

## The Role of Law Enforcement in Child Welfare Checks

**ON JUNE 3, 2018, THE TABLOID NEWS** website TMZ reported: “Janet Jackson calls cops to do welfare check...on 1-year-old son.”<sup>1</sup> The article stated: “Law enforcement sources tell us Janet made the call to Malibu authorities late Saturday night, asking cops to check in on her son...who was with her estranged husband, Wissam Al Mana, at the Nobu Hotel. We’re told police did, in fact, check in—but found no one to be in danger.”<sup>2</sup>

Welfare checks are not criminal investigations. Nationwide, child welfare checks are routinely conducted by police officers who have reason to suspect that a child may be in imminent danger of abuse and neglect or require access to immediate medical aid. Some parents consent to allow law enforcement officers access to their home and their children to conduct welfare checks. When parents refuse to provide consent for child welfare checks, police officers must balance the protections afforded by the Fourth Amendment with child safety.

The Fourth Amendment of the U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and provides that “no [w]arrants shall issue, but upon probable cause.” The Fourth Amendment applies to the states through the Fourteenth Amendment.<sup>3</sup> Naturally, warrant requirements are implicated only if a search or seizure occurs.

The U.S. Supreme Court has upheld warrantless searches of vehicles as reasonable if they are undertaken pursuant to a police officer’s “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”<sup>4</sup> This type of search is commonly referred to as the “community caretaking doctrine.” However, the Court emphasized that there is a “constitutional difference between searches of, and seizures from houses and similar structures and from vehicles,” which “stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in ‘plain view’ of evidence, fruits, or instrumentalities of a crime, or contraband.”<sup>5</sup>

Police welfare checks of residences without a warrant generally are permissible if police officers have reasonable grounds to believe an inhabitant inside a residence is in imminent danger.<sup>6</sup> Though the laws vary somewhat from state to state, many states have policies similar to the one codified in California’s Penal Code,<sup>7</sup> which requires law enforcement agencies to develop and implement written policies and procedures regarding best practices for conducting welfare checks when the inquiry is motivated by concerns that the person may be a danger to him- or herself or others.<sup>8</sup> In order to make reasonable decisions, law enforcement

must have reliable information about what is going on inside a home.

### Police and Child Protective Services

Child protection often demands that law enforcement and social services work effectively together. It is not possible to provide an exhaustive list of circumstances in which a welfare check would be required because each instance must be carefully evaluated, with the law and applicable child protection standard of care as the principal considerations.

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For example, if a child is being abused or neglected, it is often necessary to remove the child from that home immediately, without court intervention. Approximately 20 states give social workers authority to remove children without a court order, but 46 states give such authority to police officers.<sup>9</sup> Even when social workers can remove children without police assistance, most still request law enforcement presence because parents are less likely to react violently if police are present.<sup>10</sup>

In cases in which the child does not appear to be in imminent danger and there is no need for immediate removal, does it still seem prudent to check on the child to make sure that the child is safe? Reports of child abuse are often vague because the reporting party may not know what is occurring in the house. If the reporting party heard screaming, followed by a child crying, it may not be clear whether removal is appropriate. The social workers would seek to check on the child to ensure the child’s safety. Parents can consent to allow social workers to enter their home and interview or inspect their children, though abusive and neglectful parents often refuse to give such consent. In these instances, social workers do not have the authority to force entry into homes to ensure that the children are receiving proper

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care. Thus, social workers turn to police for help in obtaining a child welfare check, but the police may or may not be able to gain access to the home and the child without a warrant.

Under the “community caretaking” exception to the Fourth Amendment, police may enter a home without a warrant if the officer has an objectively reasonable belief that a person within a home is in immediate need of aid.<sup>11</sup> In determining whether an officer acted reasonably in entering a home under the community caretaking function, one must look to the “reasonable inferences he is entitled to draw from the facts in light of his experience.”<sup>12</sup> The scope of the exception often depends on the nature of the underlying offense.<sup>13</sup>

In varying circumstances, courts have upheld warrantless entries by police to conduct child welfare checks. Because there is relatively little case law in California on this issue, the law in other states can be helpful in ascertaining when such entries have been found acceptable. In *State v. Bittner*, a South Dakota case, the defendant stabbed officers who had entered his home after a call regarding domestic violence.<sup>14</sup> After the stabbing, witnesses told police officers at the scene that a baby was inside the house.<sup>15</sup> Officers entered the home to search for the child.<sup>16</sup> While in the home, the officers found and recovered the knife that had been used to stab other police officers.<sup>17</sup> The court held that it was reasonable for officers to believe that a child may be in need of emergency aid or in danger when two officers had been stabbed in the defendant’s home and that the warrantless entry was justified.<sup>18</sup> In *in re Dawn O.*, a California appellate case, a young child reported to officers that she was locked out of her home and indicated that she may have siblings inside the home.<sup>19</sup> Upon entry, officers found two small children, including an infant in a crib, in the home alone.<sup>20</sup> Again, the court held that the warrantless entry was reasonable in order to ensure the safety of any children who may have been within the home.<sup>21</sup>

