

STORMING THE CASTLE TO SAVE THE CHILDREN:
THE IRONIC COSTS OF A CHILD WELFARE EXCEPTION TO
THE FOURTH AMENDMENT

DORIANE LAMBELET COLEMAN*

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* Professor of Law Duke Law School. B.A., Cornell University, 1982. J.D., Georgetown University Law Center, 1988. For their enormously helpful comments and contributions, I thank Chris Baird, Kate Bartlett, Erwin Chemerinsky, Jim Coleman, Molly Donovan, Catherine Fisk, Amanda Lacoff, Janet Mason, Laura Underkuffler, Neil Vidmar, and Larry Zelenak. For inspiring this Article, I also thank Ken Dodge and Duke University's Center for Child & Family Policy.

INTRODUCTION

Six-year-old Jackie Doe dances suggestively in the bathroom at camp, laughing as she touches herself and another girl in private places. Concerned that Jackie's behavior indicates a premature sexual awareness, her counselor reports the incident to the child abuse hotline. Child Protective Services (CPS) assigns a caseworker to investigate the possibility that Jackie has been sexually abused. Under state law, sexual abuse is both a crime and a basis to remove the child from the custody of her parents.

At the door of the Doe family home, the caseworker explains to Jackie's mother that she needs to come in, look around, and see the child. At first, her mother refuses to allow the caseworker in, but the caseworker insists. When Jackie's mother wonders if she should call a lawyer, the caseworker tells her there is no need to consult with anyone. Jackie's mother reluctantly accedes. The caseworker says that she needs to take pictures of Jackie's body. Her mother, visibly shaken, again expresses discomfort, but the caseworker tells her "Oh, don't worry. It's more stressful for the parent than it is the child." And so Jackie's mother helps Jackie to take off her clothes. The caseworker asks Jackie to lie down on the bed and spread her legs. Despite having no training in this specialized work, she then "[takes] pictures of Jackie's vagina and buttocks in a closed position, and then instruct[s] [her mother] to spread Jackie's labia and buttocks, so that she [can] take pictures of the genital and anal areas."¹ For months afterwards, both Jackie and her mother suffer from nightmares, anxiety, and depression.

Finding no basis to substantiate its concern that the child may have been abused, the state closes its case file. Jackie's mother files suit alleging violations of her and her daughter's Fourth and Fourteenth Amendment privacy rights. In that context, the caseworker's supervisor allows that "she would not

1. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002).

have taken the pictures but opine[s] that the decision to do so lay within [the caseworker's] discretion."²

This story is both recent and true. Child welfare investigations tend to involve strip searches or genital examinations only when the state suspects that a child has been the victim of serious physical or sexual abuse; however, even mundane abuse and neglect reports investigated by officials acting in good faith can result in deeply intrusive state action that touches upon aspects of privacy that the culture and law typically have considered fundamental. State officials, including caseworkers and the police, annually conduct about 2 million such investigations which generally involve entry into and search of the family home, and interviews with and physical examinations of the children whose welfare is in question. In many cases the latter occur during school hours, so that parents do not know about them and are unable to interfere. And, states formally rely upon their officials' ability to conduct investigations unfettered by procedures designed to safeguard the privacy of the family so they can exercise the maximum discretion possible in this process. Specifically, although such investigations seek evidence that could support both a criminal and civil charge, and touch upon the Fourth Amendment's most hallowed ground—the personal residence and the person herself—states generally pursue their approach as though there is a child abuse exception to the Fourth Amendment's presumptive requirements of a particularized warrant and probable cause.³

The premise underlying this approach to the child maltreatment problem is that privileging family and individual privacy risks enormous damage to children who might be the victims of abuse or neglect. Indeed, some have argued (including myself in a different context) that it is precisely a strong cultural and legal concept of privacy that allows maltreatment of vulnerable family members to

2. *Id.*

3. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” U.S. CONST. amend. IV.

occur.⁴ As applied to child welfare programs, this argument suggests that where the government is unable to investigate reports of the possibility that children are at risk, some children will continue to suffer and even to die at the hands of their abusive parents and guardians. A child welfare exception to the Fourth Amendment's presumptive requirements is believed to be essential to protect these children.

Perhaps because many states agree with these arguments, their practices have gone largely unimpeded by the courts: The United States Supreme Court has yet to decide a case involving the constitutionality of child maltreatment investigations, and in particular, the Fourth Amendment's applicability to those investigations. Moreover, no state supreme court has addressed this issue in a straightforward manner. The lower courts, including the federal circuits and state appellate courts, only recently have begun to hear relevant cases in large enough numbers to provide a sense of how the issue is percolating. Notably, while all of the federal circuits agree that the Fourth Amendment applies to state maltreatment investigations, they are split on the essential question whether it requires a particularized warrant and probable cause,⁵ or merely some version of the administrative or "special

4. See, e.g., DORIANE LAMBELET COLEMAN, *FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM* 6-9, 91-144 (2002) (arguing that American liberalism, particularly as enshrined in the First Amendment's free speech doctrine and the Fourteenth Amendment's doctrine of parental autonomy, enables adults to create harmful circumstances for children and precludes law-based solutions to those circumstances); Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 569 (1992) (setting out the thesis that "[a]ttempts to accommodate family autonomy and privacy interests have significantly compromised the protection of our children"); Jim Puzanghera, *The Dilemmas of Child Welfare: Protect Kids or Preserve Family?*, *NEWSDAY*, Jan. 17, 1993, at 53 (referring to a policy of protecting the rights of parents and keeping families together as being "sometimes at the expense of children in danger").

5. A particularized warrant is one which, according to the Amendment's own terms, "particularly describ[es] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; see also *infra* notes 136-38, 322-33 and accompanying text (explaining that particularization is essential to assure that investigations are appropriately fettered in scope, and concomitantly that the investigating officials cannot exercise undue discretion in their conduct). Although the quantum of evidence necessary to meet the probable cause test may have varied historically and is often said to mean different things in different contexts, a survey of judges indicates that the threshold is substantially higher than that necessary to meet the reasonable suspicion test, which states tend to apply to their child maltreatment investigations, and which courts tend to apply in removal cases under the Fourteenth Amendment. See *infra* notes 132-35 and accompanying text (describing these

needs” exception to the traditional warrant preference.⁶ Depending on how liberally it is applied, the special needs standard is effectively the child welfare exception to the Fourth Amendment that states seek to perpetuate, as it may permit warrantless intrusions on the basis of no, mere, or reasonable suspicion.

