . . "We prosecuted all five cases in spite of this, and convictions resulted in each case."

San Diego Union, May 5, 1966, at A-11, col. —.

Mrs. Carter later was charged with grand theft in the case, and during her trial in January, 1963, pleaded guilty to a lesser charge of petty theft. She was granted three years' probation.

The woman, despite the petty theft conviction, appealed the county Welfare Department's ruling to the state Welfare Department. She sought retroactive aid for herself and the child, plus an order wiping out the \$1217 in repayments.

The then state welfare director, J. S. Wedemeyer, on October 21, 1963, granted both of Mrs. Carter's requests on appeal.

San Diego Union, Nov. 28, 1966, at B-1, col. —. This decision was later reversed via suit by the county in San Diego Superior Court. The new welfare director then handed down a ruling consistent with that court opinion, on Nov. 2, 1966.

⁶ See, e.g., the definition set out in PERLMAN, SOCIAL CASEWORK, chs. 1 & 5 (1957).

The record-keeping tendency inheres in both the investigative and rehabilitative phases. The caseworker gathers facts to assess strengths in the major areas of functioning, *e.g.*, finances, health, family relationships. He must record these facts to justify his assessment. Then, when the actual assisting process is underway, his focus is upon the transactions with the client. Here too he must record the trials and errors, the progressions and regressions as a continual testing of his original assessment and diagnosis. The cumulative record aids in clarifying limits and in setting new goals.

Another tenet of our welfare system derives from its position of public trust—charged, among its conflicting obligations, with the responsibility to safeguard public funds.⁷ The welfare agency's posture in meeting this responsibility tends to become chronically defensive, accounting for and justifying a thousand actions which are objects of potential investigation and criticism. Record-keeping is an essential part of this defensiveness; therefore technical decisions certifying recipients' eligibility for benefits are recorded in detail, and proofs of eligibility are kept current with any changes in the client's financial circumstances—along with copious summaries of talks with clients on points of eligibility. When this record-keeping is added to that required in the casework process, the welfare administrator's work tends to become an endless ritual of paper-work reporting. This in turn becomes an end in itself: the most important if not the only function of welfare workers.⁸ Contained in these

⁷ "The Welfare and Institutions Code is to be administered with due consideration for the safeguarding of public funds as well as the needs of the applicant." *County of Kern v. Coley*, 229 Cal. App. 2d 172, 179, 40 Cal. Rptr. 53, 56 (1964) (substantially the same wording appears in the opening paragraph of W&IC § 11004). In that case the District Court of Appeal denied the AFDC mother's claim that the man she was living with could not be held "liable" for the support of her children. The court stated that it was not a case of defining legal rights and duties (from which liability would derive) but of determining whether the children were needy. The man's income must be considered regardless of the fact that he had no duty to support children who were not his own.

⁸ The rules and red tape that swathe the agency within . . . also reach out to mold the client. He has a role to play, too; he must behave like a "case" if he is to use the service. He must fall into certain categories by need or other attribute—a dependent child, over 65 There are applications to complete or sign, appointments to be kept. He must be willing to cooperate, to bare his life's secrets in relevant areas, to bring spouse or children to the office, to file charges in court

Within the agency specialists in a hierarchy find effective communication an increasingly severe problem. There is much truth in the observation that ours is a "paper age"

The well-run social casework agency is a champion recordkeeper. [Discussing one study]. . . . Thirty-two per cent of all expenditures related to providing casework services were for recording. Moreover, if we focus . . . on the total

welfare files, and useful to defense counsel in a fraud prosecution, is social information that is often encyclopedic, as well as summaries of interviews bearing on the facts of the alleged fraud, reports of investigations by special welfare fraud investigators, and names of witnesses. This galactic breadth of client information is not likely to be available through any other government agency.⁹

process of *maintaining communication* within a bureaucratic structure, . . . a total of 51 per cent of all expenditures [were] for this purpose.

The model for the foregoing discussion has been the "ideal type" bureaucracy. Along with its gains—efficiency, reliability, precision, fairness—come what many students have called its pathologies: timidity, delay, officiousness, red tape, exaggeration of routine, limited adaptability. The agency as a means, a mechanism . . . for carrying out welfare policy becomes an end in itself. Between the altruist with his desire to help and the client with his need lies the machine, with its own "needs." These needs can result in an emphasis on technique and method, on organization routines and records, rather than on people and service.

WILENSKY & LEBEAUX, *INDUSTRIAL SOCIETY & SOCIAL WELFARE*, 240-43 (1957 ed. rev. 1965) (footnotes omitted).

⁹ The accuracy and comprehensiveness of this information depends on the length of client contact with the agency, the proficiency of the caseworkers involved, and the conduct of the client. The case folder on the one hand may be an encyclopedia of names, dates, interagency letters, summaries of life incidents, bulging to three volumes and weighing many pounds. On the other hand, it may be a slim folder of brief acquaintance, tenuous information or misinformation, and the routine minimum of eligibility forms.

As an illustration, here is a prototype AFDC case folder format:

1. "face sheet," summarizing names, birthdates and addresses of the extended family (the recipient adults, their spouses, their parents, and children, and any other family ties still maintained);
2. "case dictation," including the family history of events preceding application for aid, a social study and service plan covering finances, environment, health, family relationships, school and social progress of each child, employment potential of each family member 16 or over, family goals if any, and progress toward or away from them, a visit-by-visit summary of caseworker transactions with the clients, other agencies, neighbors, and landlords;
3. employment history summaries for all household members 16 or over, together with education plans, state employment service aptitude test scores, functional literacy test scores, and school grade transcripts when welfare training is likely;
4. family support information concerning whereabouts and ability of absent parents to support the family, plus running correspondence with the district attorney's office covering prosecution of parents who fail to provide;
5. real and personal property summaries with verification documents;
6. copies of court orders and other legal documents affecting clients, *e.g.*, divorce orders and probation findings;
7. pertinent medical records, such as pregnancy verification, disability findings, psychological consultative summaries, doctors' statements as to special dietary or rehabilitative needs;
8. narrative summaries of sleuthing by welfare special investigators;
9. correspondence from the client, including written income reports, requests for services, etc.;
10. applications, reaffirmations, and other welfare forms directly sworn to by the client.