Courts have upheld warrantless entries in cases in which anonymous callers provided detailed information regarding child abuse and a potential emergency situation.<sup>22</sup> Courts also have upheld warrantless entries in cases in which there appears to be a child inside in need of medical attention.<sup>23</sup> Warrantless searches are not permitted in cases in which law enforcement has reason to know or suspect that a child is already deceased, as there is no emergency under those circumstances.<sup>24</sup>

The police officers’ decision whether to enter a home to check on a child without a warrant is a difficult one to make. The officers are required to use their best judgment on a case-by-case basis. It is therefore incumbent upon the social workers who receive the referrals regarding potential abuse and neglect to make sure that the officers are aware of the relevant facts that may help them determine whether a child is likely to be in danger in the home. Law enforcement may be in danger, or, alternatively, subject to liability, if the social workers do not provide them with the information available prior to entering the home.

### Delayed Access

The following case is instructive on the issue of police and social worker access for child welfare checks.<sup>25</sup> Two-year-old Gail C. lived alone with her pregnant mother who suffered from severe mental health disorders, including schizophrenia and bipolar disorder. Gail’s mother stopped taking her medications when she learned that she was pregnant with her second child, and her mental health subsequently deteriorated significantly. She told several people that she planned to give birth at home by herself. The woman’s family grew concerned that Gail was not being properly cared for by her mother and called Child Protective Services repeatedly. When social workers arrived at the home to check on Gail, Gail’s mother refused to let them inside and denied them access to Gail. On several occasions, the social workers contacted law enforcement and requested that officers perform a child welfare check on Gail. The officers were also unsuccessful in gaining access to the home to check on Gail. Although Gail’s family had stated that they believed she was being neglected, the police did not have enough information to conclude that she was at risk of immediate harm or in need of medical attention.

Thus, the child was left to fend for herself for several months, during which time her mother gave birth at home. Neighbors alerted Child Protective Services that the mother no longer looked pregnant but said they could not hear either a new baby or Gail in the home. By this time, Child Protective Services had given up on contacting law enforcement for assistance, reasoning that they had not been helpful in performing child welfare checks in the past. Finally, four months after Gail’s family first began calling Child Protective Services, a neighbor flagged down a passing police officer to report a horrible odor emanating from the apartment where Gail resided with her mother. The officer determined

that the odor smelled like a dead body and, believing others in the home needed immediate aid, forced entry into the home and found Gail cuddling the body of her deceased sibling, whom he described as “mummified.” The county paid more than \$1 million to Gail for, among other things, its failure to continue contacting police after it knew that Gail’s mother was no longer pregnant.

This case is just one tragic example of what can happen when social workers fail to share enough information with police officers who are assisting them with child welfare checks. Had the social workers fully communicated the seriousness of Gail’s mother’s mental health problems or called again once they knew Gail’s mother had given birth, the officers may have felt justified in entering the home without a warrant, and Gail’s damages could have been mitigated or prevented altogether. It is critical for workers from both entities to share all information in their possession so that social workers and law enforcement can work together to determine whether a warrantless entry is appropriate.

### Qualified Immunity

If police determine that it is necessary to enter a home to perform a child welfare check under circumstances that do not actually warrant such an intrusion, qualified immunity may apply. Section 1983 of the Civil Rights Act creates a private cause of action against government officials when they violate any constitutional right.<sup>26</sup> To prevail in a Section 1983 cause of action, plaintiffs must prove that they were deprived of a constitutional right, and that the person who deprived them of that right was acting under color of law.<sup>27</sup> Generally, qualified immunity affords police officers some leeway to make reasonable mistakes in the course of performing their duties. Qualified immunity shields government officials from standing trial in Section 1983 lawsuits unless their conduct has violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>28</sup> To ascertain whether qualified immunity applies, the court must decide preliminarily “whether the facts, taken in the light most favorable to the plaintiff, demonstrate a constitutional violation.”<sup>29</sup> If so, the court must then determine whether the right was clearly established.<sup>30</sup> In other words, whether, in the specific context of the case, “it would have been clear to a reasonable officer that his conduct was unlawful.”<sup>31</sup>

A police officer cannot be granted qual-

ified immunity for a demonstrably illegal search. The U.S. Supreme Court has held that a qualified immunity analysis “must be undertaken in light of the specific context of the case, not as a broad general proposition.”<sup>32</sup> In *Mullenix v. Luna*, the Court wrote:

We have repeatedly told courts... not to define clearly established law at a high level of generality.” The dispositive question is “whether the violative nature of particular conduct is clearly established.” This inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine... will apply to the factual situation the officer confronts.”<sup>33</sup>

Accordingly, whether a police officer is entitled to qualified immunity for alleged improper conduct during a welfare check is often a mixed question of fact and law.