The profound irony of this approach is that, in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help. In 2002, for example, the states conducted approximately 1.8 million investigations concerning the welfare of nearly 3.2 million children. Only about 896,000, or twenty-eight percent, of these children were ultimately found to be victims of abuse or neglect.⁷ Seventy-one percent, or roughly 2.3 million children were thus subjected to state mandated “thorough” investigations involving at a minimum interviews, examinations, and/or home visits, in circumstances where the state in the end could not show that the children were unsafe and in need of rescue.⁸

points in detail).

6. The United States Supreme Court has held that, except in “a few specially established and well-delineated exceptions,” it is per se unreasonable for the government to search or to seize in the absence of a warrant issued by a neutral magistrate on a finding of probable cause. *Katz v. United States*, 389 U.S. 347, 357 (1967). Joining the traditional consent and exigent circumstances exceptions, the special needs doctrine has developed as a narrow but important exception to these conventional strictures. It applies when an investigation’s primary programmatic purpose is civil and not law enforcement related. Where it applies, the constitutionality of a search or seizure depends on the outcome of a reasonableness balancing analysis. The exception has resulted in reductions in privacy protections ranging from the elimination of both the particularized warrant and probable cause standards, to the requirement of a warrant but on less than probable cause, that is, on the grounds of no, mere, or reasonable suspicion. *See infra* notes 160-253 and accompanying text (discussing in detail the special needs exception and its applicability to child welfare investigations).

7. *See infra* notes 25-45 (providing this data).

8. Seventy one percent represents the percentage of cases investigated in which the state ultimately did not substantiate the original report. I take the position in this Article that, despite its beneficent intent, the state does more harm than good in many if not most of these cases. A report may be unsubstantiated for two principal reasons: First, there may have been no abuse or neglect to begin with, because the report was either fraudulent or simply wrong. Second, there may have been some evidence of abuse or neglect, but not enough to allow the relevant officials to substantiate the report. A portion of the cases in this category likely involves maltreatment that goes undiscovered. There are data suggesting that fifteen percent of all New York reports, or approximately 300,000 reports annually, are intentionally false. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 1384-88 (3d ed. 1998) (providing data from the New York Department of Social Services on

Investigating these children is consistent with the states' highly precautionary strategy to remedy the nation's maltreatment problem. However, from the perspective of the investigated child, the process is not so clearly meritorious. Indeed, despite the authorities' best intentions, the process can be harmful in two related ways. First, the investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment. It is critical in this regard that the Fourth Amendment uniquely has been interpreted to recognize the child's own individual interest in these values, by guarding her right also to be free from unreasonable searches and seizures both inside and outside the family home.⁹ Second, as the

intentionally false reports, including reports filed by spouses in contentious divorce and custody situations). It has also been persuasively argued that a significant percentage of investigated reports ultimately involve only poverty and not maltreatment. Douglas J. Besharov, *Child Abuse Realities: Over-Reporting Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 183-88 (2000). On the other hand, the National Clearinghouse on Child Abuse and Neglect Information suggests that close to 63,000 investigations annually, implicating approximately 100,000 children, yield some evidence of maltreatment, but in an amount insufficient to substantiate the allegation under state law. NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2002, at 716-1 tbls.2-5 (2004) [hereinafter CHILD MALTREATMENT 2002], available at <http://www.acf.hhs.gov/programs/cb/publications/cm02/cm02.pdf>. Other than these analyses, I have found nothing that attempts to allocate the 71 percent of unsubstantiated cases among the two explanations provided above. Thus, as between these two explanations, there simply is not an adequate basis to say in which category most cases fall. Certainly, there is no basis to conclude that any large percentage of these unsubstantiated cases involved children who were, in fact, the victims of unproven maltreatment. The 71 percent figure is thus a rough one. Nevertheless, as the only figure available, it does evidence that each year states intervene in the lives of approximately 2.3 million children where the intervention is not needed or where it fails to help a child at risk. One of my objectives is to challenge the assumption implicit in the prevailing approach that these interventions are harmless for the children involved.

9. See *infra* notes 173-74 and accompanying text (discussing this aspect of the doctrine). I claim in this Article that the Fourth Amendment is "unique" in this regard because the First and Fourteenth Amendments, under which the subject of family privacy is typically considered, do not usually provide "rights" to the children, but rather assume that their "interests" will be adequately cared for by the adults responsible for their care. See COLEMAN, *supra* note 4, at 100 (noting this point in the context of the Fourteenth Amendment's doctrine of parental autonomy). Moreover, in practice, the procedural protections afforded individuals under the Fourth Amendment are likely stronger than under the Fourteenth Amendment. See *infra* notes 132-35 and accompanying text (describing the quantum of evidence typically required to meet the Fourth Amendment's probable cause standard as opposed to the Fourteenth Amendment's reasonable suspicion standard). I use these distinctions, among others, in a companion piece entitled *Through the Prism of the Fourth Amendment: A New Look at Family Privacy* to develop the argument that the Fourth Amendment has important

introductory illustration intimates, depending upon the child and the nature of the investigation, the process can cause emotional and psychological damage ranging from temporary discomfort to significant long-term harm.¹⁰

If this strategy were a particularly effective tool in the battle against child maltreatment, it might be more defensible. However, even its proponents concede that because abuse and neglect are underreported, many more victims exist than are known to the system.¹¹ And they surmise that the investigations that do take place sometimes, or even often, fail to discover adequate evidence of maltreatment in cases where children are in fact truly victims.¹² Meanwhile, states largely ignore alternative approaches that could enhance the success of their efforts. For example, states could do more to increase societal awareness of the need to report child abuse with relevant particularity, especially in localities and among populations known to be reluctant to do so.¹³ They could work to reconcile the current conflict among experts about how to define

and as yet unrecognized contributions to make to the continuing evolution of family privacy theory. Doriane Lambelet Coleman, *Through the Prism of the Fourth Amendment: A New Look at Family Privacy* (work in progress, on file with author).