B. *Its Use In Defense*

Welfare fraud cases are won or lost on the evidence.¹⁰ The *factual ambiguities* in that evidence are most likely to be apparent in an examination of its original source, the welfare case folder. Recipient conduct leading to inferences of honesty or deceitfulness, for example, is not likely to be apparent prior to trial, unless seen in the welfare file's narrative pattern of transactions between client and agency. A recipient's promiscuity or habits of drunkenness are prejudicial conduct which also should be apparent on reading the case folder.

Competency is a second crucial issue which might be overlooked in the absence of welfare records. An intelligence quotient of 60, or a third-grade level of literacy, for example, is an evaluation which might be readily available on perusal of the file. Competency might even be relevant in the majority of welfare fraud cases although the inadequacy be less extreme—as when the literacy achievement is at a sixth-grade level and the client's mentality is within the adequate range.¹¹ Competency has a broader application in the welfare context than in the purely legal one, because the California poor law first delimits the welfare agency's responsibility and then makes the client's duty reciprocal to it. The agency must inform the recipient of "his responsibility for reporting facts material to a correct determination of eligibility and grant,"¹² whereas the client's duty lies in "reporting accurately and completely *within his competence those facts required of him* for eligibility and grant determination and [disclosing] . . . promptly any changes in those facts."¹³

Thus competency in welfare does not necessarily raise an issue of sanity or feeble-mindedness; rather, according to the given situation, it creates presumptions sufficiently flexible to deal with the level of capacity in each particular case, and sufficiently mobile to shift the burden of proof of capacity or lack of it from prosecution to

¹⁰ See note 2, *supra*.

¹¹ 53.2% of AFDC mothers have 8 years or less completed schooling; the figure is 61.7% for unemployed AFDC fathers, 83.1% for incapacitated fathers. The median years completed are 8.8 for mothers, 8.6 for fathers, and 6.0 for the incapacitated. (The functioning level of literacy is usually below the number of school grades completed.) Mugge, *Aid to Families With Dependent Children: Initial Findings of the 1961 Report on the Characteristics of Recipients*, Social Security Bull., March, 1963, at 3, 11, 13.

¹² W&IC § 11004(a).

¹³ W&IC § 11004(b) (emphasis added).

defense.¹⁴ The statute quoted above raises two questions relevant to the defense: (1) whether the agency met its responsibility to inform the client of the facts required of him; and (2) whether the client reported within his competence those facts. The welfare folder may provide useful evidence with respect to those questions.

A third issue is suggested by the agency's duty to inform the client as to what extent caseworkers' statements can be relied upon as accurate representations of transactions with the client. The earlier description of the comprehensive nature of welfare record-keeping¹⁵ implied the requirement of a high standard of performance by the AFDC caseworker. In twelve brief home visits a year he is expected to assess seven aspects of family living, *e.g.*, finances, family relationships, and so forth, while also remaining apprised of changes in eligibility factors.¹⁶ His duties demand a myriad of skills. He must understand broad principles as well as trivia; he must be not only adept in rehabilitation but adroit in investigation, thereby combining compassion for clients with adherence to regulations. The skills expected of him, therefore, far surpass those expected of the modal humanity that staffs our welfare agencies.¹⁷

¹⁴ There is no case law on this point, and hence no precedent to indicate whether the court would accept this interpretation.

It should be noted that when this issue is argued in court it probably will not be treated as one of competence. Possibly confusing readjustments in traditional legal categories would be necessary if it were. More likely, the point would go to intent, and thus be assimilated under the common law elements of fraud, discussed note 2 *supra*. The court's resolution of the issue might be influenced by the regulation, which renders the "within his competence" of the statute as the duty to assume "as much responsibility as he can within his physical, emotional, educational or other limitations." The regulation spells this out more particularly in stating what the client is required to do "within his capabilities": (1) complete all documents required in the application process; (2) make available any documents pertinent to proof of eligibility; and (3) report "all facts known to him which he believes to be material to his eligibility or which the county department has identified to him as affecting his eligibility," including "any change in any of these facts." CAL. DEP'T OF SOCIAL WELFARE, AFDC MANUAL OF POLICIES AND PROCEDURES § C-010.05 (Oct. 1, 1964).

¹⁵ See note 9, *supra*.

¹⁶ A routine home visit, for example, might include reverifying insurance policies (whose cash surrender value can affect eligibility), following up the client's plans to seek employment and arrange child care, reading the children's report cards, exploring the client's budgetary needs.

¹⁷ The person caught in the cross-fire of competing claims typically makes some kind of adjustment: he tries to reshape the role or roles to make the demands compatible; he quits the role; he adapts to the role by playing up one set of obligations, playing down another, and so on.

....

Often, however, agencies have operational requirements, set by law, tradition, policy, or public pressures, which depart from professional standards. This is particularly true of public agencies operating within a legal framework, a situation which sets the stage for role conflict.

The administration of public assistance, for instance The worker is caught between conflicting directives of agency and profession.

....

It would be no surprise, then, if when the caseworker faces clients, whose living conditions are appalling or whose family relationships are chaotic, that aid eligibility may receive a low priority on a long list of duties. Nor again, when it is his duty to admonish an AFDC mother of the man-in-the-house rule, should it be odd that he is reluctant to broach the subject, since it invades the privacy of an intimate relationship.¹⁸ Understandably, he may let other demands take precedence over an unpleasant task, and later discovering his omission, dictate the ritual formulaic phrases showing, for the purposes of the welfare file, that he has fully performed his duties. The reason for this veiling of the omission is clear: there is little time for making a second visit.¹⁹ If he were to admit his failure in the dictated report, he would be disclosing items adverse to his performance rating, well knowing that his superiors' principal means of evaluating him is through reading his dictation.²⁰ The result is that although the caseworker's interview summaries can be revealing they can also hide omissions. The defense's examination of this record may help to evaluate the existence of such possibilities.²¹

To summarize, it appears there may be questions as to the *credibility* of the caseworker because of possible self-serving motives. When, as a key witness for the prosecution, he has read his dictation or refreshed his memory from it, it would be beneficial to the defense to pursue questions revealing these motives.²² The pretrial steps

. . . [T]he worker will often break agency rules in order to treat the client humanely—the probation officer will knowingly permit infractions of curfew, the relief worker will advise recipients to keep beer bottles (and boy-friends) out of sight. But any worker who tries to be a good humanitarian and a good agency representative at the same time is in for torment of conscience.

