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Welfare Fraud and the Fourth Amendment

Erik G. Luna

I. INTRODUCTION

Welfare fraud is an epidemic. Although concentrated in the impoverished inner cities of America, this pathetic form of theft has been uncovered in uptown apartments and beach-front condos. Public assistance fraud can be perpetrated by individuals, families, and "mom-and-pop" grocery stores. In some cities, it can take on the characteristics of organized crime. Welfare fraud has even corrupted the public officials in which the citizenry has vested solemn trust. The numbers are staggering—billions of dollars in government largesse are illegally siphoned off every year. As one might guess, the public reaction has been one of absolute anger and distrust. The legislative response has echoed this public opinion. Unfortunately, the heated rhetoric often fosters draconian solutions, such as placing welfare children in orphanages, cutting off aid to legal immigrants, or simply abolishing welfare altogether.

Rather than championing efforts to reduce welfare fraud—thereby diminishing the demand for ignoble and mean-spirited solutions—welfare advocates have invested time and effort into undermining the investigatory tools available to law enforcement. In this way, these organizations are slowly but surely "killing the goose that lays the golden eggs." The final resolution might be to eliminate public assistance programs rather than to countenance unmitigated welfare fraud.

A case in point is the "consent walk-throughs" conducted by public assistance fraud investigators of the San Diego District Attorney's Office. With (and only with) the voluntary consent of the welfare recipients, these investigators inspect residences to insure eligibility for public assistance. Various San Diego area welfare advocates, however, have

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balked at this procedure. Although these organizations have not provided specific illustrations, they have made the general claim that consent walk-throughs violate the welfare recipients' Fourth Amendment rights. A comparison of case law to the written policies and actual procedures, however, reveals that these well-intentioned advocates are mistaken.

The heart of this Article is an analysis of the various investigatory rubrics that are available to welfare officials. In particular, this piece will analyze and appraise (1) the welfare "home visit" advocated by the United States Supreme Court in Wyman v. James,¹ (2) the consent search in a welfare context,² and (3) the suitability of administrative search warrants to welfare fraud investigations.³ With these rubrics in mind, this author suggests a tiered approach to searches of welfare recipients' homes. Each of the above-mentioned investigatory tools would have a discrete but important purpose in preventing and prosecuting welfare fraud. In this way, the public's right to prevent fraud and the recipient's constitutional right to be free from unreasonable searches and seizures can be harmonized.

II. A PRIMER ON WELFARE FRAUD

A. The Many Faces of Welfare Fraud

On paper, Abdul and Sharifa Roauf appeared to be an unexceptional example of a family in need. They lacked the means to care for their children—every dollar the Roaufs could scrap together went to a relative in need of emergency heart surgery.⁴ To make ends meet, they received public assistance in the form of food stamps, Aid to Families With Dependent Children (AFDC), and free medical care.⁵ The Roaufs collected nearly $150,000 in welfare benefits over the course of a decade.⁶ This government largesse was seemingly well spent, ensuring that the children had a roof over their heads, clothes on their bodies, and food in their bellies. Public empathy and support appeared to be warranted.

This family, however, had a few little secrets. Sharifa Roauf was not an unemployed housewife; she was a fashion designer who created dresses for contestants in the Miss California and Miss U.S.A. pageants.⁷ The couple's children were not infants and toddlers; they were

1. 400 U.S. 309 (1971); see infra notes 172-277 and accompanying text.
2. See infra Part III.B.
3. See infra Part III.C.
5. Id.
6. Id.
7. Id.
adults who had long since left home. There was, in fact, no relative in dire need of open-heart surgery. The Roaufs also failed to list a few assets on their welfare application: $144,000 in cash, 17,700 German Deutschemarks, and "a sizeable amount" of jewelry and U.S. savings bonds. The apparently destitute couple had duped the government with impunity. Welfare's version of "Bonnie and Clyde" would only be brought to justice after an eleven-year fraud spree.

The Roaufs, of course, have their criminal contemporaries. One welfare recipient concealed her employment as a professional art dealer, as well as her Porsche and Newport Beach apartment. An Oakland couple received nearly $200,000 in public assistance while living in a luxurious seven-bedroom residence overlooking the San Francisco Bay. Another member of the welfare rolls lived in a $1500-a-month New York City apartment and had a "mere" $14,000 in the bank. And Florida officials uncovered a Palm Beach welfare recipient who owned seven fried chicken restaurants. Most welfare offenders, however, are substantially less colorful. A San Diego couple scammed $54,000 in housing subsidies by feigning their identities: the female played the part of "a single mother in need of a place to live," while the male thespian "pretended that he was her landlord." An Oxnard, California, woman fraudulently received more than $30,000 in public assistance based on the alleged three-year absence of her husband. The father of her five

8. Id.
9. Id.
10. Id.
14. Walsh, supra note 11, at A1. Similarly, Massachusetts investigators have seen their share of infamous welfare fraud. "There was the guy on disability who managed to run marathons, the Andover engineer with the Saab 9000, the Amesbury attorney with the all-cash practice, the state employee with the yacht: All wormed their way onto public assistance." Michael Grunwald, Checking the Welfare Rolls; State Investigators Pound Their Beat in Search of Cheaters, BOSTON GLOBE, Aug. 29, 1995, at 1.
children, however, was far from absent; he had never left the home.\textsuperscript{17} A single mother living in Ojai, California, received nearly $10,000 in welfare grants to provide for her three sons. Unbeknownst to the county social services agency, her boys actually lived in Virginia with their father.\textsuperscript{18} Some Louisiana parents have “coach[ed] their children to act less intelligent and more troubled than they actually are” to obtain special welfare benefits.\textsuperscript{19} Legislators and educators have noted that welfare recipients often “prod their children to intentionally underperform on school tests and misbehave so they can qualify for ‘crazy checks.’”\textsuperscript{20}

Although typically committed by a single individual or family, welfare fraud can take on an organized, commercial structure. For instance, a Woodland Hills, California scam artist facilitated dozens of false applications for public assistance.\textsuperscript{21} The welfare checks were delivered to the ringleader’s home, where the nominal recipients would endorse the checks and receive a portion of the proceeds.\textsuperscript{22} In Los Angeles, more than 200 “Skid Row” homeless people were coerced into signing over their welfare checks by a band of care home workers.\textsuperscript{23} And from Maryland\textsuperscript{24} to Seattle,\textsuperscript{25} crooked merchants have unlawfully swapped, among other things, money, liquor, cigarettes, and narcotics for food stamps.\textsuperscript{26}

\begin{footnotesize}
6, 1996, at B3.
17. Id.
18. Id.
20. Id.
22. Id.; see also Woodland Hills: Leader of Welfare Fraud Ring Sentenced to 6 Years, L.A. TIMES, Mar. 4, 1996, at B2; Ed Jahn, \textit{Building, Zoning Code Crackdown Angers Many Residents of Tecate}, SAN DIEGO UNION-TRIB., Apr. 30, 1994, at B4 (a San Diego County investigation uncovered numerous Tecate residents using the same address).
26. See also \textit{Bogus Stores Key to Food Stamp Fraud}, SAN DIEGO UNION-TRIB., Sept. 16, 1994, at A13.

In Los Angeles, the owner of a milk delivery company quit selling dairy products to give his full attention to redeeming food stamps obtained from other drivers. He charged other drivers a 5 percent handling fee and by the time he was caught, was illegally redeeming up to $6,000 in food stamps a day.
\textit{Id.}; see also \textit{Stores are Cut from Food Stamp Program}, L.A. TIMES, Oct. 28, 1995, at A21.
\end{footnotesize}
Welfare fraud can also smack of ignominy and absurdity. The media have uncovered convicted criminals illegally collecting welfare benefits while incarcerated. According to one Social Security official, "As many as 10 percent of California's 74,000 county jail inmates may be defrauding $36 million to $60 million" in public assistance. Conversely, welfare fraud sometimes infiltrates the ranks of public trust. For example, a San Diego police officer and his spouse allegedly defrauded $30,000 in state relief. "The couple pretended not to be married," argued prosecutors, "so the wife could pose as a single mother of three and collect welfare benefits." A San Bernardino County welfare worker arranged for $59,000 in illegal public assistance payments to four cohorts. And a number of employees of the San Francisco Department of Social Services orchestrated welfare payments to fictitious recipients. The social workers surreptitiously put friends and relatives on welfare rolls and then took a "fun-in-the-sun Caribbean cruise" on the government's bill to boot.

These are the many faces of welfare fraud. They are sometimes arrogant, other times pitiful, but always criminal.

B. The Categories of Welfare Fraud

The typical perpetrator of public assistance fraud fits within one of three categories. First, a recipient may hide earnings from employment. "Unreported income" constitutes the leading form of welfare

27. Inmates Collecting from Uncle Sam, SAN DIEGO UNION-TRIB., Nov. 12, 1995, at A3. California is not the only state duped by prison inmates. Connecticut's attorney general, for example, has estimated that more than $2 million in state welfare benefits have been illegally received by incarcerated criminals. Christopher Keating, State Says Nine Inmates Received Welfare Checks Behind Bars, HARTFORD COURANT, Dec. 16, 1995, at A3.


29. Id.


33. Eloise Anderson, State Welfare System is an Easy Mark, SAN DIEGO UNION-
fraud. Second, a parent who has been certified as "absent" in order to collect augmented payments may, in fact, be present in the home. Third, the recipient may fraudulently collect government child support when his children actually live elsewhere.

Another significant form of welfare fraud is committed by individuals who are geographically ineligible. For example, an extensive multi-state investigation uncovered seventy-seven people who worked in Nevada but illegally received public assistance benefits in Arizona. A New York state probe revealed that a quarter of its recipients were also members of New Jersey's welfare rolls. The most infamous and publicly decried version of welfare "forum shopping," however, has an international flavor. Non-citizens—almost exclusively Mexican nationals—cross the border to receive welfare benefits au gratis before repatriating. California Assemblymember Jan Goldsmith videotaped numerous Mexican citizens "day-tripping into the United States for free medical care." The state legislator found that the international defrauders were "so brazen and unafraid of being caught that many parked at U.S. clinics in their cars with Mexican plates." On any particular day, a single welfare investigator can catch upwards of twenty Mexican residents illegally collecting welfare benefits. And lest one believes that only impoverished non-citizens commit international welfare fraud, investigations have uncovered affluent foreigners entering the United States for expensive surgeries on the taxpayers' bill.

Organized welfare racketeering primarily revolves around the illegal trade and trafficking of food stamps. The basic scam involves welfare recipients selling their food stamps at less than face value—typically fifty to seventy cents on the dollar—in exchange for hard cash. Then

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34. See, e.g., Marshall, supra note 33, at C5.
35. Anderson, supra note 33, at B7; Marshall, supra note 33, at C5.
36. Steepleton, supra note 33, at B3.
38. Zuckerman, supra note 13, at 72.
41. Id.
43. Sanchez, supra note 39, at A3.
44. See Jennifer Dixon, USDA Mulls Slashing Number of Stores that Take Food
the retailer (usually a corrupt grocer) redeems the full value of the food stamps via the government. The recipients might also trade their food stamps for statutorily prohibited items, such as alcohol and cigarettes. Federal investigators have uncovered sham grocery stores without food inventory that exclusively launder trafficked food stamps. According to an assistant inspector general for the United States Department of Agriculture (USDA), “Food stamps are so lucrative for some people that they forget about the grocery business and get into the food stamp business.” A whole variety of intermediaries can be injected into a food stamp scam. Most notably, recipients can exchange their food stamps for narcotics, and drug dealers then sell the coupons to retailers for cash.

Stamps, SAN DIEGO UNION-TRIB., Jan. 6, 1995, at A10 [hereinafter Dixon, USDA Mulls Slashing] (“In a typical trafficking scheme, food stamp recipients sell their coupons for cash to a retailer who pays them less than face value, generally 50 to 70 cents on the dollar. The grocer is then reimbursed the full amount from [the federal government].”); see also Jennifer Dixon, Food Stamp Scams Get Elaborate, S.F. CHRON., Mar. 31, 1994, at B2 [hereinafter Dixon, Food Stamp Scams] (“[N]etworks of small grocery stores are buying food stamps from recipients at cut rates, then redeeming them from the government at full value.”); Bogus Stores Key to Food Stamp Fraud, supra note 26, at A13; Electronic Food Stamps Prove Vulnerable to Fraud, supra note 24, at A3; Stores are Cut From Food Stamp Program, supra note 26, at A21.