10. The range of emotional and psychological damage that can be caused by the investigations process is discussed throughout this Article. However, the argument and supporting cases and studies are featured in Parts I.C, III.B, and III.D.

11. See NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS 21-22 (2002) [hereinafter CURRENT TRENDS] (discussing the dangers of both over- and under-reporting in the mandatory reporting system currently in force throughout the country); CHILD MALTREATMENT 2002, *supra* note 8, at 716-17 tbls.2-5 (2004) (noting that of the approximately 1.8 million child welfare investigations conducted annually, close to 63,000, which implicate over 100,000 children, conclude that child abuse is "indicated" but that "maltreatment [could not] be substantiated under state law or policy, [even though] there was reason to suspect that the child may have been maltreated or was at risk of maltreatment").

12. See *supra* note 8 and accompanying text (providing illustrations of this view).

13. For example, North Carolina, one of the states with the highest annual incidence of child maltreatment, requires "every person to report suspected maltreatment." N.C. CHILD ADVOCACY INST., NORTH CAROLINA CHILD PROTECTIVE SERVICES DATA CARD (2004). However, "[i]t does not require citizens to provide any proof." *Id.*; see also *State v. Wilkerson*, 247 S.E.2d 905, 907-08 (N.C. 1978) (case in which neighbors and friends witnessed repeated incidents of father severely beating toddler, and only described those incidents after child was killed after a beating); Leslie Boyd, *DSS Can't Investigate Abuse Allegations if It Is Not Made Aware of the Situation*, ASHEVILLE CITIZEN-TIMES, Apr. 25, 2004, at 1A (noting importance of reporting suspected maltreatment, and setting out maltreatment definitions, reasons for suspicion, and information about what a citizen might expect when filing a report).

abuse and neglect, to eliminate definitions that are so broad they give officials on the ground unfettered discretion to define maltreatment,¹⁴ and to make sure that the definitions that remain include real instances of maltreatment that society currently prefers to ignore.¹⁵ Perhaps most importantly, they could do what is necessary to hire, train, and retain officials to work in the field who are given an appropriately sized caseload, sufficient support, and clear guidelines to reduce the extent of their discretion, so that they can do their jobs with due care and precision, and with respect both for the privacy of the family and for the health and safety of all of the children who are subject to their programs and procedures.¹⁶ These alternative strategies are not cheap and in some respects they

14. See NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE STATUTE SERIES 2005: DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2005) [hereinafter DEFINITIONS], available at <http://nccanch.acf.hhs.gov/general/legal/statutes/define.pdf> (stating that "[t]he standard for what constitutes an abusive act varies among the States," and states with broader definitions provide child protective services with greater discretion in determining what constitutes abuse).

15. See COLEMAN, *supra* note 4, at 23-27, 56-66 (exploring the manifestations of the epidemic of childhood emotional dysfunction in the U.S. and discussing the absence of adequate parenting and childcare that is principally responsible for this epidemic).

16. See, e.g., JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 140 (Margery Fry ed., 1970) ("Only if the caseworker is mature enough and trained enough to respect even bad parents and to balance the less-evident long-term considerations against the manifest and perhaps urgent short-term ones, will she help the parents themselves and do a good turn to the child."); GWENDOLYN L. HARRIS, N.J. DEP'T OF HUMAN SERVS., TRANSFORMING CHILD PROTECTIVE SERVICES IN NEW JERSEY: DYFS TRANSFORMATION PLAN 3-4 (2003), available at <http://www.state.nj.us/humanservices/Reports/DYFS%20Transformation%20Plan-03.pdf> (calling for increased resources and finding that the New Jersey Division of Youth and Family Services "lacks the sufficient and required tools to support staff" in terms of access to supervision, technology, equipment, training, and worker safety); *Don't Economize on Saving Children*, INDIANAPOLIS STAR, Feb. 9, 2004, at 8A (calling for the appropriation of funding for two child protection bills passed to reform Indiana's child protective services system, "a system with a policy of secrecy and an admitted history of underreporting child deaths"); Jessica Guenzel, *A Little Girl Lost: State Review Will Try to Determine Whether Cracks in DSS System Led to Toddler's Death*, WINSTON-SALEM J., Nov. 9, 2003, at A1 (reporting on the death of a two-year-old girl attributed in part to "high turnover rates, unfilled positions and inadequate financing" negatively affecting the county's social services department); Susan K. Livio, *Problems Multiplied for DYFS in 2003*, STAR-LEDGER (New Jersey), Dec. 28, 2003, at 1 (reporting that following the discovery of "the battered body of a 7-year-old boy," the New Jersey state government took steps to overhaul its "chronically understaffed, underfunded Division of Youth and Family Services"); Jonathan Martin, *Child-Abuse Hotline Puts Callers on Hold*, SEATTLE TIMES, Mar. 20, 2003, at B1 (reporting that because of understaffing and budget cuts a hotline "intended to more efficiently dispatch state child-abuse investigators" had up to two-hour hold times and complaints unanswered for a week).

are also conceptually and politically complicated. Reforming the reporting requirements to demand more of the citizenry and adopting more precise maltreatment definitions are particularly thorny issues in these respects. But it is wrong for states annually to risk the welfare of millions of children and families to avoid the political and fiscal burdens involved in adopting a more effective approach to the nation's child abuse problem. It is also wrong to abandon all respect for the values ensconced in the Fourth Amendment in support of such a flawed, over- and underinclusive system.

Children's interests are always particularly vulnerable in the ubiquitous constitutional and political battle between protecting the rights of individual adults and governmental exercises of power in the name of the public good. Advocates of the prevailing approach to the maltreatment problem are right to be concerned about unfettered family privacy, for children are "the Achilles heel of liberalism."¹⁷ Enabled and then protected by liberalism's doctrine of parental autonomy, adults sometimes cause great harm to their children.¹⁸ Understanding this is not the end of the story, however, for sometimes the opposite is true. Sometimes, in its zeal to protect children from the perceived and real inclinations of their parents and to safeguard its own health and welfare, the state itself commits violent acts that harm the children. The most prevalent example of this phenomenon throughout history—which I believe is again at issue in the context of this Article—has been the needless separation either psychologically or physically of healthy children from their normally functioning families.¹⁹ Discerning the

17. This wonderful expression, which explains much about the state of childhood in the liberal scheme, has been attributed to Professors Steven Shiffrin, whose article, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980), appears to contain the expression's first mention in the legal literature, and Larry Alexander, whose article, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 855 (1981), was published shortly after Shiffrin's.