WILENSKY & LEBBAUX, *supra* note 3, at 319-22 (footnotes omitted).

¹⁸ See W&IC § 11351 cited note 3 *supra*. In interpreting this law, the welfare regulation states certain elements essential to the spouselike relationship. The caseworker must note the following aspects of the relationship: (1) presence "in or around the home"; (2) "his maintaining an intimate relationship with the mother; and (3) assumption of "substantial financial responsibility for the ongoing expenses of the AFDC family," or representation "to the community in such a way as to appear in the relationship of husband or father, or both." CAL. DEP'T OF SOCIAL WELFARE, AFDC, MANUAL OF POLICIES AND PROCEDURES, § C-155 (April 1, 1965).

¹⁹ A typical caseworker's schedule in a southern California county welfare department permits about 15 hours per week for visiting with clients. This averages at about one visit per family per month on a sixty-case workload.

²⁰ Casework supervisors do not normally make home visits with caseworkers.

²¹ As workers gain more experience they make fewer mistakes; but they also learn to cover up more skillfully. Fraud cases are so few that the new caseworker, with no experience of the criminal aspect of welfare, tends to take liberties with the record that he would shrink from after seeing the legal consequences which a seemingly trivial entry may have in a later prosecution.

²² See CAL. EVID. CODE § 780 (West 1966):

. . . [T]he court or jury may consider in determining the credibility of a witness any matter that has a tendency in reason to prove or disprove the

preparing for this would depend on the individual case. The defense might begin by examining the welfare file with the client, whose statements may serve as corroboration. A similar session with the caseworker could be productive. If a cooperative casework supervisor is available, his view of the caseworker's reliability and objectivity may help to complete the investigation.²³

II. OBTAINING DISCLOSURE

A. *The Background*

An unspoken assumption in the preceding section was that prior to trial the welfare folder is readily available to the client or his attorney. However, this is by no means established. The defense counsel may find that before trial his local welfare department limits disclosure of all of or parts of the file to him. There are various reasons for this, some arising from conflicting interpretations of statutory law,²⁴ some from policy decisions,²⁵ and some from the nature of bureaucracy itself.²⁶

truthfulness of his testimony at the hearing, including but not limited to . . .

(f) the existence or nonexistence of a bias, interest, or other motive.

²³ There are imperfections inherent in the welfare file as evidence, besides those of caseworker motive and lack of objectivity. These should be kept in mind as the defense prepares its case from file materials. They derive from: (1) the opinion nature of much of the casework dictation, which is often necessarily guesswork in assessing the client's motivation toward training and rehabilitative efforts; (2) the relationship of authority between caseworker and client, in which the latter may be tempted to assume a deceptive posture that is quickly dropped upon the worker's departure, and of which caseworkers perceive variously, depending on their individual gullibility or lack of it.

²⁴ There are statutory disclosure requirements. In the AFDC chapter, W&IC section 11206 states: "In case of dispute, the application and supporting documents pertaining to his case on file . . . shall be open to inspection . . . by the applicant or recipient or his attorney or agent."

There is no case law interpreting this provision. Some welfare agencies have taken it literally, limiting inspection to the items specifically mentioned—which will likely be irrelevant to defense preparation. A second barrier concerns possible interpretation of "dispute." Normally the statute has been applied in the administrative hearing context, in which it can be said the recipient is "disputing" action taken by a county welfare department. Cf. note 5 *supra*.

In the Old Age Security chapter, W&IC section 12008 has similar language, but adds stronger and more specific wording:

The county department shall transmit to the . . . recipient, and to his designated attorney or agent, if any, within 10 days after request is made therefore, such information as is available in the case record, which will assist the . . . recipient in filing an appeal to, or applying for a hearing before, the [state] department [of Social Welfare]

Assuming this is not an unconstitutional discrimination between family recipients and aged ones, it is still capable of narrow and literalistic interpretation.

The tendency to limit the scope of these sections has justification in their positions as exceptions to the general rule of confidentiality of welfare records:

In the law of evidence, the questions on compelling agency disclosure have been treated within the doctrine of "official privilege." This doctrine balances protection of public interests on the one hand, with prejudice against the client's claim on the other. California follows this balancing test.²⁷ The unconstitutional injustice of it²⁸ could be alleged in welfare cases, where so much depends on the welfare records. But the injustice can turn out to be a chimera because its existence seems to depend on the welfare department with which, and the official with whom, we are dealing. Consequently, it cannot be concluded that a pretrial perusal of welfare records is always barred.

... [A]ll applications and records concerning any individual made or kept . . . in connection with the administration of any provision of his code . . . shall be confidential . . . provided, however, that any agency having custody of such records may make the disbursement records available to the district attorney upon his request.

W&IC § 10850. This discretion to share or not share information with the district attorney seems empty in face of his far-reaching duty to investigate and prosecute suspected crimes. See note 37 *infra*. W&IC section 11478 makes mandatory the disclosure of information about absent parents.

Confidentiality, however, has many more exceptions carved out by the Department of Social Welfare under its authority to "make rules and regulations governing custody, use, and preservation of all records." W&IC § 10850. The broadest of these exceptions concerns recipients who have requested an administrative hearing:

The claimant shall, upon request, be given the opportunity to examine *before* and during hearing, *all evidence used by the county welfare department to support its decision*, and all documentary evidence that will be used at the hearing.