47. Bogus Stores Key to Food Stamp Fraud, supra note 26, at A13.
48. Id.
49. See Lorenza Munoz, 18 Held in Food Stamp Inquiry, L.A. TIMES., Feb. 7, 1996, at B2 (“The two-month investigation . . . zeroed in on so-called 'runners,' who buy food stamps at 50% of their value from recipients and then resell the stamps to grocery stores authorized by the USDA to redeem the stamps.”); Bogus Stores Key to Food Stamp Fraud, supra note 26, at A13 (“Some recipients use their coupons to buy drugs, alcohol or other contraband, investigators say, while restaurants trade them for produce and meat with their suppliers and route drivers.”); Stores are Cut from Food Stamp Program, supra note 26, at A21 (“Unscrupulous grocers may also purchase food stamps from other stores, wholesalers, route drivers or drug dealers, who exchange cash and contraband for coupons.”).
50. See John L Mitchell, 683 Stores Barred From U.S. Food Stamp Program, L.A. TIMES, Nov. 17, 1995, at B3 (“Food stamps also have become a medium of exchange for cash to buy drugs . . .”); Dixon, USDA Mulls Slashing, supra note 44, at A10 (“Crooked retailers also may buy stamps from drug dealers and other traffickers who trade the coupons for cash and contraband.”); Dixon, Food Stamp Scams, supra note 44, at B2 (“[The retailers'] source of food stamps may be welfare recipients or middlemen and drug dealers, who trade the paper coupons for drugs or other items of value on the street.”).
C. Welfare Fraud by the Numbers

The sheer magnitude of American public assistance is overwhelming. Nationwide, 27.5 million people received food stamps in 1994—or one out of every ten Americans—with a government price tag of about $25 billion.\(^5\) In 1991, the federal government topped the $20 billion mark in AFDC payments.\(^5\) Unfortunately, public assistance fraud has kept pace with the ever-increasing federal welfare budget.\(^4\) The USDA estimated that $3 billion in food stamps are fraudulently acquired every year.\(^2\) Some officials have estimated that the fraud rate for food stamps hovers around ten percent.\(^5\) Others have argued that the percentage is much larger, particularly in non-food stamp aid. According to a survey of welfare officials, “The most common [AFDC fraud] estimates centered around 30 percent.”\(^6\)

Welfare fraud is at epidemic proportions in some states and local communities. New York City found that sixty percent of its public assistance applicants were actually ineligible.\(^5\) Florida officials estimate that nearly fifty-one percent of state welfare cases are fraudulent.\(^9\) In California, nearly three million people receive AFDC assistance,\(^5\) and

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51. Bogus Stores Key to Food Stamp Fraud, supra note 26, at A13.
52. Dixon, USDA Mulls Slashing, supra note 44, at A10 (program costs $24 billion a year); Robert Fear, Bid to Abolish Food Stamps Fails in House, SAN DIEGO UNION-TRIB., Feb. 25, 1996, at A1 (program costs $25 billion a year); Tom Webb, Some in GOP Resist Shift of Food Stamps, SAN DIEGO UNION-TRIB., Feb. 24, 1996, at A13 (program costs $26 billion a year).
54. It should be noted that the United States is not the only nation afflicted by welfare fraud. Canadian officials have uncovered prison inmates illegally collecting millions of dollars in public assistance payments. Scott Magnish & Dick Chapman, Metrocrats Nailed Cons on Welfare, TORONTO SUN, Mar. 21, 1997, at 3; Ian Robertson, Cons in Welfare Scam, TORONTO SUN, Mar. 20, 1997, at 2. Additionally, $4.5 billion in welfare fraud is committed each year in Great Britain. See Sarah Lyall, Britain Seeks Informers to Fight Welfare Fraud, N.Y. TIMES, Oct. 29, 1996, at A10.
57. Anderson, supra note 33, at B7.
58. See Zuckerman, supra note 13, at 72; Malcolm Forbes, Jr., Magnificent Mayor, FORBES, Sept. 11, 1995, at 23. For example, nearly 30,000 New York City residents falsely claim that they are renting rooms in other people’s apartments in order to receive housing subsidies. Russ Buettner, New Lease on Welfare Scams Seen, DAILY NEWS (New York), Mar. 21, 1996, at 8.
59. Walsh, supra note 11, at A1. Moreover, as much as 59% of Florida food stamp claims are fraudulent. Id.
60. Anderson, supra note 33, at B7.
the state distributes almost $3 billion in food stamps. In fact, California doles out $28,000 in welfare benefits every minute. Cautious estimates, however, place the total amount of welfare fraud in California at $1 billion per year. Some experts have argued that as many as sixty-two percent of all state public assistance recipients are committing some form of welfare fraud. The amount of AFDC fraud alone is "enough money to pay for 750 million meals at a nonprofit food kitchen or to buy 50,000 new police cars."

A number of California communities have felt the brunt of public assistance theft. In Los Angeles County, one million residents receive $70 million in food stamps each month, while 900,000 people collect $160 million in AFDC benefits per month. Overall, one in five county residents receives some type of welfare payment. A recent study, however, determined that more than thirty-five percent of these welfare recipients were defrauding the system. A similar investigation in Fresno County concluded that nearly forty-three percent of all welfare benefits resulted from fraud. In Orange County, approximately $9 million in food stamps are disbursed each month to about 142,000 recipients, but a staggering 62.5% of child-only welfare payments in Orange County

64. See Debra J. Saunders, Rampant Fraud in AFDC, S.F. CHRON., Dec. 3, 1993, at A28; see also Richardson, O.C. Welfare Recipients Subject of Random Fraud Investigations, supra note 11, at A1. The numbers for individual welfare programs can be staggering. Of the cases investigated, nearly 67% of Medi-Cal's free medical services recipients were committing fraud. Bonnie Weston, Healthy Take From Medi-Cal Sweep, ORANGE COUNTY REG., June 27, 1996, at B1.
68. See id.
69. CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, LOS ANGELES COUNTY WELFARE FRAUD STUDY (1997) (on file with author) [hereinafter LOS ANGELES COUNTY WELFARE FRAUD STUDY].
70. Id.
are fraudulent.\textsuperscript{72} A follow-up study determined that forty-five percent of all Orange County welfare recipients were committing fraud.\textsuperscript{73} Even with the limited resources available for welfare investigations, Orange County law enforcement was able to detect and prevent nearly $300 million in public assistance fraud over a four-year period.\textsuperscript{74} In San Diego County, $500 million in AFDC benefits are distributed to 63,000 recipients each year, with another 150,000 county residents receiving other forms of public assistance.\textsuperscript{75} From July 1996 through January 1997, however, county investigators uncovered more than $4 million in actual and potential welfare fraud.\textsuperscript{76}

These are the statistics for welfare fraud—they speak for themselves.

D. Rhetoric and Reaction to Welfare Fraud

Welfare has been placed in the crucible of public scrutiny.\textsuperscript{77} Former President Ronald Reagan's image of the "welfare queen" continues to haunt American discourse.\textsuperscript{78} A majority of those polled in a \textit{Los Angeles Times} survey believed that "[p]eople are poor because they don't want to work, because welfare pays better, because they lack morals and values, or have been through a divorce or other family breakdown."\textsuperscript{79} The survey's lead sociologist concluded that "[p]eople here believe the poor in large part have brought their problems on themselves."\textsuperscript{80} "There is an antipathy to the welfare system here and anger
at having to support it," opined another scientist involved in the poll. Fifty-three percent of those surveyed believed that poor people have it easy because they receive welfare benefits without doing anything in return. Likewise, a majority felt that "[t]he government should [not] guarantee every citizen enough to eat and a place to sleep." More than two-thirds of those surveyed believed that welfare entices able-bodied people to become dependent on government aid. "There are lots of jobs out there right now for anyone who wants to work," argued one participant in the study. "But so many of these people don't want to 'lower themselves.' It's easier to just mooch off the system."

The current public resentment of welfare recipients is not a novel phenomenon; its pedigree can be traced to the fabled American work ethic. "There is a centuries-old notion that being poor is an indicator of immorality," argues UCLA law professor Gary Blasi. "There is a presumption that all moral people are hard-working people, and hard-working people have jobs." When this presumption inexplicably fails, the public points the finger at two much-maligned groups. First, the public often views welfare recipients as alcoholics and drug addicts who exploit the system to get their "fix." Cutting back on welfare, some have argued, will "protect taxpayers from subsidizing drug and alcohol abusers." Second, the public unartfully associates welfare with race and national origin. In the aforementioned Los Angeles Times poll, mi-

81. Id.
82. Id.
83. Id. (52% disagreeing with the original statement).
84. Id.
85. Id.
86. Id.
87. Richardson, O.C. Welfare Recipients Subject of Random Fraud Investigations, supra note 11, at A31.
88. Id.
89. See, e.g., Trounson, supra note 79, at A31. "Why do we give general relief and other welfare checks to homeless alcoholics and drug addicts who then spend the money on their drug of choice?" Funding of Drug Addicts, Opinion, SAN DIEGO UNION-TRIB., May 15, 1994, at G2. Some politicians argue that welfare recipients are being unfairly stereotyped "as drug users, when in fact they are most often youthful women with children." Elliot Diringer & John Wildermuth, Welfare Plan Attacked as Unrealistic, S.F. CHRON., Jan. 9, 1997, at A1. Others, however, point to one welfare recipient's public statements as being indicative of reality: "The price of [marijuana] has really gone up recently . . . I'm on welfare and I can't afford it now." Id.
orities and immigrants were the groups most often identified with poverty and welfare. Scapegoating racial minorities and recent immigrants, either by overt attacks or veiled rhetoric, has become an unfortunate mantra of many welfare opponents.

As expected, government officials have responded to this public opinion with their own phalanx against the welfare system. The governor of California recently assailed welfare as a form of "subsidized idleness." San Diego county supervisors "clearly disdain" the welfare programs they control, arguing that "[w]elfare fosters dependence on government in place of individual responsibility." These local officials assert that "the welfare system makes a mockery of the work ethic when it should preach it. It's anti-family and perpetuates the multigenerational cycle of poverty." The California Health and Welfare Secretary has been equally critical of the state's public assistance programs: "We cannot and will not tolerate this outrageous abuse of a system that is intended to help the truly needy and not the truly greedy."

"[N]othing can hurt the current [welfare] system," argued Wisconsin Governor Tommy Thompson—"It's broken." Both congressional leaders and state legislators have promulgated this "nothing to lose" philosophy. Some of the suggested reforms seem eminently reasonable, while other methods appear overly intrusive or even draconian. Some lawmakers advocate tying benefits to the academic grades achieved by the children of welfare recipients. Others would prevent recipients

91. Trounson, supra note 79, at A31.
95. Id.
97. Whitman & Glastris, supra note 78, at 26.
98. High-tech welfare reforms have been installed throughout the nation, including electronic food stamp "swipe" cards that operate like automated teller machine (ATM) cards; fingerprint and photo imaging of welfare recipients to prevent fraud; and direct deposit of welfare payments into recipients' bank accounts to preclude illegal trafficking in welfare checks. Rother, supra note 75, at B1; AFDC Fingerprinting Will Begin in L.A., SAN DIEGO UNION-TRIB., Mar. 31, 1994, at A3. Other programs target those who are caught defrauding the system, including posting the names of people convicted of welfare fraud and permanently disqualifying the offenders from ever collecting benefits again. County Will Post Welfare Fraud Names, SAN DIEGO UNION-TRIB., May 13, 1994, at B2; Edward Epstein, Wilson Begins New Attack on Welfare Fraud, S.F. CHRON., Aug. 19, 1994, at B3.
from collecting higher payments for additional children and would furnish birth control for all beneficiaries. A number of states, including California, have contemplated requiring underage mothers to live with their parents in order to be eligible for welfare benefits. Furthermore, both federal and state legislators have advocated placing welfare children in state-run orphanages under certain circumstances. California’s governor has even urged county welfare offices to advise poor mothers in risky living environments to give up their children for adoption. Many officials, however, are not interested in changing the system—they want to downsize or even abolish government-sponsored welfare. “Popular political thinking,” argues one welfare official, “calls for the elimination of social-welfare altogether.”

One would think that welfare advocates and civil libertarian organizations would focus their efforts on assuaging negative public opinion, advocating the substantial benefits of public assistance, and saving the welfare “safety net.” Eliminating welfare programs would undoubtedly exacerbate crime rates, increase the homeless population, and create serious public health risks. “Without the food stamps,” related one seventy-five-year-old widow, “all I will have left to do is die. Without them, ... I will starve to death.” Six-year-old Alison Higginbotham suffers from a “rare seizure disorder called infantile spasms.”


104. See, e.g., id.; Epstein, supra note 98, at B3; Lochhead, supra note 100, at A3; One Small Step, supra note 100, at B1; Fear, supra note 52, at A1; Polick, supra note 77, at B9; Rother, supra note 75, at B1.


106. See id.


lic assistance, she would have to be institutionalized.\footnote{Id.} Forty-five-year-old Constance Cortes has been wheelchair-bound since suffering a stroke seven years ago.\footnote{Trounson, supra note 79, at A1.} Although she has repeatedly tried to get a job, employers routinely reject her because of her physical disability.\footnote{See id.} Instead of being a homeless vagrant, public assistance allows Cortes to help “distribute food bags to people worse off than herself and write [] letters for neighbors who can’t read or write.”\footnote{See id.} These are the images that welfare advocates should be extolling—people in need through no fault of their own.