18. See COLEMAN, *supra* note 4, at 99-107 (exploring this idea).

19. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (discussing the draconian removal policies of the Ancient Spartan state); *State v. Kargar*, 679 A.2d 81, 82-85 (Me. 1996) (describing the removal of a young boy from the custody of his Afghani immigrant parents because of biased conceptions about the nature of Afghani cultural practices and their tendency to harm children); Nancy McDaniel & Nita C. Lescher, *The History of Child Protective Services*, in *HELPING IN CHILD PROTECTIVE SERVICES: A COMPETENCY-BASED CASEWORK HANDBOOK* 39 (Charmaine Brittain & Deborah Esquibel Hunt eds., 2004) (discussing the New Deal program of Aid to Families with Dependent Children (AFDC) as

necessity of a separation is obviously the critical issue. In this Article, I argue that the Fourth Amendment's unusually express and considered compromise between individual rights and social order, and the presumptive requirements that codify that compromise, are particularly useful tools to resolve this issue because they assure that we always balance the threat of private violence against the public violence that necessarily results from governmental searches and seizures.²⁰ More than that, though, the Amendment recognizes that while privacy *sometimes* permits the individual to

"established to prevent child welfare authorities from removing children from their parents for financial reasons"); Lorie Graham, *Indigenous Peoples: Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619, 624-26 (2001) (noting that "[b]y the time [the Indian Child Welfare Act] was enacted into law in 1978, one-third of all Native American children were being removed from their communities and families and placed in non-Indian foster care, adoptive homes, and educational institutions" and discussing at length the reasons and consequences of such unnecessary removals); Jonathan L. Hafetz, "A Man's Home Is His Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 178, 207-08 (2002) (describing the increased regulatory activity of government during the late nineteenth and early twentieth centuries, stating, "intervention in the homes of poor families expanded through child neglect and abuse investigations, and frequently led to the removal of children to institutions").

20. In his most recent work, Fourth Amendment scholar Andrew Taslitz develops the compelling argument that government searches and seizures are inevitably acts of "political violence." ANDREW E. TASLITZ, *LAW ON THE STREET: SEARCH AND SEIZURE, RACE AND RESPECT IN AMERICAN LIFE* (forthcoming 2006). In Professor Taslitz's words, "[a]bsent a citizen's voluntary consent, all police activity involves violence or its threat. A 'search' is by definition an unwanted, thus forced, invasion of a reasonable expectation of privacy. A 'seizure' similarly is an unwanted interference with a person's freedom of movement or his possessory interest in property." *Id.* As he describes it, this violence typically causes its subjects to experience a range of emotional responses including fear, degradation, humiliation, and indignity along with its obvious physical impacts including confinement. *Id.* And he insists that these facts ought not to be obscured simply because political violence "may often be legitimate, necessary to enforcing the law, to encourage respect for it, and to catch the bad guys." *Id.* Indeed, given that the Framers were "distrustful of the state, fearful that it [would] use its awesome force to ... impose tyrannical rule in ways both large and small," Taslitz suggests that "[t]he Fourth Amendment is best understood ... as ... an attempt to tame political violence, ensuring its service to the 'security' of a free People by prohibiting unreasonable exercises of the state's use of force." *Id.* In other words, the Amendment's own terms, which Taslitz agrees involve a preference for the particularized warrant and probable cause, strike the balance between "[t]he right of the People to be secure in their persons, houses, papers, and effects," see U.S. CONST. amend. IV, and the need for the government to be allowed to commit acts of political violence to secure "the 'public' or 'common' good," see TASLITZ, *supra*. Because I think that it more aptly describes the acts of the government in child welfare cases, I use the term "public violence" in lieu of Professor Taslitz's "political violence," but the essential point is the same.

hide bad facts, it *always* means the right to dignity, personal security, and mobility. This last and deeply valuable idea ought not be abandoned, certainly not in the name of saving children who can benefit from it as much as adults.

The important relationship of the Fourth Amendment to the child welfare system has been surprisingly neglected by the legal academy. This dearth of scholarly attention is especially surprising given the judiciary's deeply conflicting views on the subject. Largely because of their tendency to focus on criminal procedure to the exclusion of even dual (civil-criminal) purpose investigations, no Fourth Amendment scholar has given the matter much attention in the legal literature or in case or hornbooks.²¹ And because of their tendency to focus on the First and Fourteenth Amendments and state law, family and children's law scholars also have ignored the subject, both in the legal literature and in casebooks.²² Occasional

21. Most notable in this regard is that Wayne R. LaFave's essential treatise contains only a brief section referring to the subject. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.3, at 457 (3d ed. 1996) (focusing on case law involving home visits as a condition to receiving state welfare funds, and within that context discussing also ordinary child abuse investigations). In that section, he notes that addressing the subject further is unnecessary because "it has been thoughtfully addressed in the recent legal literature." *Id.* § 10.3, at 464-65. As explained below, this is in fact not the case. See *infra* note 23 and accompanying text. Professor LaFave also notes that the subject has "seldom emerged in the reported cases." LAFAVE, *supra* § 10.3, at 464. He provides a "but see" cite to one federal appellate case and two state cases. *Id.* § 10.3, at 464 n.32. Of course, as I will discuss below, this issue has emerged quite strongly in the reported cases in the last ten years. See *infra* notes 169-89 and accompanying text (discussing this case law). Professor LaFave otherwise relies on dated analyses from two older articles to suggest that the legal standard likely requires a warrant but only on a finding of reasonable suspicion that maltreatment has occurred or that a child is at risk of abuse or neglect. *Id.* § 10.3; see *infra* notes 328, 337-39 and accompanying text (discussing the relevance of this work). Most important from a doctrinal standpoint is the absence from Professor LaFave's treatise of any discussion of the relevance of modern special needs analysis to this obviously apposite body of facts.