CAL. DEPT OF SOCIAL WELFARE OPERATIONS MANUAL 2.20665 (Oct. 1, 1966) [hereinafter cited as OPERATIONS MANUAL] (emphasis added).

²⁵ The policy considerations might include:

(1) privacy of persons and transactions not directly involved (*e.g.*, where an absent father has confided to the caseworker his reasons for not contesting a divorce); (2) damage to a client's self-esteem, as where the caseworker has evaluated the client's mentality or character in a very derogatory light; (3) potential family or neighborhood social disruption resulting from disclosure of statements given in confidence to agency staff; (4) destruction of agency relations with the professional community on which it must rely for some confidential reports (*e.g.*, psychiatric evaluations); (5) agency "housekeeping" (*e.g.*, in order not to expose to public scrutiny the more egregious examples of poor casework or incompetent administration).

²⁶ There are factors promoting secretive hoarding tendencies that seem to be inherent in the dynamics of the bureaucratic system. See generally BLAU, BUREAUCRACY IN MODERN SOCIETY (1956).

²⁷ CAL. EVID. CODE § 1040 (West 1966). Cases on official privilege are reviewed in CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, ARTICLE V, 468-70 (1964), and in 27 OP. ATT'Y GEN. 194 (1956).

²⁸ That is, the nondisclosure tends to become an *ex parte* determination without rebuttal by the client. Davis has noted a recent trend in the federal courts toward liberalization in favor of the client. 1 DAVIS, ADMINISTRATIVE LAW § 8.15 (1958, Supp. 1965, at 202-03). Likewise in California. WITKIN, CALIFORNIA EVIDENCE § 1058 (1966).

B. *The Procedure*

What procedures are available to temper the effects of an agency's refusal to disclose? There are the usual pretrial motions for inspection; and, for production of papers during trial, there is the subpoena duces tecum.²⁹ In addition, there is an administrative procedure which, though not intended to be used in the judicial context, may serve as a preliminary discovery device. This procedure is the administrative hearing referred to in the statutes and regulation cited earlier.³⁰ (It should be kept in mind, however, that the informal measures of telephoning or visiting the welfare agency are more likely to discover valuable information than the formal administrative measures, and will be far more immediate.)

The steps to the hearing room begin with a written request from the recipient, which is sent to the state Department of Social Welfare.³¹ In three weeks he would receive the first formal "disclosure," a letter from the caseworker explaining the basis of the county welfare department's suspension of aid.³² A more informative discovery comes through examining the agency's hearing "brief," which must be prepared within 45 days.³³ The brief is an abstract of social background, a summary of the welfare case record and information bearing upon the loss of benefits, a listing of the issues with statements as to applicable statutes and regulations, and a partisan interpretation of this information from the county welfare department's point of view.³⁴ The time lapses involved make it likely that the defense would

²⁹ WITKIN, *supra* note 28, at §§ 939, 1058-62. The creation of rights to discovery by the accused is a court-made rule dating back only a few years. WITKIN, CALIFORNIA CRIMINAL PROCEDURE 271 (1963).

³⁰ See note 24, *supra*. For an explanation of the welfare administrative hearing and the role of legal counsel therein, see Silver, *How to Handle a Welfare Case*, 4 LAW IN TRANS. Q. 87 (1967).

³¹ W&IC § 10950. In the regulations applying this law, the request is required to be "in writing, but it need not be in a particular form. . . . It should include the reasons for dissatisfaction with the county's action." OPERATIONS MANUAL 2.2054.

³² OPERATIONS MANUAL 2.2058.2. This letter is by necessity superficial, due to its brevity and the necessity of explaining the rule in general, conclusory terms.

³³ *Id.* at 2.2064.1. This regulation requires the hearing to be held within that time, so it is presumed that the county would prepare it before then. There is no provision for exchange of pleadings, so it is presumed defense counsel would arrange his own prehearing conference with welfare officials for the purpose of obtaining the brief.

³⁴ It is not called a brief, but the term seems suitable here. The regulation about it is very loosely worded, making obligatory upon the county agency the duty to "evaluate and organize oral and written evidence, and make a plan for its presentation in a systematic fashion" *Id.* at 2.2058.33. Hence, contents of this "presentation" are not uniform throughout the state. Nevertheless, the outline form is given in the text because the Department of Social Welfare has unofficially praised such an outline as a model presentation.

need a court continuance in order to proceed through a pre-administrative discovery prior to the criminal trial. Thus the administrative discovery has only limited utility. But if the defense attorney *has* found it possible to coordinate the administrative and judicial schedules, he would be in a position to invoke the client's right to inspect the "application and supporting documents pertaining to his case on file."³⁵ And the defense counsel might even find that he may exercise the privilege of searching *all* of the welfare file.

IV. TRIAL STRATEGY

Perhaps the case stereotype presented at the beginning of this note was devoid of issues. Perhaps Ruby Recipient was guilty, and an attempt to try the case would have been fruitless or even destructive to the ends achieved by negotiation. Yet there is a possibility that in some cases issues are present which are not visible to the defense counsel who lacks knowledge of the processes by which welfare is administered. In this section some of these issues will be explored.

A. *Exclusion of Incriminating Admissions*

Earlier it was seen that the caseworkers' dictation, covering each interview with the client, is a major source of direct and indirect evidence in the welfare file. Actually, the file commonly mentions three sources of contact between officials and clients.

1. *The Contexts*

Casework interviews comprised the majority of those contacts reported in the file. Nearly all take place in the recipient's home, and routinely number six to twelve a year. The earlier description of these noted that they can be somewhat hectic and often involve conflicting obligations.³⁶ In the interview, diverse topics may be covered, ranging from technical eligibility standards to personal counseling on family problems. In recording these, the worker makes a few notes which he later—up to two months later—uses when preparing his dictated report.

Family support interviews are prescribed in the early stages of applying for AFDC and at any later time when other children are conceived. Client participation is mandatory, since the failure to assist the interviewer in determining the whereabouts of the absent father

³⁵ W&IC § 11206, quoted note 24 *supra*.