Balancing the privacy interests provided in the Fourth Amendment and children’s protection from abuse and neglect is challenging and fraught with uncertainty. While

courts cannot condone law enforcement officials routinely conducting warrantless searches in the name of preventing child abuse, the need to ensure that children are safe in their homes is a paramount concern. Courts have tried to marry these two conflicting needs with the community caretaking exception to the Fourth Amendment, and both social services and law enforcement need nuanced instruction on exactly when child welfare checks are warranted to save children from extreme harm. Nonetheless, when reasonable mistakes are made, police officers are protected from liability under the qualified immunity doctrine.<sup>34</sup> ■

<sup>1</sup> Staff, *Janet Jackson calls cops to do welfare check... on 1-year-old son*, TMZ (June 3, 2018), <https://www.tMZ.com/2018/06/03/janet-jackson-calls-police-welfare-check-1-year-old-son-eissa-estranged-husband-wissam>.  
<sup>2</sup> *Id.*

<sup>3</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>4</sup> *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

<sup>5</sup> *Id.* at 442.

<sup>6</sup> *See Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006); *Michigan v. Fisher*, 558 U.S. 45 (2009)

<sup>7</sup> *See, e.g., ARIZ. REV. STAT. TIT. 13. CRIM. CODE §13-3601N* (“When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer shall determine if a minor is present. If a minor is present, the peace officer shall conduct a child welfare check to determine if the child is safe and the child might be a victim of domestic

violence or child abuse.”)

<sup>8</sup> PEN. CODE §11106.4:

(a) Every law enforcement agency shall develop, adopt, and implement written policies and standard protocols pertaining to the best manner to conduct a ‘welfare check,’ when the inquiry into the welfare or well-being of the person is motivated by a concern that the person may be a danger to himself or herself or to others. The policies shall encourage a peace officer, prior to conducting the welfare check and whenever possible and reasonable, to conduct a search of the Department of Justice Automated Firearms System via the California Law Enforcement Telecommunications System to determine whether the person is the registered owner of a firearm.

(b) For purposes of this section, “reasonable” as used in subdivision (a) means that the officer could conduct the firearm registry check without undue burden on the execution of the officer’s other duties, that there are no exigent circumstances demanding immediate attention, and that the peace officer has access to, or can reasonably ascertain, relevant identifying information.

<sup>9</sup> DONNA PENCE & CHARLES WILSON, *THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT* (1992), available at <https://www.childwelfare.gov/pubPDFs/law.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Mincey v. Arizona*, 437 U.S. 385, 392 (1978).

<sup>12</sup> *People v. Ray*, 21 Cal. 4th 464, 477 (1999).

<sup>13</sup> *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984).

<sup>14</sup> *State v. Bittner*, 359 N.W. 2d 121, 123 (S.D. 1984).

<sup>15</sup> *Id.* at 126.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 126-27.

<sup>19</sup> *In re Dawn O.*, 58 Cal. App. 3d 160, 162 (1976).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 163-64.

<sup>22</sup> *See State v. Boggess*, 115 Wis. 2d 443 (1983) (the reporting party provided the first and last names of the children and gave specific information regarding injuries that the children sustained); *State v. Frink*, 42 Ore. App. 171, 176-77 (Ct. App. 1979) (the reporting party stated that a child was being “shot up with drugs”).

<sup>23</sup> *See Wooten v. State*, 398 So. 2d 963 (Fla. Dist. Ct. App. 1981) (the reporting party witnessed a man shake, yell at, and strike a thirteen-month old baby before taking the child into his apartment).

<sup>24</sup> *People v. Draper*, 196 Colo. 450 (1978).

<sup>25</sup> *Gail C.*, a minor by and through her guardian ad litem, *Marla C. Mahoney v. County of Riverside*, et al. No. RIC1804569, (Riverside County Superior Ct., 2018).

<sup>26</sup> *See Owens v. City of Independence*, 445 U.S. 622, 651-52 (1980).

<sup>27</sup> 42 U.S.C. §1983.

<sup>28</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>29</sup> *Curley v. Klem*, 298 F. 3d 271, 277 (3d Cir. 2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

<sup>30</sup> *Couden v. Duffy*, 446 F. 3d 483, 492 (3d Cir. 2006).

<sup>31</sup> *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

<sup>32</sup> *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

<sup>33</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal citations omitted).

<sup>34</sup> Qualified immunity does not apply to state law causes of action, e.g., CIV. CODE §52.1, which authorizes actions against those who interfere or attempt to interfere by threat, intimidation, or coercion with the exercise of California or federal constitutional or statutory rights. Such causes of action are generally subject to the government claims statutes and state immunities, however.



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