22. See, e.g., JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS (4th ed. 1999) (containing important treatment of issues implicated by abuse and neglect laws, and an article excerpt arguing that mandatory reporting requirements, among other things, trigger intrusive investigations, and thus ought to be considered most carefully, but otherwise not mentioning investigations and their relationship to the Fourth Amendment); ROGER J.R. LEVESQUE, CHILD MALTREATMENT LAW: FOUNDATIONS IN SCIENCE, PRACTICE AND POLICY 295-374 (2002) (containing a chapter entitled "Seizing Children, Terminating Relationships and Providing Alternate Care," which despite the "seizure" language focuses exclusively on Fourteenth Amendment issues and does not otherwise address maltreatment investigations or any Fourth Amendment issues); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW (4th ed. 2000)

flurries of interest in this relationship have arisen over the last 15 years, which have generated two particularly noteworthy pieces.²³

(containing a substantial treatment of the broader subject entitled “Protecting the Child from Abuse and Neglect” and a subcategory called “Discovery of Abuse” but focusing exclusively in that context on reporting laws, and then skipping directly to “The Causes and Effects of Abuse and the Treatment of the Abusing Family”); Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000-36 (1975) (discussing the risks and utilities inherent in the child welfare scheme, including in the investigation process, without noting the Fourth Amendment’s relevance to this area).

Indeed, I have found only one family law text that gives any attention to the matter; its authors state the problem exactly and nail the critical question on its head. See ELLMAN ET AL., *supra* note 8, at 1384-87. Reflecting on the large number of unfounded reports and unsubstantiated claims that pervade the system, its authors note that “[p]ractices used in child abuse investigations are also the subject of increasing criticism.” *Id.* at 1385. In support of this point, they cite “the provisions, explicit or implied, in many states that allow coercive, investigatory home visits, often without a search warrant or the necessity of establishing probable cause.” *Id.* The authors then ask:

What is to be made of [the] criticisms [regarding the practices used in child abuse investigations]? The risks of inaction, and of overly-aggressive intervention, are both severe: failing to stop abuse causes great harm, even death, to children; false accusations, aggressively pursued, can destroy families and reputations.... egregious examples of both are plentiful. Has the law shown enough sensitivity to the need to balance the risks of both mistakes? What improvements seem most necessary in this area?

Id. at 1387. My goal in this Article is specifically to address this series of questions.

23. Both pieces attempt squarely and thoroughly to address whether and how the Fourth Amendment applies to child welfare investigations, and both recognize the critical significance of the special needs exception to the analysis of this issue. The first piece is a scholarly student note by Michael R. Beeman, Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034 (1989), which argues in an older doctrinal context that the appropriate balance of the state’s need for an investigation and the family’s right to privacy mitigates in favor of requiring only an administrative warrant issued on the basis of the investigation’s reasonableness in the circumstances, rather than on the basis of probable cause. The other piece is a more pragmatic article by Mark Hardin, the Assistant Director of the American Bar Association’s National Legal Resource Center for Child Advocacy and Protection. Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493 (1988). Hardin’s article provides a detailed analysis of then-applicable Fourth Amendment law to all conceivable aspects of child maltreatment investigations in the context of his thesis that states ought to enact legislation specifically authorizing CPS and police to force compliance with child abuse investigations when necessary. *Id.* at 517-19. Hardin argues that such legislation ought to require a warrant on reasonable suspicion for social workers and on traditional probable cause for police in particularly intrusive settings. *Id.* at 536-48.

A few other pieces discuss aspects of the issues this Article raises. See Alan W. Blackman, Comment, *Warrantless Home Searches: The Road to Calabretta*, 22 J. JUV. L. 64 (2001-2002) (providing an overview of the special needs doctrine’s evolution and its application to the child abuse investigation in *Calabretta v. Yolo County Dep’t of Social Services*, 189 F.3d 808 (9th Cir. 1999)); Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1 (1991) (arguing from the child development perspective that

This earlier work, however, was produced before the Supreme Court refined the parameters of the Fourth Amendment's special needs exception, and before the issue had received attention from the federal appellate courts. Consequently, it is relatively unhelpful in today's quite different jurisprudential climate. And because it gives no more than a passing nod to the crucial individual interests and real-world harms implicated by the states' current investigatory approach, it also fails to tee up the facts so as to allow a thorough evaluation of the competing interests at issue. This Article seeks to fill this broad and deep hole in the legal literature.

Part I first summarizes the child maltreatment problem and describes the prevailing approach to investigating reports of abuse and neglect. It then explores the real-world impact of this approach, arguing that an unfettered and overbroad investigatory tool comes at a steep cost to literally millions of children and families. Part II sets out relevant Fourth Amendment doctrine and examines whether the special needs exception might constitutionalize the prevailing strategy of conducting warrantless investigations, often on little more than mere suspicion. This doctrine applies where "special needs, beyond the need for normal law enforcement" renders these protections "impracticable."²⁴ Part II concludes that the degree of interconnectedness between civil and law enforcement authorities and motivations that underlie many if not most investigatory schemes likely will preclude the doctrine's usefulness

the standards applied to governmental strip searches of children ought to vary based on the child's age); Michael Compitello, Comment, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135 (1997) (recognizing that child abuse investigations often cause more harm than good so that a healthier balance must be struck between family privacy and the states' need to investigate maltreatment reports, and arguing that because the courts and the constitutional doctrine under the First, Fourth, and Fourteenth Amendments are ineffective in this context, a legislative solution protecting family privacy would best achieve this needed balance); Jillian Grossman, Note, *The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations*, 27 FORDHAM URB. L.J. 1303 (2000) (proposing that children be able to consent to searches and that the evidentiary standard for exigent circumstances in child abuse cases be lowered to reasonable suspicion to allow the government greater latitude in such investigations); Christina B. Sailer, Note, *Qualified Immunity for Child Abuse Investigators: Balancing the Concerns of Protecting Our Children from Abuse and the Integrity of the Family*, 29 J. FAM. L. 659 (1990) (contending that allowing officers qualified immunity from civil rights claims in child maltreatment contexts best reflects the balance between family privacy and the state's need to investigate maltreatment allegations).

24. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

for this purpose. My own view is that absent exigent circumstances or lawfully obtained consent, the Fourth Amendment's presumptive warrant and probable cause requirements ought to apply whenever the state investigates children and their families in this context. As the introductory illustration reflects, CPS acting alone can do substantial harm to a child and her family. Part III thus develops a normative argument based in fundamental Fourth Amendment principles rejecting the exception. The investigations are generally too intrusive of deeply and reasonably held expectations about privacy, dignity, personal security, and mobility, to justify unfettered official intervention. I conclude that the Amendment provides a unique and unexplored opportunity within the constitutional jurisprudence to solve the delicate cultural impasse between advocates of family privacy and proponents of aggressive maltreatment programs in a way that best reflects the children's need for protection against both private and public violence.

I. THE PREVAILING APPROACH TO MALTREATMENT INVESTIGATIONS

Approximately 896,000 children are abused or neglected in the United States each year.²⁵ The maltreatment included in this estimate ranges from physical beatings and sexual abuse to medical, nutritional, and emotional neglect.²⁶ At least 1,400 children die each year from the most serious instances of maltreatment.²⁷ The majority of child victims are below age three, with 41 percent of fatalities involving children under age one, and 76 percent involving children under age four.²⁸ Undoubtedly, abuse

25. This statistic is based on the number of cases that CPS agencies across the country were able to substantiate. CHILD MALTREATMENT 2002, *supra* note 8, at xiv.

26. *Id.* at 22. Broken down by category, the data reveals that [d]uring 2002, 60.5 percent of victims experienced neglect (including medical neglect); 18.6 percent were physically abused; 9.9 percent were sexually abused; and 6.5 percent were emotionally or psychologically maltreated. In addition, 18.9 percent of victims experienced such "other" types of maltreatment as "abandonment," "threats of harm to the child," and "congenital drug addiction."

Id. (citations omitted).

27. NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT FATALITIES: STATISTICS AND INTERVENTIONS 1 (2004) [hereinafter FATALITIES], available at <http://nccanch.acf.hhs.gov/pubs/factsheets/fatality.pdf>.

28. *Id.* at 2. According to the National Clearinghouse on Child Abuse and Neglect Information, "[t]his population of children is the most vulnerable for many reasons, including

and neglect is a significant national problem that takes a real and personal toll on children and families everywhere. Consequently, it also is a most pressing policy and practical concern of state and local governments, which are ultimately responsible for developing and administering the response.

The most recent estimates from 2002 indicate that “2.6 million referrals, including 4.5 million children, were made to [state and local] CPS agencies [throughout the United States].”²⁹ A combination of federal and state statutory law requires either “everyone” or specially defined categories of persons, including teachers and doctors, for example, to report suspected maltreatment.³⁰ The ten

their dependency, small size, and inability to defend themselves.” *Id.*

29. CHILD MALTREATMENT 2002, *supra* note 8, at 5.

30. *See, e.g.*, Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C. §§ 5101-5116) (conditioning funding to states for child abuse prevention and treatment programs on states having in effect, among other things, laws that provide for some form of mandatory reporting of child abuse); D.C. CODE § 4-1321.02 (2001) (requiring professionals such as medical personnel, teachers, law enforcement, daycare providers, and others who come into contact with children through their work to report suspected abuse either to the police or CPS); N.J. STAT. ANN. § 9:6-8.10 (West 1993) (requiring “[a]ny person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse” to report the information to the Division of Youth and Family Services); N.Y. SOC. SERV. LAW § 413(1) (Consol. Supp. 2005) (requiring reporting by medical personnel and others that might “have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child,” as well as if they gain knowledge of possible abuse by the parent or guardians coming before them in their professional capacity). Approximately eighteen states have “any person” reporting requirements, while the majority “limit mandatory reporting to professionals working with children.” CURRENT TRENDS, *supra* note 11, at 3. The reporting requirements were adopted in the mid- to late 1960s in response to two important articles that for the first time described as medical diagnoses the “battered child syndrome” and the “maltreatment syndrome,” and provided that a physician’s failure to follow up on the diagnoses constituted a violation of professional ethics. *See* Vincent J. Fontana et al., *The “Maltreatment Syndrome” in Children*, 269 NEW ENG. J. MED. 1389 (1963) (expanding the “battered child syndrome” diagnosis to include “a situation ranging from the deprivation of food, clothing, shelter and parental love to incidents in which children are physically abused and mistreated by an adult,” thereby suggesting that by broadening the diagnosis in this way and renaming it the “maltreatment syndrome” the term more “fully describe[s] the true picture of this often life-threatening condition”); C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 17 (1962) (describing the “battered child syndrome” as “a clinical condition in young children who have received serious physical abuse” explaining that the diagnosis “should be considered in any child exhibiting evidence of fracture of any bone, subdural hematoma, failure to thrive, soft tissue swelling or skin bruising ... or where the degree or type of injury is at variance with the history given regarding the occurrence of the trauma,” and stating that “[p]hysicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that

states with the most annual reports of child maltreatment are, in descending order: California, New York, Florida, Texas, Michigan, Georgia, Ohio, North Carolina, Illinois, and Missouri.³¹ In describing the typical state policies and practices relating to child welfare investigations, this Article relies primarily on national figures and on illustrative provisions and practices from these states.

A. Defining the Cases for Investigation

The first feature of the prevailing strategy involves, at least in principle, taking no chances and casting the widest net possible in identifying the cases that will be investigated. This objective is accomplished through broad legal definitions of abuse and neglect, and screening criteria that are nearly as broad. It also involves statutory or regulatory provisions that mandate the investigation of all screened-in reports, and related provisions that allow state officials to go to court to compel compliance with the investigations.

Legal definitions of “abuse” and “neglect” are typically vague and overbroad, often purposefully so.³² This is to assure that the state can exercise wide discretion in treating targeted parental conduct as maltreatment; and it ensures that the state is not precluded from addressing such conduct by the failure of the legislature or administrative officials to include all conceivable forms of abuse or neglect in its laws.³³ For example, although California apparently

no expected repetition of trauma will be permitted to occur”). For a discussion of the history of the states’ child maltreatment efforts, see generally CURRENT TRENDS, *supra* note 11.

31. CHILD MALTREATMENT 2002, *supra* note 8, at 16-17 tbl.2-5; see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 201 tbl.321 (2002) (listing the same ten states as having the highest number of child abuse reports, albeit in a slightly different descending order).