³⁶ See text accompanying notes 9, 16, & 17 *supra*.

disqualifies the applicant from receiving benefits.³⁷ In addition to giving this assistance, the applicant must be willing to sign a criminal complaint against him for failing to support his children.³⁸ These interviews take place in the office of the interviewer, who is an investigator employed by the district attorney. In the welfare folder these interviews are reported in the agency forms, notices, and occasional memoranda between the district attorney's office and the welfare department.

Welfare special investigator interviews normally occur when the client is suspected of misrepresenting her circumstances in order to receive aid. The possible presence of a man in the home of an AFDC mother is the circumstance which receives nearly all the welfare investigator's attention. A few investigations are undertaken on a "random sample" basis, with no prior suspicion that ineligibility exists. The interviews, in both random and suspicious cases, begin in the client's home, usually after a period of early morning or evening surveillance. At the conclusion, the client is requested to come to the office the following day for interrogation. The office questioning is routinely done with appropriate warnings that there is a risk of criminal liability, that admissions may be held against the client, and that he has a right to silence and to counsel. The client is then encouraged to sign a statement of admissions. The investigators take careful notes, dictated within a week in the form of a detailed narrative summary which often forms the basis of subsequent prosecution. A copy of this narrative is placed in the case folder.

2. Applying Recent Constitutional Law Cases

a. The *Miranda* case.

In the case stereotype, Mrs. Recipient made incriminating admissions. The contexts in which these admissions usually occur have been previously noted. An analysis must now be made of the applicability of *Miranda v. Arizona*³⁹ to those contexts. The *Miranda* decision excluded certain evidence in order to enforce the safeguards of informing a suspect of his right to silence and to counsel while in

³⁷ W&IC § 11477. The requirement is one of the conditions under which states received federal grants-in-aid under the Social Security Act. 42 U.S.C. § 602(a)(10), *as amended*, (Supp. I, 1966). As a result, the district attorney plays a major role in administration of welfare to families. See the statutory outline of this role in W&IC §§ 11475-11488.

³⁸ W&IC § 11477. The crime is failure to provide, under CAL. PEN. CODE § 270 (West 1955).

³⁹ 384 U.S. 436 (1966).

custody for questioning by law enforcement officers. This analysis then, should begin by inquiring: (1) whether the interviewers are law enforcement officers; and (2) whether the welfare recipient is under custodial interrogation.

Miranda does not directly answer the question whether the term "law enforcement officer" includes welfare caseworkers; however, an answer may be implied indirectly. In the opinion, there is frequent reference to police stations and district attorneys' offices.⁴⁰ The implication is that officers are those who primarily investigate or prosecute violations of the law. This would seem to exclude welfare workers, whose major function, limited by statute, regulation and administrative process, is to minister to our social and economic ills. Yet at times, it can be argued, a caseworker assumes the role of a police investigator.

Our case stereotype, for example, probably was first investigated when Ruby Recipient's past or present eligibility for aid was questioned. A neighbor may have telephoned to report the presence of Mr. Mars, or perhaps the client's own statements aroused the caseworker's suspicions. In either case the worker's duty was to re-examine the client's eligibility, *i.e.*, to determine whether the law was broken. He would question neighbors, interview the landlord, and obtain sworn statements from Mrs. Recipient. Insofar as he performs this function, it can be argued, he is no different from (although less legally trained than) a police officer or district attorney's investigator. The possibility of prosecution is as real, regardless of whether a police officer or caseworker is involved.⁴¹ Damning statements would not be admissible if improperly obtained by a police officer. It would seem to follow, therefore, that they should be no more admissible when the police function temporarily is being performed by a caseworker.⁴² The issue has yet to be considered in an appellate case. But

⁴⁰ *Id.* at 465-73.

⁴¹ One authority on social welfare writes that recent trends point toward increased exercise of police functions by caseworkers. Wilensky, *Introduction to WILENSKY & LEBEAUX*, *supra* note 8, at *xlvi*-*l*. Yet there are subtle psychological differences, between policemen and caseworkers, that may be inherent in their role positions as well as present in the personality constellations gravitating to the two fields. These differences conceivably could show up in different probabilities of prosecution. However, it is unlikely that a rule of law could achieve such refinement as to take cognizance of these subtleties. See note 42 *infra*.

⁴² The partial overlapping of administrative and police functions is recognized in California statutes covering contexts parallel to welfare. Penal Code § 817 (West 1956), *as amended* (Supp. I, 1966), includes policemen, marshals, sheriffs, parole officers, etc., within the class of "peace officer." It also permits the designation, to be made by law, of other public employees as peace officers, "but only for the purposes of that

if it is decided contrary to the thesis here, the defense can still reasonably argue for the exclusion of admissions made to welfare special and family support investigators, since these interviewers more easily fit the traditional meaning of the term "law enforcement officers."

Yet assuming the correctness of the present thesis, it still must be determined whether any of the interviews described are a form of custodial interrogation. The *Miranda* guideline is not clear:

By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*.⁴³

A central concern throughout the Court's opinion is psychological coercion.⁴⁴ In the above italicized disjunctive the Court seems to have

law." As a result, the peace officer designation has been applied to limited functions in such regulatory provisions as Health & Safety Code § 24231 (West 1955), *as amended*, (Supp. I, 1966) (air pollution control), Health and Safety Code § 8325 (West 1955) (cemetery supervision), Labor Code § 2641 (West, Supp. I, 1966) (housing commission investigations), and Health & Safety Code § 3902 (West 1955) (wiping rag inspections).

⁴³ 384 U.S. at 444 (emphasis added). A footnote to the quoted sentence states: "This is what we meant in *Escobedo* [v. Illinois, 378 U.S. 478 (1964)] when we spoke of an investigation which had focused on an accused."

That the choice of phrasing in the quoted sentence might have been accidental seems unlikely in view of its repetition later in the opinion:

The principles announced today deal with the protection which must be given . . . when the individual is first subjected to interrogation while in custody at the station *or otherwise deprived of his freedom of action in any significant way*.