Unfortunately, the ostensible defenders of the poor have focused an inordinate amount of their resources in an ill-fated battle. Instead of attacking legislative attempts to limit or eliminate public assistance, welfare advocates have vehemently criticized law enforcement efforts to uncover fraud. For example, after the culmination of a comprehensive welfare investigation in Orange County, the local Legal Aid Society assailed both the motives and methods of law enforcement.\footnote{Probing of Welfare Recipients Under Fire, supra note 63, at A3; Richardson, O.C. Welfare Recipients Subject of Random Fraud Investigations, supra note 11, at A1.} “There’s nothing I’ve seen in state law that authorizes this kind of far-reaching investigation of welfare recipients,” argued a senior attorney with the Legal Aid Society.\footnote{Richardson, State Welfare Official Touts Wilson Policy, supra note 96, at B4; Richardson, O.C. Welfare Recipients Subject of Random Fraud Investigations, supra note 11, at A1.} “And even if there were, it would violate federal constitutional principles.”\footnote{See also Probing of Welfare Recipients Under Fire, supra note 63, at A3; Richardson, O.C. Welfare Recipients Subject of Random Fraud Investigations, supra note 11, at A1.} A Los Angeles welfare advocate vilified the law enforcement priorities: “If they spent just an iota of the time looking at white-collar crime, they would bring in a whole lot more money than they would bring in going after welfare fraud.”\footnote{AFDC Fingerprinting Will Begin in L.A., supra note 98, at A3.} And another welfare supporter questioned the benefits of investigating fraud, arguing that “[e]ven if someone was later determined ineligible, I wonder how much it would cost.”\footnote{Saunders, supra note 39, at 9Z1.}
Assuming that these arguments have some validity, welfare advocates still miss the bigger issues. "Instead of blasting proposals to address welfare fraud as scapegoating the poor," argued the director of the California Department of Social Services, "critics should be embracing efforts to eliminate it." First, welfare fraud takes money away from those who truly need assistance. Those who defraud the system, argues a former welfare recipient, are "not stealing from the rich taxpayer, they're stealing from the person in line behind them who legitimately needs the help. They're stealing from a child." Second, and more importantly, it makes more sense to prevent, investigate, and prosecute welfare fraud rather than squeeze the blamless with sweeping budget cuts. An attorney for the Legal Aid Foundation of Los Angeles sarcastically attacked efforts to uncover welfare fraud with the following rhetorical question: "If you want to save a whole lot more [money], then why not shut down the whole program?" However unintentionally made, this advocate uncovered the precise point that many welfare supporters have missed. If government is not allowed to prevent fraud effectively, welfare programs are likely to be eliminated. "I think the American people genuinely feel the need to support people in poverty who legitimately have a financial need," opined the executive director of the American Public Welfare Association. "[A]t the same time, they appropriately resent any situations in which their generosity..."
is being taken advantage of.\textsuperscript{124} By assailing efforts to prevent fraud, welfare advocates are slowly but surely killing the goose that lays the golden eggs—or, if you prefer, cutting off their noses in spite of their faces.

Some of the most ardent supporters of increased efforts to crack down on fraud are welfare recipients themselves.\textsuperscript{125} For example, ninety-five percent of all aid recipients favored a fingerprinting program to prevent multiple case fraud.\textsuperscript{126} According to the director of research and statistics for the Los Angeles Department of Public Social Services, "[R]ecipients feel this will make the [welfare] program more credible."\textsuperscript{127} "I think it's a good idea," said one welfare recipient—"There's a lot of fraud out there. It's a good idea to buckle down on them."\textsuperscript{128} Another public assistance beneficiary argued, "If we can cut out the fraud, maybe those of us who really need the help will get it."\textsuperscript{129} These are the words of those in need, not the sound bites of their gilded advocates. Welfare recipients understand that the elimination of fraud is merely a proxy for a bigger issue—the continuing viability of the welfare system itself.

E. The San Diego Consent Walk-Through

Like most counties in California, San Diego employs "consent walk-throughs" to verify eligibility for welfare benefits and to uncover suspected fraud. The purpose of this consent-based investigation is to corroborate pertinent application information provided by welfare recipients. The walk-through includes looking for evidence to prove that an ostensibly "absent parent" is out of the residence, that a dependent child is present in the home, that recipients are not receiving unreported income, and that the beneficiary does, in fact, live at the alleged residence.\textsuperscript{130}

One might be inclined to question the usefulness of this investigatory procedure and ask: "What can be discovered by walking through

\textsuperscript{124} Id.
\textsuperscript{125} See Karen Kucher, Probers Weed Oust Welfare Cheaters, SAN DIEGO UNION-TRIB., July 7, 1997, at B1 ("I think it is a really good idea [to conduct home searches]. How else can you make sure that the facts are all there? It doesn't bother me at all."); Trounson, supra note 79, at A1 ("Cortes said she understands the anger of people who believe the government needs to do a better job of policing welfare fraud, and she favors several of the new restrictions on eligibility."); Paige, supra note 101, at 1.
\textsuperscript{126} See Berger, supra note 67, at B1.
\textsuperscript{127} Id.
\textsuperscript{129} Id.
\textsuperscript{130} See Kucher, supra note 125, at B1.
someone's residence?" The answer is plenty. As described by two Los Angeles investigators, "[S]urprise visits to recipients' homes have turned up fathers, who were reported by the mothers to be absent deadbeats, hiding in the closet.\textsuperscript{131} These investigators "have unraveled employment and Social Security paper trails to find hundreds of dollars in income more than recipients have declared on their welfare applications."\textsuperscript{132} The director of the California Department of Social Services noted that social workers who process the welfare applications "seldom see the children who are being aided."\textsuperscript{133}

Applicants may receive aid for children who do not live with them or do not exist by using phony birth certificates, and county welfare officials have almost no way of knowing it. What's more, welfare recipients are not required to provide any proof of residence in the county where they apply for aid. Applicants can supply post office boxes as addresses and receive their welfare checks with no questions asked. And [when] no home visits are conducted, they have little fear of ever being caught.\textsuperscript{134}

A Los Angeles welfare study, "emphasiz[ing] the impact that unannounced home/field calls have on the prevention and detection of welfare fraud," concluded that most information confirming or contradicting eligibility is obtained by walk-throughs.\textsuperscript{135} Moreover, consent walk-throughs often uncover children living in dangerous or unsupervised conditions. Investigators have found youngsters with nothing to eat. "I went to one home where the woman basically had a pile of bones in some water and was making soup," related one investigator.\textsuperscript{136} Others have found young children left alone for hours on end: "There are people who just don't realize that a 9-year-old shouldn't be watching the 4-year-old."\textsuperscript{137}

San Diego County has two categories of welfare fraud inquiries. "Early fraud" investigators check suspicious applications prior to any public assistance payments.\textsuperscript{138} The goal of this type of probe is not criminal prosecution but to confirm eligibility and to prevent theft before a criminal case would otherwise be necessary. "Full field" investigators, on the
other hand, uncover fraud after welfare payments have been made. Although criminal prosecution is not necessarily the aim of full field investigations, it remains a distinct possibility in every inquiry. Both early fraud and full field investigators rely on consent walk-throughs of recipients' homes as the primary investigatory tool in performing their duties.

The written policies regarding consent walk-throughs are clear and concise. Investigators are not to enter a recipient's residence without permission and should tell the recipient that the encounter is consensual. The consent to enter must be freely and voluntarily given and must not result from the recipient's submission to an unlawful assertion of authority, intimidation, or coercion. Because the walk-throughs are based on consent, investigators must respect and abide by a recipient's request to terminate the inquiry. Investigators should identify themselves and state their reasons for the visit. Moreover, the policies emphasize that investigators' attitudes should be professional, courteous, and respectful toward the recipients. The recipient, rather than the investigator, takes the lead in the search. They open doors, go through rooms, pull out drawers, and move items for inspection; the investigator merely follows the recipient. A child may not authorize a walk-through, and neither a roommate nor a landlord may consent to a search of the recipient's rented living areas. Investigators may not enter rooms to which the recipient does not have access, nor rooms where permission to enter has not been given. The policies also remind investigators that illegally obtained information or evidence will be inadmissible in court.

The practice of the San Diego public assistance fraud investigators strictly conforms to these policies. This author has found the investigators to be scrupulous and professional in performing their duties. Ken Bell, for example, has been an investigator for two and a half years. This muscular, middle-aged African-American loves his job and does it with a personable, courteous demeanor. During a recent ride-along, Ken described the procedures he follows during every consent walk-through. His investigations take place only during the daylight hours of the work week. Ken always shows the recipients his identification, gives his name, and asks whether they have applied for welfare. He explains his purpose

139. Id.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
in coming to their home and empathetically asks about the recipients' circumstances. He prefers not to do a walk-through but always receives the recipient's express consent before conducting a search. If a recipient does not consent to a walk-through or asks to talk with an attorney, Ken immediately ends the conversation without searching the residence. He has found, however, that most recipients have a very positive reaction to the consent request. In fact, many recipients want the investigators to come inside their home to prevent neighbors from knowing about their welfare application.

Ken has seen it all. He recalls the woman who applied for aid for her two children—both of whom had been dead for years. He remembers parents who applied for welfare while their “crack babies” were still in the hospital, and he recalls the welfare recipient who not only lived in an exclusive area of San Diego, but had a maid. Ken, however, works mostly in Logan Heights, an area renown for gang activity and crime.

Drunks, drug addicts and prostitutes hang out on the corner. Robberies, burglaries, stabbings and shootings are common. Law-abiding people lock themselves in their homes with barred windows when the sun goes down. . . . They know who are the crack addicts, the junkies and the drunks. And they know that the first week of each month is the worst, because that's when the . . . [welfare] checks come out. On those nights, . . . the darkness throughout the neighborhood is broken by sparks from plastic cigarette lighters that crack addicts use to smoke.146

Some area apartment complexes are filled solely with welfare recipients. Inside many of these graffiti-defaced buildings, the only source of legal income is the monthly public assistance checks. Welfare fraud is rampant in Logan Heights, often overwhelming the investigators who are charged with discovering this form of theft. But Ken Bell and his colleagues understand the bounds of their duties—to vigorously investigate welfare fraud while assiduously respecting the rights of the recipients. And, as will be shown, both the policies and actual practice of these welfare investigators are wholly consistent with the United States Constitution.147

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146. Funding of Drug Addicts, supra note 89, at G2.
147. See infra Part III (discussing welfare searches).
III. THE INVESTIGATORY RUBRICS

“Anytime you can reduce the number of people on any public program who aren’t qualified to be on it, [you] bring a sense of integrity, and taxpayers don’t feel they are being ripped off.”

—President Bill Clinton

A. The Welfare “Home Visit”

The first analytical tool available to welfare investigators is the “home visit” espoused by the United States Supreme Court in Wyman v. James. Unlike the constitutional exceptions based on “reasonableness” or exigencies, the Court has held that home visits do not implicate any Fourth Amendment protections. Although the few judicial opinions interpreting Wyman have varied in their resolutions, boundaries for this type of warrantless search can be sketched.

1. Pre-Wyman

In Parrish v. Civil Service Commission, the California Supreme Court announced its lone opinion on the propriety of welfare searches. In that case, the Alameda County Board of Supervisors launched a string of unannounced predawn searches of the homes of county welfare recipients for the express purpose “of detecting the presence of ‘unauthorized males.’” The program was not performed pursuant to search warrants, nor was it restricted to the homes of recipients whose welfare eligibility was in doubt. Instead, a majority of the recipients whose homes were searched pursuant to “Operation Bedcheck” were “under no suspicion whatever and were in fact subjected to the raid for that very reason.”

The California Supreme Court began its opinion by asserting that the search in question must comply “with the standards which govern searches for evidence of crime.” It noted that “four separate and independently sufficient factors” compelled this heightened judicial scrutiny. First, the evidence sought by the investigators would have sup-
ported a criminal prosecution "without further action on their part or subsequent culpable conduct by the recipient." The county was searching for evidence of ineligibility that arguably would have resulted in a type of forfeiture—the canceling of welfare benefits. Third, the county did not limit the searches to the homes of recipients whose welfare eligibility was under suspicion. Finally, the search was not conducted during working hours and without inconvenience to the occupants.

The court then rejected the county's contention that the searches were conducted after the voluntary consent of the welfare recipients and held that surrounding circumstances vitiated any consent given by the welfare recipients. Although the county authorities were instructed to avoid forcing their way into any home, a refusal to consent to the search could serve as a basis for terminating welfare benefits. The court stated:

The persons subjected to the instant operation confronted far more than the amorphous threat of official displeasure which necessarily attends any such request. The request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more certain, immediate, and substantial. These circumstances nullify the legal effectiveness of the apparent consent secured by the Alameda County searchers.