32. See generally DEFINITIONS, *supra* note 14, at 1 (providing the minimum state statutory definitions of child abuse, neglect, and sexual abuse required by the Child Abuse Prevention and Treatment Act).

33. See, e.g., *People v. Beaugez*, 43 Cal. Rptr. 28, 32 (Cal. Dist. Ct. App. 1965) (rejecting a “void for vagueness” challenge to a state child abuse statute in part because, “[t]he type of conduct [addressed] defies precise definition” and “[i]n number and kind the situations where a child’s life or health may be imperiled are infinite”); *Campbell v. State*, 240 So.2d 298, 299 (Fla. 1970) (stating that, “[t]he fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness”); SANFORD N. KATZ, WHEN PARENTS FAIL: THE LAW’S RESPONSE TO FAMILY BREAKDOWN 64 (1971) (“[N]eglect statutes recognize that ‘neglectful’ behavior can also vary, and thus cannot be easily or specifically defined.... The broad neglect statutes allow judges to examine each situation on its own facts.”). *But see* Wald, *supra* note 22, at 1020 (emphasizing the

has no intention to proscribe such culturally acceptable practices as ear piercing, male circumcision, or reasonable corporal punishment, it nevertheless defines “physical abuse” all-inclusively, as “non-accidental bodily injury that has been or is being inflicted on a child.”³⁴ Similarly, North Carolina defines a “neglected juvenile” most broadly to include the child “who does not receive proper care, supervision, or discipline ... or who is not provided necessary medical ... or ... remedial care; or who lives in an environment injurious to [her] welfare....”³⁵

In part because the definitions of abuse and neglect are so broad, and because anyone is permitted to make a report, including those with no training in identifying maltreatment, most states have procedures to “screen in” reports that conform to their official interpretations, and correspondingly to “screen out” nonconforming reports. This process serves to ensure, to the extent possible, that the state conducts formal investigations only in circumstances where legally relevant conditions exist.³⁶ Of the 2.6 million referrals

importance of “specific terminology” as a means of “limit[ing] the scope of intervention, ... [clarifying] the types of harm that justify official action, and [constraining] expert testimony so that it will not be based solely on individual views regarding proper child development”). Wald further points out the difficulty of defining terms such as “inadequate home” and “inadequate parent,” observing that, “[t]here is certainly no consensus about what types of ‘inadequate’ behavior would justify intervention.” *Id.* at 1022. Moreover, because of the vagueness of so-called “moral neglect” statutes, “intervention is likely to be haphazard and subject to the social worker’s or judge’s personal value judgments.” *Id.* at 1034.

34. STATE OF CAL. ET AL., MANUAL OF POLICIES AND PROCEDURES: CHILD WELFARE SERVICES § 31-002(9)(B) (2002), available at <http://www.dss.cahwnet.gov/getinfo/pdf/cws1.pdf>.

35. N.C. GEN. STAT. § 7B-101 (2004). Applying this definition, CPS sought to interview a two-year-old child apart from her mother and to enter into and examine the family home based on an anonymous report that the child had once been seen naked and apparently unsupervised in the family’s driveway. *In re Stumbo*, 582 S.E.2d 255, 256-57 (N.C. 2003). On appeal from a lower court’s order compelling parental compliance with the investigation, the North Carolina Supreme Court found that CPS had exceeded its authority in defining neglect so broadly as to include these facts. *Id.* at 258-59 (noting that “not every act of negligence on the part of parents or other caregivers constitutes ‘neglect’ under the law and results in a ‘neglected juvenile,’” and that, in general, such terms are defined only in situations of “either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile”). Nevertheless, absent a parent’s willingness to challenge a proposed investigation in court, the broad definitions continue to serve as only minimal limitations on official discretion to intervene in the family.

36. Virtually all states “included specific criteria for accepting or excluding referrals alleging child abuse and neglect,” with exclusionary criteria such as third-party perpetrators not responsible for the child’s care, referrals that lacked sufficient information, cases of educational neglect, and referrals related either to reasonable discipline or custody issues. OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH &

made nationally in 2002, 67.1 percent, or approximately two-thirds, were screened in, and 32.9 percent, or approximately one third, were screened out.³⁷

Most investigations, over 90 percent by some estimates, are conducted with the apparent consent of relevant adults.³⁸ As I will

HUMAN SERVS., NATIONAL STUDY OF CHILD PROTECTIVE SERVICES SYSTEMS AND REFORM EFFORTS: REVIEW OF STATE CPS POLICY ch. III (2003), *available at* <http://aspe.hhs.gov/hsp/CPS-status03/state-policy03/chapter3.htm>; *see, e.g.*, GA. DEP'T OF HUMAN RES., SOCIAL SERVICES MANUAL §§ 2103.1, .18 (1999) (requiring that reports be screened to assure that they meet certain criteria before being passed along for investigation). In Georgia, a report is screened in if (1) it includes an allegation against a known or unknown person who may be the child's parent, guardian, or caretaker; (2) the alleged victim is under eighteen; and (3) the report is consistent with the state's maltreatment definition. *Id.* Most screened-out reports in Georgia involve dated incidents, educational neglect, incidents of a criminal nature where the parent's negligence in allowing a child to be exposed to the situation has been previously ruled out, reports of statutory rape when evidence exists that the parent has protected the child, allegations concerning an unborn child, juvenile delinquency, and some poverty and custody issues where the "only indicated concerns contain absolutely no report of any abuse or neglect." *Id.*; *see also* 40 TEX. ADMIN. CODE § 700.503 (2003) (requiring that reports be screened out that involve, inter alia, truancy, runaways, children between the ages of ten and seventeen who need supervision because they have committed certain offenses and are already under the juvenile court's jurisdiction, reasonable physical discipline, latchkey children whose parents have taken "appropriate precautions to assure the children's safety," or harmful or violent children); N.C. DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVS., 1 FAMILY SERVICES MANUAL § 1407 (2004), *available at* <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1407.pdf> (requiring that reports be screened out if they would not "minimally meet the statutory guidelines for child abuse, or dependency" if true, such as reports of homelessness, head lice, truancy, and age-appropriate sexual activity); OHIO DEP'T OF JOBS & FAMILY SERVS., FAMILY, CHILDREN AND ADULT SERVICES MANUAL § 5101:2-34-06 (requiring reports to be screened out before investigation unless they contain at least the names and addresses of the child and her parents; the child's age; the type, extent, and duration of the alleged abuse or neglect; the circumstances giving rise to the maltreatment; and the child's current condition).