Id. at 477 (emphasis added).

⁴⁴ "[T]he ease with which questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, . . . and to entrap him into fatal contradictions . . . give rise to a demand for total abolition [of unjust methods of interrogation]." *Id.* at 443, *quoting approvingly* *Brown v. Walker*, 161 U.S. 591, 596-97 (1896).

"Again we stress that the [disapproved] modern practice of . . . interrogation is *psychologically rather than physically oriented*. As we have stated before, 'Since *Chambers v. Florida*, 309 U.S. 227, this court has recognized that *coercion can be mental as well as physical* . . . ' *Blackburn v. Alabama*, 361 U.S. 199, 206 . . . (1960)." *Id.* at 448 (emphasis added).

"[The authors of police interrogation manuals] say that the techniques portrayed in their manuals . . . are the most effective *psychological stratagems* to employ during interrogations." *Id.* at 449 n.9 (emphasis added).

"The subject should be *deprived of every psychological advantage*." *Id.* at 449 (emphasis added), *quoting disapprovingly* O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956).

"These tactics are designed to put the subject in a *psychological state* where his story is but an elaboration of what the police purport to know already . . ." *Id.* at 450 (emphasis added).

Also see the Court's extensive discussion of the psychologically coercive atmosphere urged by interrogation manuals. *Id.* at 450-57.

"This atmosphere carries its own badge of intimidation. To be sure, this is *not physical intimidation*, but it is equally destructive of human dignity." *Id.* at 457 (emphasis added).

extended that concern indefinitely to contexts yet to be delineated.⁴⁵ One such context may be the casework interview. Consequently, the question arises as to how psychological coercion can be present when the caseworker makes no conscious effort to intimidate the recipient or to entrap her with interrogational snares. The answer is that coercion is not *necessarily* dependent upon the interviewer's intentions, any more than it is upon the custodial environment of a police station or interrogation room—although both these factors may be significant in determining coerciveness. The interpersonal dynamics of the relationship between questioner and accused is also a factor deserving consideration. In the instance of a caseworker questioning a client, there is a dynamic pattern inherent in the welfare administrative process—a pattern which tends to carry over into any worker-client interview, regardless of the intentions of the participants or the literal content of their discussion.

Because of his position as potential arbiter of aid according to complex rules and judgements not understood by the client, the caseworker inevitably is in the role of benevolent autocrat.⁴⁶ Reciprocal to this position is that of the client, who is in the role of a suppliant, seeking cues as to what posture he should take in order to qualify for or maintain aid.⁴⁷ A northern California study has shown that, with respect to welfare, most recipients understand that they have rights, but see their relationship with welfare officials as being outside the scope of conduct in which a concept of rights inheres.⁴⁸ The caseworker-client relationship, then, is one in which

⁴⁵ Interpreted broadly, in-custody questioning becomes merely one facet of the many-faceted principle against self-incrimination. There is language in the opinion to support this interpretation: "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way . . ." *Id.* at 467 (emphasis added).

⁴⁶ The caseworker's role ambivalence—between social therapist and bedroom sleuth, mentioned earlier,—probably adds to the client's confusion: The worker-as-therapist urges the client to reveal his secret self, and when he does, the worker-as-autocrat-or-policeman moves in to enforce the adverse legal consequences of this revelation.

⁴⁷ Even though the interview does not concern the topic of granting or denying aid, the relationship carries over in a more diffuse, less conscious form: powerful authority versus unworthy subject watching for clues as to what will be the "right" thing to do. See note 48 *infra*.

⁴⁸ Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370 (1966). This study confirms a specific instance of a widely accepted sociological generalization about the effects of role position upon interpersonal transactions. See, e.g., Lieberman, *The Effects of Changes in Role on the Attitudes of Role Occupants*, HUMAN RELATIONS, Nov. 1956, at 385. In that study, factory workers' attitudes were measured before and after promotion to supervisory positions. A marked correlation between attitudes and role position was found. Later, an economic recession forced layoffs and demotions of those previously promoted. Re-measurement showed that the attitudes again changed correspondingly. The underlying theory is that role

psychological coercion is inherent, just as in the police interrogation described in *Miranda*. Furthermore, there is judicial opinion which recognizes this interpretation.

b. The *Parrish* case.

The central question in *Parrish v. Civil Service Comm'n*⁴⁹ was whether caseworkers who had taken part in mass raids upon AFDC recipients had violated their constitutional rights. A secondary issue raised there—concerning waiver—is crucial to this discussion. The county welfare department argued that the recipients' right to freedom from warrantless search was waived when they consented to admit caseworkers to their homes. The California Supreme Court ruled that no effective waiver was shown, since a recipient's refusal to consent would result in suspension of her welfare benefits. The power to terminate aid, whether actually exercised, was held to be inherently coercive.⁵⁰

The *Parrish* ruling may be the nexus between the broad principle of the *Miranda* decision and specific situations of welfare fraud processing. If waiver of the freedom from search cannot occur by acquiescence in a caseworker's request, then neither can waiver of the right against self-incrimination—so long as the caseworker is performing his law enforcement function.

It may be doubted, however, that circumstances voiding a waiver of the fourth amendment restraint on warrantless searches can also void an apparent waiver of the fifth amendment restraint on self-incrimination. It might be argued that the rights guaranteed by the two amendments occupy different levels in the hierarchy of constitutional rights: the client-caseworker relationship which precluded waiver in *Parrish* might not have a similar effect in the welfare fraud-administrative setting described earlier.

Established case precedent would seem to overcome this argument. In *Boyd v. United States*⁵¹ the Supreme Court, commenting on the relation between the two amendments, stated:

occupants meet the expectations associated with that role. The change in function, to a certain extent brings a change in attitudes, in order that they be consistent with the newly adopted behavior and actions required by the role.