The county, therefore, failed to meet its "heavy burden" of showing that the recipients' consent was freely and voluntarily given.

Moreover, the court reasoned that even a welfare recipient's voluntary consent would be invalid under the "doctrine of unconstitutional conditions." The "operation rested upon the assumption that a welfare agency may withhold aid from recipients who do not willingly submit to random, exploratory searches of their homes." Where the receipt of

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157. Id. at 227.
158. Id.
159. Id. at 228.
160. Id.
161. Id. at 229-30.
162. Id.
163. Id.
164. Id. at 230.
165. Id.
166. Id.
"a publicly-conferred benefit" such as welfare is conditioned on the waiver of constitutional rights, the government must establish:

(1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.\textsuperscript{167}

Operation Bedcheck, however, failed to meet these requirements. The county did not limit the scope of the search to individuals suspected of fraud.\textsuperscript{168} In fact, the county authorized the search of non-suspect recipients to bolster its public appearance.\textsuperscript{169} Moreover, less intrusive means were available to detect fraud without constitutional infirmities. Welfare investigators, the court noted, could have "maintain[ed] an external watch" to see if unauthorized males entered or left the residence.\textsuperscript{170}

"[S]o striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope, that no valid link remains between that operation and its proffered justification."\textsuperscript{171}

2. \textit{Wyman v. James}

Four years after \textit{Parrish}, the United States Supreme Court announced "the definitive word on the latitude which circumscribes the authority of 'in home' visits of welfare recipients by the officials administering the programs."\textsuperscript{172} In \textit{Wyman v. James},\textsuperscript{173} the plaintiff was a mother of a two-year-old boy and a recipient of AFDC assistance.\textsuperscript{174} A caseworker informed the plaintiff that a "home visit" was required to verify her eligibility for welfare.\textsuperscript{175} The plaintiff, however, refused to allow the visit, despite an admonition that her failure to consent would result in the termination of public assistance.\textsuperscript{176}

In an opinion by Justice Blackmun, the Supreme Court upheld the home visit procedure and the conditioning of welfare benefits on a

\begin{itemize}
  \item \textsuperscript{167} Id. at 230-31.
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} Id. at 231-33.
  \item \textsuperscript{170} Id. at 232.
  \item \textsuperscript{171} Id. at 231.
  \item \textsuperscript{172} Reyes v. Edmunds, 472 F. Supp. 1218, 1223 (D. Minn. 1979).
  \item \textsuperscript{173} 400 U.S. 309 (1971).
  \item \textsuperscript{174} Id. at 313.
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id. at 313-14.
\end{itemize}
recipient's consent to enter the home. The Wyman majority began with a simple proposition—the welfare agency was not conducting a "search" within the meaning of the Fourth Amendment. The home visit simply could not be "equated with a search in the traditional criminal law context."[179]

The visitation in itself is not forced or compelled, and...the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.[180]

The Court then concluded that even if the home visit was a search, it did not fall within the proscription of the Fourth Amendment.[181] The Court reasoned that the search "does not descend to the level of unreasonableness."[182] The opinion noted eleven factors which made the home visit reasonable and, therefore, constitutionally permissible:

(1) The focus of public assistance is on the dependent child, not the parent.[183] The child's needs "are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights."[184]

(2) The welfare agency is fulfilling a public trust.[185] It "has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses."[186]

(3) Similarly, the public, as provider of the "trust funds," has the right to know how these resources "are utilized and put to work."[187]

(4) The emphasis of the home visit "is upon the home, upon 'close contact' with the beneficiary, upon restoring the aid recipient 'to a condition of self-support,' and upon the relief of his distress."[188]
Moreover, the search is “concerned about any possible exploitation of the child.”

(5) The home visit is an established routine in many states and is “the heart of welfare administration.” It “affords a personal, rehabilitative orientation, unlike that of most federal programs.”

(6) The procedures employed minimized “any ‘burden’ upon the homeowner’s right against unreasonable intrusion.” Welfare recipients were given written notice several days before the proposed home visit. The notice specified a particular date, and the entire procedure emphasized privacy. “Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home [were] forbidden.”

(7) The recipient could not complain of any “unreasonable intrusion of her home” or that the search constituted “the obtaining of information as to criminal activity.” There was no “visitation at an awkward hour... no forcible entry... no snooping [and] no impolite or reprehensible conduct of any kind.”

(8) The information necessary to verify welfare eligibility was not obtainable through off-site interviews or by examining records. These sources “would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs.”

(9) A caseworker conducts the home visit rather than “police or uniformed authority.” The “primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility.”

(10) “The home visit is not a criminal investigation, does not equate with a criminal investigation, and... is not in aid of any criminal proceedings.” If, however, the visit leads “to the discovery of fraud

189. Id.
190. Id.
191. Id. at 319-20 (quoting Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 YALE L. J. 746, 748 (1970)).
192. Id. at 321.
193. Id. at 320.
194. Id. at 320-21.
195. Id. at 321.
196. Id.
197. Id. at 321-22.
198. Id. at 322.
199. Id.
200. Id.
201. Id. at 323.
202. Id.

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and a criminal prosecution should follow, . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.\textsuperscript{203}

(11) A warrant procedure has "seriously objectionable features in the welfare context."\textsuperscript{204} Probable cause "requires more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it."\textsuperscript{205} Even "[i]f a warrant could be obtained . . . it presumably could be applied for \textit{ex parte}, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation."\textsuperscript{206} "In this setting the warrant argument is out of place."\textsuperscript{207}

In concluding that a home visit was not an unreasonable search, the Court drew an analogy to a civil audit conducted by the Internal Revenue Service.\textsuperscript{208} If a particular tax deduction is called into question by the I.R.S., the taxpayer must produce some proof supporting his eligibility for the deduction.\textsuperscript{209} If the taxpayer refuses to present the necessary evidence, he simply loses the deduction.\textsuperscript{210}

The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here [the welfare recipient] has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.\textsuperscript{211}

Finally, the Court distinguished those precedents which "held that the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection."\textsuperscript{212} Those cases involved "a true search for violations."\textsuperscript{213} "[E]ach case arose in a criminal context where a genuine

\begin{itemize}
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id. at 324.
\item \textsuperscript{206} Id. at 323-24 (footnote omitted).
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id. at 324.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. at 325.
\item \textsuperscript{213} Id.
\end{itemize}
search was denied and prosecution followed. The statute in this case, however, did not make a welfare recipient's "refusal a criminal offense."

3. Post-Wyman

Although Wyman appeared to be a momentous and far-reaching decision, there has been a relative dearth of case law applying its principles. Two post-Wyman cases, however, reveal the fine line between a permissible home visit and an unconstitutional search.

In Reyes v. Edmunds, four welfare recipients complained that the Minnesota Department of Public Welfare in Ramsey County was conducting searches in violation of the Fourth Amendment. Ramsey County established a "Mobile Unit" to investigate possible welfare fraud which "did not appear... to be so flagrant as to justify immediate in-depth criminal investigation or other proceedings." Investigators would ask an alleged welfare offender for permission to enter her home, informing her that a complaint had been received regarding her eligibility for benefits. Once inside, the investigators would ask to look around the residence to confirm or contradict the complaint. If the recipient denied the investigators either entry into the home or consent to look around the residence, the investigators would inform the recipient that the county would terminate her welfare benefits due to her failure to consent. If the recipient still refused to allow the search, the investigators would leave the residence and initiate the termination of welfare benefits.

After an interesting discussion of Fourth Amendment principles, the federal district court distinguished the procedures of the Mobile Unit from those found acceptable in Wyman. First, "[t]he Mobile Unit was organized solely to investigate complaints of welfare fraud." The investigators "were not social workers" and their focus was on criminal fraud rather than assistance, rehabilitation, or prevention of child exploitation. Second, recipients received no notice of the impending home search.

214. Id.
215. Id.
217. Id. at 1221.
218. Id.
219. Id. at 1221-22.
220. Id. at 1222.
221. Id.
222. Id.
223. Id. at 1222-23.
224. Id. at 1223-26.
225. Id. at 1224.
226. Id.

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visit. Rather, "[s]nooping within the house was its primary purpose and the recipient's privacy was decimated." Third, "[t]he purpose of the visit was exclusively, solely, and undeniably" to obtain evidence of criminal activity. "This Unit," the district court opined, "was not engaged in social work, but in police work." The searches conducted by the investigators, therefore, fell outside the ambit of Wyman. Even the ostensible consent of some welfare recipients would not vitiate the unconstitutional nature of the county's procedures.

Existence upon the largess of the taxpaying public may appear to some to be a way of life to a segment of society. This jaundiced view should not obscure the fact that, at best, it is a demeaning status by virtue of, among other things, being subject to bureaucratic autocracy. What greater inhibition to freedom can there be than that which a welfare recipient faces when subjected to a threat by the authorities to eliminate her sole means of providing food, shelter and clothing for her family? This is coercion in its purest form . . . . In essence, what the Ramsey County plan has attempted to do is to condition welfare benefits upon a surrender to the state of the sanctity of a man's castle. Even a loose reading of Wyman v. James does not extend that Court's holding to this extreme . . . .

Accordingly, the district court declared the policies and practices of the Mobile Unit unconstitutional and enjoined the county from conditioning welfare benefits upon a recipient's consent to search her home.

In S.L. v. Whitburn, welfare recipients challenged the procedures used to verify eligibility for public assistance programs as violating the Fourth and Fourteenth Amendments. In Wisconsin, caseworkers used written criteria to determine whether a welfare applicant provided insufficient or erroneous information to verify eligibility. If the caseworker believed that an applicant's eligibility was questionable, the caseworker would request a home visit of the applicant's residence. The caseworker did not obtain a search warrant. Rather, "the county [notified] the applicant that a field representative [would] be visiting the home . . .

227. Id.
228. Id.
229. Id.
230. Id. at 1225.
231. Id. at 1226.
232. Id. at 1227-28.
233. Id. at 1226.
234. Id. at 1230.
235. 67 F.3d 1299 (7th Cir. 1995).
236. Id. at 1302.
237. Id.
238. Id.
in the next ten days. Although the field representative must conduct the visit between 8:00 a.m. and 8:00 p.m., the county did not inform the applicant of the exact date or time of the visit.

Tracking the analysis in Wyman, the Seventh Circuit panel first determined that the home visits were not searches within the meaning of the Fourth Amendment. The court noted several factors that compelled this conclusion. A field representative must receive consent from the applicant prior to entering the home. Moreover, the representative must "inform the applicant that she can withdraw her consent to the home visit at any time." All inquiries must relate to information requiring verification. The field representative "can note only things in plain view or inspect areas of the house or examine closets and open doors if the occupant gives permission." A refusal to consent to the visit does not constitute a crime, nor are benefits denied or terminated based on a failure to consent.

The court further noted that "Wyman is an unexceptional application of the principle that the Fourth Amendment's 'prohibition does not ap-

239. Id.
240. The following official procedures are prescribed for all home visits:

[W]hen the field representative makes contact with the applicant, he identifies himself as a field representative for the County and asks to be admitted to the home. The representative is not permitted to enter the home without consent. The representative is allowed to tell the applicant that refusal may delay the provision of public assistance, but he may not tell the applicant that assistance will be automatically denied if permission to enter is refused. The representative is required to tell the applicant that he or she can retract consent at any time. Once inside, the representatives are instructed that anything that is in plain view and pertinent to eligibility can be noted. Otherwise, however, field representatives are told to limit their investigation to the criteria of eligibility that the caseworker has designated as in need of verification. Field representatives may ask to see areas of the residence, and they can ask for permission to inspect closets, cabinets, attics, basements, garages, etc., but they are forbidden to inspect these areas without the resident's consent.

241. Whitburn, 67 F.3d at 1307.
242. Id. ("[A] field representative can enter an applicant's home only if the applicant consents.").
243. Id.
244. Id. ("The field representative's inquiries are limited to items in need of verification . . . ").
245. Id.
246. Id. ("[T]he applicant's refusal to consent to the home visit is not a criminal act, and benefits are not denied or cut off because the applicant has refused to allow the home visit.").
ply . . . to situations in which voluntary consent has been obtained.\(^{247}\) Moreover, the court rejected the plaintiffs' argument that a welfare recipient's consent to a home visit is involuntary as a matter of law.\(^{248}\) This claim, the panel concluded, "defies the whole body of Fourth Amendment jurisprudence which emphasizes that the voluntariness of consent is a question of fact to be decided in each case."\(^ {249}\) Further, the court found the doctrine of "unconstitutional conditions" to be wholly inapplicable in this context.\(^ {250}\) The county forbade field representatives from informing welfare recipients that their benefits would be terminated if they refused a home visit. Although the county may, in fact, discontinue benefits if a recipient denies consent for the home visit, "this follows from the County's inability to verify the applicant's eligibility, not from the applicant's refusal to allow a home search."\(^ {251}\)

The court then determined that, "[a]s in Wyman, the home visits at issue, even if they are considered searches within the meaning of the Fourth Amendment, are reasonable searches that do not violate the Constitution."\(^ {252}\) The Seventh Circuit noted several factors that demonstrated the reasonableness of the home visits.\(^ {253}\) First, a state has a paramount interest in ensuring that the public assistance funds accrue to the intended individuals for the appropriate purposes.\(^ {254}\) Second, welfare applicants are given notice of visitation.\(^ {255}\) Although a date is not specified, an applicant is not penalized if the field representative is unable to reach the applicant within the ten days allowed for the visit.\(^ {256}\) Third, the visit takes place during normal business hours except in special circumstances.\(^ {257}\) Fourth, the visit is not conducted by police or uniformed authority.\(^ {258}\) And finally, the visit is not a criminal investigation nor is it done in furtherance of any criminal proceeding.\(^ {259}\) "Rather, the purpose of these home visits [is] to verify an applicant's eligibility for

\(^{247}\) Id. (quoting Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).
\(^ {248}\) Id.
\(^ {249}\) Id. at 1307-08.
\(^ {250}\) Id. at 1308.
\(^ {251}\) Id.
\(^ {252}\) Id.
\(^ {253}\) Id. at 1308-09.
\(^ {254}\) Id.
\(^ {255}\) Id. at 1309.
\(^ {256}\) Id.
\(^ {257}\) Id.
\(^ {258}\) Id.
\(^ {259}\) Id.
public assistance consistent with the public trust." Based on these considerations, the court held that the policy was reasonable and, therefore, consistent with the Fourth Amendment.

Finally, the welfare recipients argued that the due process guarantee of the Fourteenth Amendment "requires the County to give applicants notice that they can prevent home visits by providing adequate documentation." The court summarily rejected this claim. The recipients received sufficient due process through the written notice procedure and the opportunity to contact the appropriate government body "to protest the home visit and provide additional documentation to confirm eligibility."

4. Legal Synthesis

Although these four cases reach different conclusions, one can harmonize their principles. To navigate the legal straits of these decisions, a home visit policy must satisfy two requirements. First, the visit cannot be made for the purposes of criminal investigation, furthering criminal prosecution, or gathering evidence of criminal activity. Administrative purposes that do not implicate the criminal justice system, however, can serve as valid and laudable goals. These purposes include: (1) ascertaining whether an applicant is eligible for welfare, and thereby confirming that the public trust is being fulfilled; (2) ensuring the health and welfare of dependent children and preventing the exploitation of children; and (3) maintaining close contact with the recipients and helping to restore them to a condition of self-support. This list is not exhaustive. A great variety of goals might satisfy this constitutional prong.

Second, the procedures followed in conducting a home visit must be "reasonable." This, of course, is a relative term which cries out for a "totality of the circumstances" analysis. A few seemingly mandatory

260. Id.
261. Id.
262. Id.
263. Id. at 1311.
264. Id.
266. Wyman, 400 U.S. at 319; Whitburn, 67 F.3d at 1309; Parrish, 425 P.2d at 230.
267. Wyman, 400 U.S. at 318-19; Whitburn, 67 F.3d at 1308-09; Reyes, 472 F. Supp. at 1224.
268. Wyman, 400 U.S. at 319.
269. Id. at 318-22; Whitburn, 67 F.3d at 1308-09; Reyes, 472 F. Supp. at 1224-26; Parrish, 425 P.2d at 230-31.
constraints, however, are worth noting. Some form of written notice of an impending home visit should be delivered to recipients, although the exact date and time of the visit need not be stated.\textsuperscript{271} Visits during non-business hours should be avoided, and predawn "raids" are undoubtedly unreasonable.\textsuperscript{272} Moreover, mass searches probably are the presumption of invalidity.\textsuperscript{273} The visit should be conducted by a caseworker or welfare investigator, rather than by police officers or uniformed authority.\textsuperscript{274} The privacy of the recipient must be emphasized—snooping or entry by false pretenses is unacceptable.\textsuperscript{275} Impolite or reprehensible conduct could render the home visit legally defective.\textsuperscript{276} In addition, the recipient should not be threatened with termination of welfare benefits unless the recipient consents to the visit. This does not mean, however, that a recipient who denies entry cannot have her benefits discontinued. So long as the termination of welfare resulted from an inability to verify the recipient’s eligibility, and not from her refusal to allow a home search, there is no constitutional violation.\textsuperscript{277}

B. Consent Searches

Voluntary consent is the most celebrated and utilized exception to the Fourth Amendment’s probable cause and warrant requirements. As noted by the United States Supreme Court, “[A] search conducted pursuant to a valid consent is constitutionally permissible.”\textsuperscript{278} Consent is “one of the specifically established exceptions to the requirements of both a warrant and probable cause.”\textsuperscript{279} Although challenged by many civil libertarians, searches pursuant to valid consent are not inherently coercive.\textsuperscript{280} “The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.”\textsuperscript{281} The Fourth Amendment requires only that law enforcement “demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express

\textsuperscript{271} Id. at 320-21; Whitburn, 67 F.3d at 1311; Reyes, 472 F. Supp. at 1224.
\textsuperscript{272} Wyman, 400 U.S. at 320-21; Parrish, 425 P.2d at 232.
\textsuperscript{273} Wyman, 400 U.S. at 320-22.
\textsuperscript{274} Id. at 322-23; Reyes, 472 F. Supp. at 1224-25.
\textsuperscript{275} Wyman, 400 U.S. at 320-21; Reyes, 472 F. Supp. at 1224.
\textsuperscript{276} Wyman, 400 U.S. at 320-21.
\textsuperscript{277} Id. at 324; S.L v. Whitburn, 67 F.3d 1299, 1308 (7th Cir. 1995).
\textsuperscript{279} Id. at 219.
\textsuperscript{280} Cf. id. at 247.
or implied. Unlike constitutional guarantees that protect the integrity and fairness of a criminal trial, a "waiver" of the right to be free from unreasonable searches and seizures need not be knowing and intelligent. It need only be voluntary.

The consent exception to the Fourth Amendment is of vital importance both to law enforcement and the public at large. The benefits are monumental, though often overlooked.

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

In contrast, a search pursuant to coerced consent flies in the face of both the Fourth Amendment and the Due Process Clause. Such searches smack of inquisition and brutal police tactics of the past. An involuntary consent is no consent at all—it is the antithesis of permission.

The following sections sketch the parameters of constitutional consent searches. Although judicial analysis of consent searches in the welfare context is wanting, the body of jurisprudence on standard criminal consent searches provides appropriate legal boundaries.

1. Voluntariness

"Voluntariness" is not easily defined. As noted by the Court, there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen. ... [N]either linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'" Justice Frankfurter once reasoned that "[t]he notion of 'voluntariness' is itself an amphibian."

In defining voluntariness in the consent search context, two competing values must be reconciled: "the legitimate need for such searches and the
equally important requirement of assuring the absence of coercion.”

To meet these concerns, the United States Supreme Court has resolved that voluntariness must be tested by all relevant facts presented before the tribunal. “[W]hether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”

Only by weighing all facts related to the ostensible consent can it be determined whether an individual’s “will has been overborne and his capacity for self-determination critically impaired.” This determination is made by the trial court as the trier of fact and law in the first instance. As with all warrantless searches, the government bears the burden of proof, and voluntariness must be shown by a preponderance of the evidence.

The following list of factors have been included in the “totality of the circumstances” when determining the voluntariness of a consent to search. It should be noted, however, that this list is not exhaustive, nor is any single factor controlling. Rather, the total weight of all relevant factors guides the ultimate decision.

**Characteristics of Individual Consenting to Search**

- Age
- Education
- Intelligence
- Ability to see and hear

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289. *Id.* at 227.

290. *Id.; see also* United States v. Mendenhall, 446 U.S. 544, 557 (1980) (stating the proposition that consent should be determined from the totality of the circumstances).


- Race, as compared to that of officers\textsuperscript{299}
- Legal knowledge or experience with criminal justice system\textsuperscript{300}

\textit{Circumstances of Individual Immediately Prior to Consent}

- Under arrest\textsuperscript{301}
- In custody\textsuperscript{302}
- Handcuffed\textsuperscript{303}
- Location where consent requested (e.g., at home, at police station, on street)\textsuperscript{304}
- Number of officers present\textsuperscript{305}
- Whether officers are uniformed\textsuperscript{306}

\textit{Actions and Statements by Individual Consenting to Search}

- Initially refusing to consent\textsuperscript{307}
- Refusing to assist in gaining entry\textsuperscript{308}
- Requesting a justification for the search\textsuperscript{309}
- Asking whether officers have a search warrant\textsuperscript{310}
- Asking to be left alone\textsuperscript{311}
- Defying, opposing, or resisting search\textsuperscript{312}

\textit{Actions and Statements by Law Enforcement}

- Failure to give \textit{Miranda} warnings\textsuperscript{313}
- Failure to warn of right to refuse consent\textsuperscript{314}
- Failure to warn that evidence uncovered during search could be used in court\textsuperscript{315}

\textsuperscript{299} Mendenhall, 446 U.S. at 558.
\textsuperscript{300} Watson, 423 U.S. at 424-25; People v. James, 561 P.2d 1135, 1146 (Cal. 1977).
\textsuperscript{301} Watson, 423 U.S. at 424; People v. Smith, 409 P.2d 222, 235 (Cal. 1966); People v. Shelton, 388 P.2d 665, 668 (Cal. 1964).
\textsuperscript{302} Watson, 423 U.S. at 424.
\textsuperscript{303} People v. Radliff, 715 P.2d 665, 671 (Cal. 1986); James, 561 P.2d at 1140.
\textsuperscript{304} Mendenhall, 446 U.S. at 559.
\textsuperscript{305} People v. Poole, 227 Cal. Rptr. 594, 598 (Ct. App. 1986).
\textsuperscript{306} People v. Munoz, 101 Cal. Rptr. 265, 268 (Ct. App. 1972).
\textsuperscript{307} Lane v. Superior Court, 76 Cal. Rptr. 896, 898 (Ct. App. 1969).
\textsuperscript{308} People v. Shelton, 388 P.2d 665, 668 (Cal. 1964).
\textsuperscript{309} Crofoot v. Superior Court, 175 Cal. Rptr. 530, 534 (Ct. App. 1981).
\textsuperscript{310} Id.; Lane, 76 Cal. Rptr. at 898.
\textsuperscript{311} Crofoot, 175 Cal. Rptr. at 535.
\textsuperscript{312} People v. Munoz, 101 Cal. Rptr. 265, 267-68 (Ct. App. 1972).
\textsuperscript{314} United States v. Mendenhall, 446 U.S. 554, 558-59 (1980); Watson, 423 U.S. at 425; Schneckloth, 412 U.S. at 248; People v. James, 561 P.2d 1135, 1146 (Cal. 1977).
\textsuperscript{315} Watson, 423 U.S. at 425.
Length of pre-consent questioning
Requesting that individual step outside of residence
Making promises of leniency
Attempting to surprise, frighten, or confuse individual
Using subtle forms of coercion
Threats or displays of force
Whether weapons were drawn

Many of these factors, however, will never come into play in the welfare context. Public assistance fraud investigators do not wear uniforms, do not use handcuffs, do not carry weapons, and do not place recipients under arrest or in custody. In addition, none of the foregoing factors is necessarily determinative. For example, the judiciary has consistently held that failure to inform an individual of his right to refuse consent or rights under *Miranda* does not automatically vitiate permission to search. Nor is consent necessarily involuntary because the individual has been arrested or is in handcuffs. Instead, each of these factors must be collectively weighed by the trial court.

320. *Watson*, 423 U.S. at 424. For example, in *Crofoot v. Superior Court*, an officer coerced a defendant by stating that the defendant "shouldn't have any objections to [him] looking in the backpack if he weren't doing anything." *Crofoot v. Superior Court*, 175 Cal. Rptr. 530, 534 (Ct. App. 1981). The *Crofoot* court stated that this was the equivalent of saying "By exercising your constitutional right to withhold consent from me to search the backpack you will be admitting to me that you have done something wrong; it is better to let me search the pack and discover for myself. You cannot leave until you give consent." *Id.*
There are some facts, however, that should be irrelevant to the ultimate determination. For example, a search is not involuntary merely because consenting to the search would not be in the individual’s best interests. There are many reasons why someone might consent to search. Judicial inquiry into an individual’s subjective reasoning is fraught with peril. As argued by the United States Supreme Court, “[T]he question is not whether the [individual] acted in her ultimate self-interest, but whether she acted voluntarily.” Moreover, law enforcement’s initial decision to ask an individual for consent to search generally should not factor into the voluntariness equation. The government need not support its consent query with suspicion of criminal activity or “some level of objective justification.” So long as “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter,” or “to disregard the police and go about his business,” the encounter is consensual and no reasonable suspicion is required. The acts and words which precede the request, and the manner in which the query is presented, should guide the court’s analysis. The decision to request consent to search, in and of itself, is a neutral consideration.