⁴⁹ 66 Cal. 2d 253, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). A caseworker had refused to take part in these early morning bed checks and was fired. He sought reinstatement, arguing that his superior's orders to do illegal acts could rightfully be ignored. For a full discussion of the facts and holding, see *Comment*, 5 SAN DIEGO L. REV. 258 (1968).

⁵⁰ 66 Cal. 2d at 261-64, 425 P.2d 228-31, 57 Cal. Rptr. 628-32.

⁵¹ 116 U.S. 616 (1886). Petitioner in a civil proceeding contested the forfeiture of

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in 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 in 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.⁵²

In the Court's view then, it appears that the two rights are generically identical. They are distinct only in application, by virtue of being different modes of the restraint against governmental invasion—of privacy of the home and person in the fourth amendment, and of privacy of the personality in the fifth.

Even accepting this equivalency of standards for waiver of either fourth or fifth amendment rights, it still may be argued that interviews taking place *in the recipient's home* present a different situation from that of *Parrish*, where the scene of consent was set at the client's

imported plate glass seized by the customs collector in New York. Under a statute offering the owner of seized goods an election between producing certain documents and forfeiting the goods, the district court ordered him to produce the invoice for the glass, since the quantity and value were important to the government's case. Petitioner objected because of the risk of criminal liability under other federal laws not involved in this particular civil proceeding. The Supreme Court reversed and remanded for new trial. The compulsory production of petitioner's private papers was held to be in violation of both the fourth and fifth amendments:

It is not the breaking of his doors, and rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . . and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony or his private papers . . . is within . . . condemnation* In this regard *the Fourth and Fifth Amendments run almost into each other.*

Id. at 630 (emphasis added).

This case has never been overruled. It has received recent approval in *Garrity v. New Jersey*, 385 U.S. 493, 496-98 (1967), and in *Spevack v. Klein*, 385 U.S. 511, 513-16 (1967). In *Garrity*, appellants (police officers) were told that if they refused to answer questions they would be removed from office. The Court declared:

There are rights of a constitutional stature whose exercise a State may not condition by the exaction of a price. . . . We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

385 U.S. at 500.

In *Spevack* petitioner was disbarred because he had refused, on fifth amendment grounds, to produce financial records or to testify in a judicial inquiry into alleged professional misconduct. The Court reversed disbarment, stating: "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." 385 U.S. at 516.

⁵² 116 U.S. at 633.

front door. Nor would the recipient's home seem to resemble the office interrogation settings such as were discussed in *Miranda*. Rather would the recipient seem to draw psychological support from the familiar surroundings of home and, to that extent, suffer less from the intimidation inherent in an office interrogation setting.

Nevertheless, it can be argued that physical surroundings are not the essential factors upon which a distinction about waiver is based. Certainly surroundings may be significant enough to be determinative in a case which must balance conflicting values.⁵³ But a common ground more fundamental to both *Parrish* and *Miranda* seems to be the *relationship* between the official and the accused. For example, the effects of the authority-versus-suppliant dyad mentioned earlier⁵⁴ seem sufficient to void a purported consent. Even more insidious would be the effects of the confidential relationship⁵⁵ carried over from the worker's therapist role. Its effect could result in the recipient's divulging information far beyond discretion. In such an instance, the fact that the questioning occurred in the recipient's home would add support to, rather than detract from, this argument.

This analysis is similarly applicable to the family support and welfare special investigator interviews. In the routine family support interview, the constitutional question does not arise, because the welfare applicant is in the position of a complaining witness seeking child support as a matter related to obtaining aid. This is distinguishable from the less frequent occurrence where the eligibility for funds already granted has been called into doubt. At such times there is a risk of criminal liability.⁵⁶ The police function has come into being,

⁵³ On this point commentators on *Miranda* have exposed its basic ambiguity concerning the extension of the rule to police field investigations. For the view that physical surroundings might not be crucial, see Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199, 211-12 (1966). For an opposite interpretation, see Lynch, at 221, 225-26 in the same symposium.

⁵⁴ See text accompanying notes 46-48 *supra*.

⁵⁵ For law enforcement and welfare administrative purposes confidentiality is more a myth than a reality. See note 24 *supra*.

⁵⁶ It has been this writer's impression that welfare officials and family support investigators, in performing their specialized welfare administrative functions, tend not to see themselves as presenting recipients with a risk of criminal liability. While on the witness stand, they identify their functions as, e.g., that of "determining eligibility," or "assisting the complainant to obtain child support." Even assuming that this testimony is insufficiently developed to amplify the law-enforcement nature, at crucial moments, of these administrative functions, there are grounds for suppression of the admissions so obtained. These grounds derive from the doctrine of unconstitutional conditions, arising in the *Boyd*, *Garrity*, and *Spevack* cases discussed in note 51 *supra*. An analogy to those cases may thus further strengthen an argument for suppression of self-incriminating admissions even if it is determined that the custodial interrogation

and the support interview is at that time focused upon the accused. The constitutional restraints would consequently apply. A similar analysis of the welfare investigators' interviews seems unnecessary, since the police function is being performed at all times by them: the recipient is under suspicion, and the investigator is determining whether the facts warrant a referral to the district attorney for prosecution.

The effects of a written waiver in these interviews remain to be determined. *Parrish* began by examining the consequences of the recipient's refusal to consent. Because suspension of benefits would have resulted, the court said that the government had a "heavy burden" to show a knowing and intelligent waiver as described in *Miranda*.⁵⁷ The burden had not been sustained; and the question as to how it might be remains unanswered. In the family support interview, a refusal to sign a waiver could result in suspension of aid; and even if it did not, there is indication in *Parrish* that the *seeming* possibility of such a consequence would be a coercive threat sufficient to void a purported waiver. It can in fact result in a suspension, because a refusal to waive would likely also be a refusal to divulge information. As such it comes within the ambit of the welfare statute, which requires cooperation with law enforcement officials concerning support by the absent father. Failure to cooperate disqualifies the recipient.⁵⁸ Regardless whether non-waiver actually does disqualify, to the recipient it may reasonably *seem* to do so. In her prior ex-

of *Miranda* is not present. The argument is that the inherently coercive relationship of welfare or family support administrator to the recipient will preclude admission of the recipient's damning statements, since those statements are made as a condition of maintaining aid eligibility. There may be a legitimate state interest in requiring this information from the recipient, for welfare purposes. See, e.g., O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443, 453-56, 460-77 (1966). But there is also strong precedent declaring that the information thus obtained may not be used in criminal prosecution: "There are rights of a constitutional stature whose exercise a State may not condition by exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (quoted more fully at note 51 *supra*).