Although the judiciary has extolled the “totality of the circumstances” formulation, there are a few situations where appellate courts have apparently “pre-balanced” the issue of voluntariness. For example, when an occupant obliviously says “come in” in response to a knock at the door, he cannot later claim that consent to enter the residence was involuntary. In such cases, “the only event which induced consent to the officers’ entry was the sound of knocking at the door.... For all [the occupants] knew or apparently cared, they might have been extending

328. See, e.g., James, 561 P.2d at 1143.
Contrary to defendant’s implication, there may be a number of “rational reasons” for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile.

Id.
332. Id. at 434 (quoting California v. Hodari D., 499 U.S. 621, 628 (1991) (citation omitted).
their invitation to an unwelcome acquaintance, a curious parent, an irate neighbor, or a thief.  

Most of the circumstances involving "pre-balancing," however, entail conduct so coercive as to make consent per se involuntary. Consent obtained by overt threats and force, or by mere acquiescence to a claim of authority, is involuntary as a matter of law.  

For example, the United States Supreme Court announced in *Bumper v. North Carolina*:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

The Court, therefore, established "a marker, inserted along the spectrum evincing various circumstances from consent as a matter of law, through conflicting circumstances, to nonconsent as a matter of law."

"[R]eference to a search warrant," opined a California appellate court interpreting *Bumper*, "is such a claim of lawful authority that it will as a matter of law preclude reliance on consent or acquiescence thereafter elicited." So when law enforcement prefaces a consent request with "I have a search warrant" or "a search warrant is en route," any subsequent permission to search will be considered involuntary.

Coercion as a matter of law can take many forms. An officer might demand entry into the home—"open the door"—or claim a right to

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337. *Linke*, 71 Cal. Rptr. at 376.
339. The clarity of this per se rule has been obscured by subsequent tautological distinctions. The California appellate courts have opined that police claims such as "we will get a search warrant [unless you consent]," *People v. Ruster*, 548 P.2d 353, 359 (Cal. 1976), *overruled by* People v. Jenkins, 620 P.2d 587 (Cal. 1980), or "[we will] secure a search warrant [unless you consent]," *People v. Ratliff*, 715 P.2d 665, 671 (Cal. 1986), or "[we will] go down and apply for a search warrant [unless you consent]," *People v. Gurtenstein*, 138 Cal. Rptr. 161, 166 (Ct. App. 1977), "merely amounted to a declaration of the officers' legal remedies should defendant refuse to cooperate."
340. 715 P.2d at 671. Moreover, reference to an arrest warrant, rather than a search warrant, does not unequivocally result in an involuntary consent. *Linke*, 71 Cal. Rptr. at 376.
enter—"I have come to make a search."\textsuperscript{342} Law enforcement might state that resistance would be "unwise or fruitless."\textsuperscript{343} Consent might result from unmitigated harassment, intimidation, or threats.\textsuperscript{344} One federal agent went so far as to threaten to take a parent's children into custody unless he consented to a search.\textsuperscript{345} Consent also might be deemed "fruit of the poisonous tree." There can be no voluntary consent following an illegal detention,\textsuperscript{346} an illegal arrest,\textsuperscript{347} an illegal search,\textsuperscript{348} or an illegal entry.\textsuperscript{349}

Ultimately, police coercion not only vitiates consent and invalidates the search but also jeopardizes the admissibility of subsequent confessions or searches.\textsuperscript{350} Police tactics that derogate an individual's constitutional rights are unacceptable in any context.

2. Implied Consent

Consent can take many forms, and "there is no talismanic phrase which must be uttered by a suspect in order to authorize a search."\textsuperscript{351} Consent has been judicially inferred from a multitude of phrases. "Yes," "Yeah," "Go ahead," "I don't care," and "Do what you want" have all been interpreted as voluntary permission to search.\textsuperscript{352} But voluntary consent has also been implied from statements which do not encompass affirmative permission. As noted by the California judiciary, "Words may imply consent as well as express it."\textsuperscript{353} For example, disclaiming any interest in some property is "virtually the equivalent of an implied consent to search."\textsuperscript{354} Also, stating the location of an item implies consent to search for it.\textsuperscript{355}

\begin{itemize}
  \item \textsuperscript{342} People v. Munoz, 101 Cal. Rptr. 265, 268 (Ct. App. 1972); see also Lane v. Superior Court, 76 Cal. Rptr. 895, 898 (Ct. App. 1986); People v. Cove, 39 Cal. Rptr. 536, 537 (Ct. App. 1964).
  \item \textsuperscript{343} People v. James, 561 P.2d 1135, 1142 (Cal. 1977).
  \item \textsuperscript{344} Florida v. Bostick, 501 U.S. 429, 438 (1990); Munoz, 101 Cal. Rptr. at 268.
  \item \textsuperscript{345} United States v. Hatley, 999 F.2d 392, 394 (9th Cir. 1993).
  \item \textsuperscript{346} Florida v. Royer, 460 U.S. 491, 501-02 (1983).
  \item \textsuperscript{347} James, 561 P.2d at 1140; People v. Havens, 381 P.2d 927, 930 (Cal. 1963); People v. Baker, 231 Cal. Rptr. 577, 887 (Ct. App. 1986).
  \item \textsuperscript{348} James, 561 P.2d at 1140; Baker, 231 Cal. Rptr. at 881.
  \item \textsuperscript{349} James, 561 P.2d at 1140; Havens, 381 P.2d at 930; People v. Poole, 227 Cal. Rptr. 594, 598 (Ct. App. 1986); Munoz, 101 Cal. Rptr. at 268.
  \item \textsuperscript{350} See, e.g., People v. Brown, 260 Cal. Rptr. 293, 296 (subsequent search); Poole, 227 Cal. Rptr. at 599 (subsequent confession).
  \item \textsuperscript{351} James, 561 P.2d at 1143.
  \item \textsuperscript{352} Id.; People v. Carrillo, 412 P.2d 377, 380 (Cal. 1966) ("go ahead"); People v. Perillo, 275 Cal. Rptr. 160, 163 (Ct. App. 1969) ("I don't care"); People v. Linke, 71 Cal. Rptr. 371, 381 (Ct. App. 1968) ("come right ahead").
  \item \textsuperscript{353} People v. Superior Court (Henry), 116 Cal. Rptr. 24, 26 (Ct. App. 1974).
  \item \textsuperscript{354} People v. Mendoza, 224 Cal. Rptr. 145, 149 (Ct. App. 1986).
  \item \textsuperscript{355} See Superior Court (Henry), 116 Cal. Rptr. at 26, and cases cited therein; see
\end{itemize}
Moreover, "no words at all need be spoken: in appropriate circumstances, consent to enter may be unmistakably manifested by a gesture alone." Opening the door and stepping back, extending one's hand toward the entrance of a residence, and handing over the keys to a door have all been viewed as forms of implied consent to enter and search. But a failure to object to the search can never be construed as an implied consent. Resting upon implied consent is inviting peril; express consent is invariably preferable to relying upon judicial speculation.

3. Third Party Consent

The Fourth Amendment only protects an individual from unreasonable searches and seizures. The Fourth Amendment does not guarantee that a search will only be conducted if a particular resident consents. "The consent of one person with common or superior authority over the area to be searched is all that is required; the consent of other interested parties is unnecessary." In the welfare context, therefore, it is not dispositive that the recipient was not the individual that consented to the search.

In 1974, the United States Supreme Court declared that valid consent need not be conferred by an individual with personal or proprietary interests at stake. Rather, permission can be obtained from a third party who possessed common authority over or other sufficient relation-


358. Harrington, 471 P.2d at 963.
361. U.S. CONST. amend. IV.
365. Id.
ship to the premises or effects sought to be inspected." The Court was careful not to constrain law enforcement by the often-archaic property jurisprudence:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Moreover, actual common authority to consent need not be proven. Instead, the individual permitting the search must have apparent common authority to do so. The test is an objective standard of reasonableness: "[W]ould the facts available to the officer at the moment... 'warrant a man of reasonable caution to the belief that the consenting party had authority over the premises?" In the words of the California Supreme Court, "[T]here must be some objective evidence of joint control or access to the places or items to be searched which would indicate that the person authorizing the search has the authority to do so." So long as the investigator reasonably and in good faith believed that an individual had authority to consent, there is no constitutional

366. Id. at 171.
367. Id. at n.7 (citing Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964)) (citations omitted).
369. Id. at 185-86; People v. Jacobs, 729 P.2d 757, 762-63 (Cal. 1987) (finding eleven-year-old child's consent to police search was unreasonable because child lacked apparent authority even though parents had left her alone to baby-sit her two younger siblings); People v. Bishop, 51 Cal. Rptr. 2d 629, 639-41 (Ct. App. 1996) (holding that estranged wife, who had moved to battered women's shelter, maintained authority to consent to search of husband's house); People v. Cooney, 286 Cal. Rptr. 765, 768 (App. Dep't Super. Ct. 1991) (finding daughter did not have reasonable apparent authority to consent to her mother's locked closet because she did not have a key to the padlock); People v. Roman, 278 Cal. Rptr. 44, 47-48 (Ct. App. 1991) (holding that landlord did not have apparent authority to consent to search of tenant's garage without showing that tenant had been evicted, abandoned the property, or had granted landlord authority to enter premises). Of course, the government bears the burden of proving apparent common authority. Rodriguez, 497 U.S. at 181.
370. Rodriguez, 497 U.S. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1967)).
371. Jacobs, 729 P.2d at 762. For example, apparent authority to consent has been found where an individual "present at and in charge of the premises has in his possession the keys to the premises and willingly permits the officers to enter." People v. Corrao, 20 Cal. Rptr. 492, 495 (Ct. App. 1962).
violation.\textsuperscript{372} The Fourth Amendment does not guarantee that government investigators "always be correct, but that they always be reasonable."\textsuperscript{373}

Third party consent, both valid and defective, can arise from many types of business and personal relationships. As a matter of law, hotel employees\textsuperscript{374} and landlords\textsuperscript{375} cannot consent to searches of their tenants’ current residences.\textsuperscript{376} A spouse, on the other hand, can consent to a thorough residential search almost without exception.\textsuperscript{377} This is true even when the spouse’s husband or wife is in custody or confined in jail\textsuperscript{378} or when severe antagonism marks the marital relationship.\textsuperscript{379} Moreover, ostensible spouses and paramours can manifest sufficient indices of common authority to validly consent to a search.\textsuperscript{380} Parents generally have vast authority to permit searches of their minor children’s rooms and effects.\textsuperscript{381} A child’s “occupancy is subservient to the control of his parents. . . . They may enter and search the room at will, or may authorize others to make such a search.”\textsuperscript{382} Conversely, however, a

\textsuperscript{372} Rodriguez, 497 U.S. at 184.
\textsuperscript{373} Id. at 185.
\textsuperscript{376} However, a landlord or hotel employee can consent to a search of common areas. Corrao, 20 Cal. Rptr. at 495. Moreover, a tenant who has been evicted or has abandoned the residence has no standing to object to a landlord’s consent to search. Roman, 278 Cal. Rptr. at 48; People v. Superior Court (York), 83 Cal. Rptr. 732, 737-38 (Ct App. 1970).
\textsuperscript{377} Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971); People v. Reyes, 626 P.2d 225, 234 (Cal. 1974) ("The wife of a suspect may consent to a search of the residence.").
\textsuperscript{378} People v. Ingle, 348 P.2d 577, 582-83 (Cal. 1960).
\textsuperscript{379} People v. Bishop, 51 Cal. Rptr. 2d 629, 639-40 (Ct. App. 1996).
\textsuperscript{381} People v. Daniels, 93 Cal. Rptr. 628, 630-32 (Ct. App. 1971); Vandenberg v. Superior Court, 87 Cal. Rptr. 876, 879-80 (Ct. App. 1970).
\textsuperscript{382} Daniels, 93 Cal. Rptr. at 632. In Vandenberg, the court stated:

In his capacity as the owner of the legal interest in the property, a father can transfer to the police the limited right to enter and search the entire premises including that portion of the real property which has been designated by the parent for the use of his children. . . . In his capacity as the head of the household, a father has the responsibility and authority for the discipline, training and control of his children. In the exercise of his parental authority a father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son’s social behavior and
child usually does not have actual or apparent authority to permit a search of the parent's residence. A child's interest in the family home is subservient to that of the parent; the minor does not have coequal dominion. "Although parents may choose to grant their minor children joint access and mutual use of the home, parents normally retain control of the home as well as the power to rescind the authority they have given." There are, of course, exceptions to this rule. But consent to search given by a minor child should generally be considered invalid.