⁵⁷ 66 Cal. 2d at 264 & n.13, 425 P.2d at 230 & n.13, 57 Cal. Rptr. at 630 & n.13.

[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination

An express statement . . . could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused. . . .

Miranda v. Arizona, 384 U.S. at 475. See notes 59 & 60 *infra*.

⁵⁸ W&IC § 11477: ". . . Any of the following acts by the parent . . . shall be deemed to be a refusal to offer reasonable assistance to law enforcement officers:

. . . (d) The concealment of the identity or whereabouts of the absent parent."

The family support investigator could properly infer that the recipient's silence on such matters as her boyfriend's alleged presence in the home amounts to "concealment of the identity or whereabouts of the [here, alleged] absent parent."

perience of being processed through the routine family support interviews with her original application for aid, she would have been told that failure to cooperate would cause disqualification. Her carryover of this experience to present interviews with family support investigators is not unreasonable. The *Parrish* court relied heavily upon this subjective element. It portrayed the caseworkers who sought entry to AFDC homes as "persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood [and who] posed a threat which was . . . certain, immediate, and substantial."⁵⁹ Thus the prosecution's burden of showing a knowing and intelligent waiver is indeed heavy. It is not shown by mere presentation of a waiver statement signed by the defendant.⁶⁰ The defense can require the prosecution to go much further, to prove that "an intentional relinquishment or an abandonment of a known right or privilege"⁶¹ occurred. Under this rule the prosecution's first hurdle is the requirement of volition. As shown, the real or imaginary authority of the interviewer over the recipient's aid status by itself may foreclose further state testimony. The second hurdle is the requirement that the waiver be knowing and intelligent.⁶² It is a formidable bar when seen in the light of the earlier discussion about competence and the welfare agency's duty to inform.

In summary, the prosecution's proof of waiver is open to attack at several points. The defense could raise these points by undertaking the following lines of questioning:

- (1) Did the client understand that her statements could lead to criminal prosecution?
- (2) What effect did she believe her disclosure or failure to disclose would have upon her welfare status?

⁵⁹ *Parrish v. Civil Service Comm'n*, 66 Cal. 2d at 263, 425 P.2d at 229, 57 Cal. Rptr. at 629. An omitted citation refers to *Lynumn v. Illinois*, 372 U.S. 528 (1963), in which the threat of discontinuing benefits was an important element in determining that a recipient's confession was coerced.

⁶⁰ As stated in *Miranda v. Arizona*, 384 U.S. at 476,

[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogations.

Id. at 476.

The mere fact that [Miranda] signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights.

Id. at 492.

⁶¹ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937) was cited in *Miranda* as the controlling standard of proof of waiver. 384 U.S. at 475.

⁶² See note 60 *supra*.

(3) Did she actually know the nature of the right being waived?⁶³

(4) Is her level of education and functioning intelligence adequate to understand the wording of the waiver?⁶⁴

V. CONCLUSION

Some aspects of welfare administration have been discussed, which raise key issues in preparing the defense in welfare fraud prosecution. Unless these issues are contested, the welfare cases will continue to receive the summary treatment outlined at the beginning of this note. One may question whether they *should* receive other than summary justice. The very existence of the question is characteristic of the conflicts inherent in our society's relationships with any deviant, low-status group.⁶⁵ The more antagonistic to our values those of the group seem, the more irrational our response, and the more likely we are to demand a less than full justice for them when brought within the scope of our penal laws.⁶⁶ Law enforcement and the machinery of criminal justice tend to become the forward phalanx of our defense and offense against them. Likewise, the objects of our scorn tend to see themselves as we do: unworthy of rights, incapable of responsibilities. This reflected image accelerates to new lows the downward spiral of their responsibility-assumption. It is a reciprocal action that confirms the mutual isolation of the prideful from the scorned. It is to the detriment of proud society, on the one hand,

⁶³ The study on recipients' understanding of welfare rights, mentioned earlier might support an argument that the recipient did not see herself as rights-bearing in the welfare context.

⁶⁴ The use of welfare records would be indispensable here for the defense's evaluation of her competency before trial.

⁶⁵ See, e.g., the research project on the enforcement of laws against homosexuals: Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 643 (1966).

⁶⁶ E.g., our feelings as affluent "haves" toward welfare recipient "havenots." Discussing these attitudes, a forensic psychiatrist writes:

The non-person, be he poor . . . is the inevitable enemy of the person. He is unconsciously perceived to threaten the person's possessions, his powers, his values—even his ultimate survival.

The solution—a typically neurotic one, in my opinion—is to compromise [the need for compassion with the need to penalize] by both giving to and oppressing the non-persons. . . . [T]hey must not be allowed to suffer to the point where they might be tempted to reverse the social order. At the same time they must be constantly reminded, through the infliction of punitive sanctions and discriminatory exclusions, that they are non-persons. They must be living examples to all who might be tempted to renounce their social obligations and join the ranks.

Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357, 365 (1966).

which must pay the price in human wastage and social destruction. It is also at the expense of the scorned deviants, on the other hand, paid in terms of individual suffering. The institution of criminal justice must not aid in perpetrating this social damage. More caution in prosecuting, more thorough contesting in trial, and a fuller hearing are necessary, not less.

MICHAEL S. EVANS*

* Student contributor, University of San Diego School of Law. Mr. Evans, who is currently on leave of absence from the Department of Public Welfare, San Diego County, has testified in his capacity as a caseworker in welfare fraud litigation. In addition, he is a candidate for a Masters Degree in social work at San Diego State College.