The most difficult questions in the law of third party consent involve the generic roommate. Generally, a cotenant can consent to a search of all areas of joint control. A roommate, for example, could consent to the search of a common kitchen or living room. The issue becomes tricky, however, when one or more cotenants are away from the residence or disagree as to whether to consent to the search. A cotenant present in the residence may validly consent to a search of common areas regardless of whether the defendant is inside. Moreover, a pres-

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Vandenberg, 87 Cal. Rptr. at 880. The California Supreme Court, however, has ruled that "[c]ommon authority over personal property may not be implied from the father's proprietary interest in the premises." In re Scott K., 155 Cal. Rptr. 671, 676 (Ct. App. 1979). Thus, while a parent may authorize the search of his minor child's room, he does not necessarily have authority to permit a search of the child's locked personal effects. See id.

384. Id.
385. The Jacobs court noted:

We do not suggest that consent by a minor will be ineffective in all cases in which no adult occupants are present. As a child advances in age she acquires greater discretion to admit visitors on her own authority. In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas. Exceptional circumstances also may justify a search that otherwise would be illegal. For example, some courts have upheld searches made at the request of a child or when a child is the victim of or a witness to a crime.

See id. at 764.
386. People v. Clark, 857 P.2d 1099, 1116 (Cal. 1993) ("Thus, objects left in an area of common use or control may be within the scope of the consent given by a third party for a search of the common area."); see People v. Boyer, 768 P.2d 610, 626 (Cal. 1989) ("When one cotenant with joint control of the area to be searched is present on the premises, he or she may consent to the search despite the absence of others."); see also People v. Wilkins, 17 Cal. Rptr. 2d 743, 749 (Ct. App. 1993) (stating that a search is reasonable if one of the joint occupants consents and is present during the search); People v. McClelland, 186 Cal. Rptr. 365, 366 (Ct. App. 1982) (stating that the cotenant has authority to consent to a search of the common areas).
387. See supra note 386 and accompanying text.

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ent cotenant can consent to a search over the refusal or objections of another tenant who is also present at the residence. Likewise, when a roommate is away from the premises, an absent cotenant can consent to a search. An absent cotenant, however, may not validly consent when her roommate is present and refuses to consent to the search.

The California Supreme Court has acknowledged the intrinsic hazards of cotenant consent, and has warned against governmental abuse:

We have recognized that the assumption of risk inherent in co-occupancy has its limits. An entry or search, even though authorized by a co-occupant, may be so intrusive that it belies the conclusion that the parties assumed or even contemplated the risk of its occurrence by deciding to jointly inhabit the subject residence. For instance, an absent cotenant cannot authorize the police to burst into occupied premises unannounced if there is no emergency justifying such a frightening intrusion.

Cotenants cannot consent to a search of occupied bedrooms and bathrooms because the inhabitant of these rooms "is entitled to an expectation of privacy far greater than those persons in the common areas of a house, such as the living room and kitchen." Moreover, a cotenant cannot consent to a search of private bedrooms in which she maintains no joint control. The right to privacy trumps expedience in such circumstances—as it should.

4. The Scope of Consent

The scope of consent delineates the time, place, and extent of a search. As with the issue of voluntariness, the appropriate scope of a search is a factual issue judged by the totality of the circumstances.

389. Wilkins, 17 Cal. Rptr. 2d at 751; People v. Engel, 164 Cal. Rptr. 454, 461 (Ct. App. 1980) (stating that cotenant could validly consent to the search of an area where she had a possessory right).
391. Tompkins v. Superior Court, 378 P.2d 113, 116 (Cal. 1963) (holding that "one joint occupant who is away from the premises may not authorize police officers to enter and search the premises over the objection of another joint occupant who is present at the time"). When a present tenant neither expressly objects nor is asked for his consent, however, there is some judicial authority for an absent tenant validly consenting to a search. Veiga, 262 Cal. Rptr. at 926.
As articulated by the United States Supreme Court, the scope of a consent search is measured by "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? Law enforcement is limited "by the mutual understanding and reasonable expectations of the parties," and the government bears the burden of showing that a warrantless search was within the scope of consent. The individual permitting the search can expressly limit the scope of his consent.

[T]he "scope" of a consent may be determined equally from reasonable implications derived from a person's express words and conduct as well as from a person's express words which require no implications. The concept of an officer's "reasonable expectations" is simply that of the "reasonable person" test—the right of a hearer to draw inferences from another's express words and conduct.

For example, an individual's failure to object to the extension or continuation of a search may indicate that the scope of consent was not exceeded.

Two considerations guide the scope of any particular search. First, "the search must be limited in scope to that which is justified by the particular purposes served by the exception" to the warrant requirement of the Fourth Amendment. For example, a warrantless search incident to a lawful arrest is premised on officer safety and preservation of evidence. Such concerns, however, only validate a search of the arrestee and the area within his immediate control—not his house two blocks away. Second, "[t]he scope of a search is generally defined by its expressed object." For example, consent to search the interior of a car includes within its scope permission to examine a paper bag lying

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398. Jimeno, 500 U.S. at 262; Crenshaw, 12 Cal. Rptr. 2d at 175; People v. Martinez, 65 Cal. Rptr. 920, 922 (Ct. App. 1992).
399. Engert, 164 Cal. Rptr. at 463 (affirming the denial of the defendant's suppression motion because his girlfriend claimed communal ownership of the boxes that were searched and specifically consented to the search of one box).
400. United States v. Pena, 920 F.2d 1509, 1515 (10th Cir. 1990) (holding a consensual search of the rear quarter panel of an automobile to be valid because the defendant did not object to the scope of the search); United States v. Espinosa, 782 F.2d 888, 892 (10th Cir. 1986) (concluding, under the totality of the circumstances, that the defendant's failure to object, detract, or narrow the search of his automobile indicated that the police search was reasonable).
403. Royer, 460 U.S. at 500.
404. Florida v. Jimeno, 500 U.S. 248, 251 (1991); People v. Crenshaw, 12 Cal. Rptr. 2d 172, 174 (Ct. App. 1992) (upholding search of defendant's car when he knew that the authorities wanted to search for drugs and placed no limitations on the search).
on the vehicle's floor. Consent to search the trunk of a car, however, does not authorize law enforcement to pry open a locked briefcase found inside the trunk. And permission to search the interior of a vehicle does not license an inspection of the trunk, or vice versa. Moreover, consent may be withdrawn at any time before the search is completed.

Generally, law enforcement does not need separate permission to search containers within the scope of the original consent. For example, agreeing to a search of one's suitcase necessarily includes consent to search pouches and envelopes within the luggage. Similarly, permission to search a tote bag authorizes a search of a container within the bag which can be opened without "a key, knowledge of a combination, or anything other than merely removing the lid." But consent to "look around" a residence does not include within its scope permission to search closed suitcases and sealed boxes. Searches of locked rooms and containers always require independent consent, despite their apparent inclusion within the original scope of the search.


405. Jimeno, 500 U.S. at 251.
406. Id.
407. People v. Martinez, 65 Cal. Rptr. 920, 922 (Ct. App. 1968). Many other examples have been provided by judicial opinion. "Consent to search a barn does not authorize search of a cellar not connected with the barn." Id. (holding search of an automobile to be unconstitutional when the defendant said, "Search me"). Even the most comprehensive consent to a vehicular search would not include permission to slash open a spare tire. United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990). And consent to search for a man seen running toward a house would not include permission to probe for burglar's tools. People v. Superior Court (Arketa), 89 Cal. Rptr. 316, 319 (Ct. App. 1970).
411. People v. Cruz, 395 P.2d 889, 892 (Cal. 1964); People v. Murillo, 50 Cal. Rptr. 290, 293 (Ct. App. 1966) (holding that consent to search an apartment did not include consent to use a key found in the search to open the defendant's attaché case).
412. Florida v. Jimeno, 500 U.S. 248, 251-52 (1991); People v. Cooney, 286 Cal. Rptr. 765, 768 (Ct. App. 1991) (holding that consent to search a house did not include consent to search a locked closet inside the house). It should be noted, however, that everything within plain view is subject to search and seizure. People v. Szabo, 165 Cal. Rptr. 719, 725 (Ct. App. 1980).
5. Consent Searches in the Welfare Context

Although the purposes of welfare consent searches are different than those in the criminal investigation context, the relevant considerations and limitations are analogous. Welfare investigators must be cognizant of the circumstances surrounding a request for consent to search. It should be remembered that reasonableness is the ultimate test and that everything said or done can be incorporated into the totality of the circumstances. The best course is to stay well within the bounds of the Constitution, avoiding the legal gray areas subject to unbridled judicial discretion. If someone traverses the fine line between validity and illegality, he is likely to be hauled into court to explain his actions, words, and motives.

Consent to search should be unequivocal, and implied consent should be avoided. "May I have consent to come in?"—or words to that effect—should preface a recipient's permission, and ambiguous responses should be followed up with, "Is that a yes?" It should never be assumed that some furtive motion is equivalent to consent. Particularly careful attention should be paid to instances where a recipient initially refuses to consent, requests a justification for the search, or asks whether the investigator has a search warrant. Although not required and sometimes counterproductive, advising the recipients of their Miranda rights or their right to refuse consent to a search are clear indicators of voluntariness.

An investigator should never claim the right to enter unless he possesses a valid search warrant. Using threats or force is always unacceptable and almost assuredly unconstitutional. 413 Although much leeway exists in light of Illinois v. Rodriguez, 414 third party consent should be avoided at all costs. Legally definitive consent can only be received from the welfare recipient. Investigators may generally assume that a recipient may consent to an inspection of his dependent child's living quarters; however, the scope of consent must at all times be reasonable. If any uncertainty exists as to whether a particular room or item may be inspected, express consent should be requested. As a general rule, independent consent should be obtained to search for items not in plain view.

C. Administrative Searches

Searches by public assistance investigators might also fit within one of two legal niches that heretofore have gone untested in the welfare con-

413. See supra note 322.
414. 497 U.S. 177, 185-86 (holding third party consent valid when premised on apparent common authority).
text. First, investigators could conduct warrantless administrative searches pursuant to the Supreme Court's 
Colonnade-Biswell doctrine. Second, investigators could apply for and execute administrative search warrants—
instruments that require less than criminal probable cause to issue. As discussed below, the former option is 
fatally flawed by its required nexus to commercial operations. The latter alternative, however, offers a promising 
solution to the conflict between public concern over welfare and individual constitutional rights.

1. Warrantless Administrative Searches

Beginning with 
Colonnade Corp. v. United States' and Biswell v. United States," the Supreme Court opined that warrantless searches of certain "closely regulated" businesses would not necessarily violate the Fourth Amendment. Industries governed by pervasive regulations, the Court held, had reduced expectations of privacy in their buildings, effects, and documents. A businessman submerged in federal, state, and local regulation simply "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." The Colonnade-Biswell doctrine, therefore, "is essentially defined

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415. Through what has become known as the Colonnade-Biswell doctrine, the Court has recognized that the Fourth Amendment affords less protection to proprietors of "closely regulated" industries. New York v. Burger, 482 U.S. 691, 700-01 (1987) (citing United States v. Biswell, 406 U.S. 311 (1972); Colonnade Corp. v. United States, 397 U.S. 72 (1970)).
416. See infra Part III.C.
421. Donovan, 452 U.S. at 600; see also People v. Harbor Hut Restaurant, 196 Cal. Rptr. 7, 8-9 (Ct. App. 1983).

The central precept to be found in Colonnade, Biswell, and Donovan is that, in undertaking to engage in a highly regulated and licensed enterprise, the entrepreneur thereby consents to the array of regulations associated with the trade; that is, its burden as well as its benefits. The businessman engaged in such a trade cannot but reasonably anticipate that his establishment is subject to periodic inspections undertaken to further the regulatory objective.
Id.
by ‘the pervasiveness and regularity of the federal regulation’ and the
effect of such regulation upon an owner’s expectation of privacy.”422
Moreover, “a long tradition of close government supervision” emphasizes
the ubiquity of the regulatory scheme and the limited solitude anticipated
by the industry.423 Because entrepreneurs in closely regulated industries
maintain lesser expectations of privacy in their businesses, the warrant
and probable cause requirements of the Fourth Amendment have dimin-
ished application.424 A warrantless search of these commercial premises, therefore, can be “reasonable” and constitutionally valid.425

The Supreme Court has established a three-part test for assessing the
validity of a warrantless search scheme pursuant to the Colonnade-
Biswell doctrine. First, there must be a substantial government interest
served by the warrantless investigations.426 Second, the warrantless
searches must be necessary to further the regulatory strategy.427 Third,
the investigatory scheme must provide “a constitutionally adequate sub-
stitute for a warrant” through its certainty and regularity of applica-
tion.428 This final prong essentially requires “narrow tailoring” of the in-
spection provisions to ensure minimal intrusion upon Fourth Amendment
rights.429 The Court has approved warrantless search schemes for li-

422. Burger, 482 U.S. at 701 (quoting Donovan, 452 U.S. at 600).
423. “[T]he duration of a particular regulatory scheme will often be an important
factor in determining whether it is sufficiently pervasive to make the imposition of a
warrant requirement unnecessary.” Donovan, 452 U.S. at 606.
424. Burger, 482 U.S. at 702.
425. Id.
426. Id. at 702; Donovan, 452 U.S. at 602; United States v. Biswell, 406 U.S. 311,
315-16 (1977); see also Pinney v. Phillips, 281 Cal. Rptr. 904, 911-12 (Ct. App. 1991);
Los Angeles Chem. Co. v. Superior Court, 276 Cal. Rptr. 647, 655-56 (Ct. App. 1990);
Rptr. 248, 251 (Ct. App. 1985).
427. Burger, 482 U.S. at 702; Donovan, 452 U.S. at 601, 602-03; Biswell, 406 U.S. at
316; see also Pinney, 281 Cal. Rptr. at 911-12; Los Angeles Chem. Co., 276 Cal. Rptr.
at 655-56; Paulson, 265 Cal. Rptr. at 581-82; Kim, 219 Cal. Rptr. at 251.
428. Burger, 482 U.S. at 703; see also Pinney, 281 Cal. Rptr. at 911-12; Los Angeles
Chem. Co., 276 Cal. Rptr. at 655-56; Paulson, 265 Cal. Rptr. at 581-82; Kim, 219 Cal.
Rptr. at 252.

In other words, the regulatory statute must perform the two basic functions
of a warrant: It must advise the owner of the commercial premises that the
search is being made pursuant to the law and has a properly defined scope,
and it must limit the discretion of the inspecting officers.

Burger, 482 U.S. at 703.

This is accomplished by comprehensive regulations that place the businessman
on notice that his property may be subject to inspection and by careful limitations
on the time, place, and scope of any warrantless search. Id.
429. Kim, 219 Cal. Rptr. at 252.

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censed firearm dealers, underground and surface mines, and automobile junkyards. Likewise, California courts have upheld warrantless inspection provisions for massage parlors, liquor licensees, pharmacies, optometrists, wholesale fish dealers, vending machine licensees, and nursing home licensees.

Public assistance in America can be described as a massive industry. Although the "stock holders" are ill-defined and a "mission statement" is conspicuously absent, the pervasive regulatory scheme and the sheer numbers involved are indicative of the industrial nature of the American welfare system. The government undoubtedly has a substantial interest in curbing the tide of public assistance fraud. The unmitigated fleecing of taxpayer largesse makes the detection and prevention of welfare fraud a compelling concern for all levels of government. Moreover, warrantless inspections of welfare recipients' homes are a necessary component of any fraud detection scheme because it would be nearly impossible to verify the absence of a parent or the presence of a dependent child without home visits. "[G]overnment has a significant need to routinely inspect for violations of public health and safety standards for private property," reasoned one California appellate court, "[and] such inspections involve 'a relatively limited invasion of . . . privacy.'

A keen legislator could draft a warrantless search scheme providing both certainty and regularity in its application.

There are, however, obvious problems with applying the Colonnade-Biswell doctrine to the homes of welfare recipients. Although the American welfare system can be loosely described as an "industry," individual welfare recipients are neither businesses nor commercial entities. And

430. Biswell, 406 U.S. at 311.
431. Donovan, 452 U.S. at 694.
432. Burger, 482 U.S. at 691.
433. Kim, 219 Cal. Rptr. at 248.
441. See supra notes 51-76 and accompanying text.
442. See supra Part II.E.
even though their eligibility and concomitant payments are pervasively regulated, they are human beings with no necessary connection to an industrial complex. But more importantly, the Supreme Court and lower courts have emphasized "the sanctity accorded an individual's home." The underpinnings of this conviction are both historical and pragmatic: A man's home is his castle, and only with grievous solicitude and upon convincing rationales should government interfere with the privacy of his abode. The warrant and probable cause requirements, therefore, "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.")

The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

In contrast, commercial enterprises possess a lesser expectation of privacy than an individual's home. The Supreme Court has articulated that "business premises may . . . reasonably be inspected in many more situations than private homes." A broad definition of "reasonableness" under the Fourth Amendment can countenance warrantless searches of particular industries based on detailed statutory provisions and pervasive regulations. But to extend that principle to private residences would stretch the constitutional guarantee beyond its breaking point. The Connnade-Biswell doctrine, therefore, is simply inapplicable in the welfare context.

2. Administrative Search Warrants

"[N]o Warrants shall issue," proclaims the Fourth Amendment, "but upon probable cause." Probable cause is the general standard by which the reasonableness, and hence, the constitutionality of a given warrant, is judged. As its name implies, probable cause deals with probabilities—the likelihood that a certain fact will be found true.

445. Camara, 387 U.S. at 528.
447. Donovan, 452 U.S. at 599 ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home."); New York v. Burger, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home.").
449. U.S. CONST. amend. IV.
450. Camara, 387 U.S. at 535.
The appropriate considerations "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Probable cause is a "fluid concept" which accommodates the factual and legal scenario at hand. Although it cannot be "reduced to a neat set of legal rules," probable cause in the criminal context can be roughly defined as "a reasonable ground for belief of guilt." "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." The facts and circumstances supporting an administrative inspection, however, rarely suffice as criminal probable cause. In the welfare context, allegations of fraud would seldom demonstrate specific criminal activity. Rather, fraud claims stem from otherwise innocuous facts (e.g., the father living in the home) which in and of themselves are not criminal. Moreover, direct corroboration is often impossible to obtain. Anonymous phone tips of welfare fraud uniformly lack indices of "veracity," "reliability," or "basis for knowledge." Neighbors and acquaintances rarely provide evidence against the recipient, fearing reprisal or exposure of their own fraud. And "probable cause in the welfare context," according to the Court, "requires more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of probable cause 'is a reasonable ground for belief of guilt.'") (citation omitted).

452. Id.
463. Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."); see also Brinegar, 338 U.S. at 175 ("The standard of proof is accordingly correlative to what must be proved.").
455. Brinegar, 338 U.S. at 175.
456. Id. at 175-76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (alterations in original).
457. Cf. Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) (noting the unique attributes justifying area building inspections, including the passage of time, the nature of the building, or the condition of the entire area).
of the aid that has been authorized for it." These inherent obstacles to welfare fraud investigation "highlight[] the unworkability of attempting to apply traditional standards of criminal probable cause to such searches."

Beginning in 1959, the United States Supreme Court recognized that administrative inspections are a breed apart from criminal searches. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Probable cause, the Court has held, is "a flexible standard of reasonableness" which can conform to the needs and rights implicated by a particular search. Administrative searches are generally not intended to gather evidence of criminal activity. Inspection warrants serving administrative purposes, therefore, need not be supported by criminal probable cause. Rather, such warrants can issue on a lesser quantum of proof than required for criminal investigations. Administrative probable cause can be established by two methods. First, "specific evidence of an existing violation" can justify the issuance of an administrative warrant. "[T]here must be some plausible basis for believing that a violation is likely to be found," opined one California appellate court. "The facts offered must be sufficient to warrant further investigation." Second, administrative probable cause can be satisfied by "reasonable legislative or administrative standards for conducting an . . . inspection [of] a particular dwelling." Such standards could be based on, among other things, "the passage of time."

460. *Wyman*, 400 U.S. at 324.
463. *Id.* at 383 (Douglas, J., dissenting).
467. County of Contra Costa v. *Humore, Inc.*, 53 Cal. Rptr. 2d 647, 653 (Ct. App. 1996) (finding sufficient evidence to support reasonable suspicion of ongoing violations to justify the issuance of an 'inspection permit').
470. *Id.* (quoting *Marshall*, 647 F.2d at 102).
472. *Id.*
The California legislature has codified the administrative probable cause standard and established procedures for the issuance of administrative inspection warrants.\(^{473}\) The search must be pursuant to state or local legislative mandates "relating to building, fire, safety, plumbing, electrical, health, labor, or zoning."\(^{474}\) The warrant must be supported by an affidavit demonstrating "cause," particularly describing the place to be searched and the purpose of the inspection.\(^{475}\) In addition, the affidavit must aver that consent to inspect was requested and denied, or give sufficient reasons why consent was not first sought.\(^{476}\) The issuing judge may request testimony from the warrant applicant and other witnesses to confirm the existence of cause to search.\(^{477}\) The warrant is only valid for fourteen days after issuance,\(^{478}\) and may only be executed between the hours of 8:00 a.m. and 6:00 p.m. in the presence of the residence's owner or occupant.\(^{479}\) If consent to search had previously been sought and refused, twenty-four hours notice must be given prior to the execution of the warrant.\(^{480}\) The statute also expressly prohibits the use of force to enter the residence or conduct the search.\(^{481}\)

Judicial opinions have upheld administrative search warrants in a variety of settings: occupational health and safety inspections of manufacturing plants,\(^{482}\) hazardous waste inspections of shipyards,\(^{483}\) and build-


475. Id. § 1822.51.

476. Id. § 1822.52.

477. Id.

478. Id. § 1822.53.

479. Id. § 1822.55.

480. Id. § 1822.56.

481. Id.

482. Id. A person "who willfully refuses to permit an inspection," however, "is guilty of a misdemeanor." Id. § 1822.57. Criminal liability, therefore, is intended to serve as a substitute for official force.

ing, zoning, and health and safety inspections of residences. In the opinion of this author, administrative inspection warrants would also be appropriate in the welfare context. As noted by the Wyman Court, the main focus of public assistance is the health and welfare of the dependent child. Nutrition, hygiene, and a healthy living environment are the laudable goals of welfare. Administrative warrants to search the homes of welfare recipients further the “health” and “safety” of a significant portion of the citizenry and therefore would satisfy the statutory requirements. While criminal probable cause would almost certainly be wanting, administrative probable cause could be demonstrated in many welfare cases. For example, an anonymous call that a dependent child does not live at the residence, coupled with an adult-only building restriction in the complex, would likely suffice for probable cause.

The details of a welfare administrative warrant scheme would have to be based on trial and error and the fallible interplay between judicial opinion and executive action. The first step, however, is the enactment of enabling legislation by state or local officials. Until then, the administrative warrant in the welfare context remains only a theoretical possibility.

IV. A MODEST RECOMMENDATION: A TIERED APPROACH TO WELFARE SEARCHES

Public assistance administrators have a multitude of alternatives in the investigation of welfare eligibility and fraud. This author, however, would suggest one of two models for conducting inspections of welfare recipients’ homes. First, consent walk-throughs could serve as the sole method of investigation. As argued above, such schemes are wholly consistent with the Constitution. Moreover, they are generally effective in meeting the goals of welfare investigations.

Second, a tiered approach to welfare searches could be adopted. Each of the aforementioned investigatory rubrics would serve an important purpose in this multi-method scheme.

836, 842 (Ct. App. 1989).
487. CAL. CIV. PROC. CODE § 1822.50 (“any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning”).

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A. Wyman "Home Visits."

Early fraud\textsuperscript{488} investigators would utilize home visits to confirm a recipient's eligibility for welfare benefits. Consistent with \textit{Wyman} and \textit{Whitburn}, sufficient notice should be given to the recipients, and time constraints should be placed on when a home visit can occur. If consent to conduct a home visit is refused, welfare benefits can be denied or terminated. This consequence, however, must stem from an inability to verify eligibility for welfare; it should not result from a recipient's refusal to permit a home visit.

B. Consent "Walk-Throughs."

Both early fraud and full field\textsuperscript{489} investigators would request voluntary consent to search the recipient's residence where welfare fraud is suspected. The consent, of course, must be voluntary. And as previously argued, investigators should avoid legal "gray areas" by receiving unequivocal express consent to search from the welfare recipient. Moreover, investigators must always be mindful of the scope of consent, erring on the side of independent permission.

C. Administrative Inspection Warrants.

Either early fraud or full field investigators could utilize an administrative search warrant procedure. Such a warrant should be sought when eligibility for welfare is in question, either from insufficient information or suspected fraud. The statutory requirements, however, must be met. The application for an inspection warrant must generally follow a rebuffed request to search, and the warrant can only be executed in the presence of the recipient between the hours of 8:00 a.m. and 6:00 p.m. As noted above, enabling legislation by local or state officials for this proposed "welfare warrant" has yet to be considered.

D. Criminal Search Warrants.

And finally, welfare investigators should seek a standard search warrant where criminal probable cause is apparent. Where sufficient evidence can be produced to support "a reasonable ground for belief of
of welfare fraud, the often tedious search warrant process should be heeded. Although such circumstances will rarely surface in the welfare fraud context, criminal search warrants are always the preferable method of investigation.

This tiered method could meet the often competing goals of public assistance administrators: maximizing the detection and prevention of welfare fraud, while minimizing the intrusion into the lives of welfare recipients and staying within the bounds of the Constitution. Of course, this proffered approach is only a suggestion. The intelligentsia of social welfare are likely to have other, superior recommendations. But be assured that welfare fraud is endangering the continued viability of the American "safety net." There are many options within the realm of possibility; the status quo, however, is not among them.