37. CHILD MALTREATMENT 2002, *supra* note 8, at 5; *see supra* note 36 (providing examples of reasons why reports are screened in or out). Although data is not available about the source of screened-in, rather than screened-out, reports, "professionals submitted more than one-half (56.5%) of the [initial] reports." CHILD MALTREATMENT 2002, *supra* note 8, at 6. These "professionals" are defined as individuals whose work regularly brings them into contact with children, and they are generally legally mandated to report suspicions of child abuse. *Id.* Of the screened-in reports that are ultimately substantiated, "nearly one-quarter ... were referred by legal, law enforcement or justice personnel"; nevertheless, "four groups of reporters [educational and social services personnel, anonymous reporters, and law enforcement] accounted for more than one-half of all unsubstantiated reports." *Id.* at 8; *see also id.* at 18 tbl.2-7.

38. According to a New York CPS official, most families under investigation do not realize that they have the right not to talk to investigators; if they do recognize the existence of this right, however, CPS is able to convince them of the value of cooperation "ninety-nine out of 100 times." *See* Telephone Interview with Official, New York Child Protective Services,

explain below, there is reason to believe that state officials do not lawfully obtain many of these consents. Specifically, the Supreme Court has indicated that consent obtained from misleading representations about the law enforcement motivations underlying the investigation may be unlawful, as is consent given by children who are not mature minors.³⁹ No data exists that describes the portion of apparently consent-based investigations that fall into these categories. However, one could reasonably imagine that the number is not insubstantial as officials appear to rely both on deception⁴⁰ and school-based examinations⁴¹ to avoid parental interference with the investigatory process.

At the same time, states have developed a variety of compliance protocols for use in circumstances where parents are approached but refuse to cooperate with the investigation. They range from

Albany County, N.Y. (June 24, 2003) (on file with author). In some cases, officials may mislead parents regarding the state's authority to compel cooperation. Thus, Georgia's CPS manual provides that when parents are uncooperative in a 24-hour investigation, the investigator should "take immediate action to gain access to the child" by "[i]nform[ing] the parents of the department's intent to involve court/law enforcement unless they immediately cooperate" with the investigation and, if this step fails, "contact[ing] the agency SAAG [Special Assistant Attorney General] and/or the Juvenile Court for immediate legal assistance" or "contact[ing] law enforcement for immediate assistance." GA. DEP'T OF HUMAN RES., *supra* note 36, § 2104.20. For cases that do not warrant an immediate response from the courts or law enforcement, CPS is encouraged to (1) "[c]ontact[] relatives, friends, or neighbors who may be of assistance in gaining entry to the home;" (2) "[c]ontact[] the school principal or social worker or a public health nurse to assist;" (3) "[s]end[] the parent written notification that explains the legal requirement" requiring CPS to investigate or (4) "[o]btain[] a court order for [the] parent's cooperation." *Id.* In many cases, the quality of the consent that is obtained also can be criticized on the basis that a large percentage of the families subject to investigation are accustomed to state intervention in the home for other reasons; these families may not be afforded the same privacy protections as those who are otherwise free from such intervention. For example, the adults involved may be required to permit home visits as a condition of receiving certain government benefits. *See infra* note 226 (discussing the Supreme Court's decision in *Wyman v. James*, 400 U.S. 309 (1971)), and notes 296-300 and accompanying text (discussing this phenomenon generally).

39. *See infra* notes 139-46, 154-55 and accompanying text (discussing the contours of the consent exception and its misuse by officials).

40. *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), is illustrative in this respect. In that case, a CPS supervisor instructed the assigned caseworkers "to visit the Tenenbaum's home ... to examine the child for marks and bruises, to assure herself that [the child's] living conditions were acceptable, and to discuss with the Tenenbaums [their child's] sleeping in school and her delayed development." *Id.* at 589. "In accordance [with their supervisor's] instructions, [the caseworkers] did not mention the real reason they were there—the reports of possible sexual abuse." *Id.*

41. *See infra* notes 57-58 and accompanying text (discussing this investigatory approach).

requiring CPS to obtain a court order based on the report and an affidavit of parental noncompliance,⁴² to requiring CPS to obtain a search warrant based on a finding of probable cause to suspect that a child is at risk of maltreatment.⁴³ Notably, the latter approach, which is most protective of family privacy, is relatively unusual.

42. *See, e.g.*, Telephone Interview with Official, Georgia Department of Human Resources, Division of Family and Children's Services (June 24, 2003) (on file with author) (explaining that in Georgia, a court will order parental compliance with a CPS investigation where the department demonstrates by a preponderance of the evidence that "good cause" exists to believe that maltreatment has occurred); *see also* FLA. STAT. ANN. § 39.301(12) (West Supp. 2005) (providing that, if a parent denies CPS "reasonable access" to the child when CPS deems access necessary, CPS shall seek a court order or other legal authority); N.C. GEN. STAT. § 7B-303 (2003) (allowing state officials to obtain an order of noncompliance based on a report and evidence of noncooperation with the investigation); Telephone Interview with Official, Florida Department of Children and Families (June 24, 2003) (on file with author) (explaining that the probable cause standard for obtaining a court order under section 39.301 is met "by virtue of a report [of abuse or neglect] being received"); Telephone Interview with Official, Tennessee Department of Children and Families (July 9, 2003) (on file with author) (explaining that, if denied access, CPS will first enlist the aid of law enforcement and then file a motion asking the court to order the investigation's completion without the parents' consent; the judge then grants the order, for which no standard exists beyond noncompliance with a statutorily required investigation, so no showing of abuse or neglect is necessary); Telephone Interview with Attorney, Legal Division, Texas Child Protective Services (June 24, 2003) (on file with author) (explaining that, although compliance orders are generally not used, "good cause" is usually shown through a report of child abuse or neglect and the lack of cooperation by the child's family with the investigation).

43. *See, e.g.*, SHELDON SILVER & ROGER GREEN, A GUIDE TO NEW YORK'S CHILD PROTECTIVE SERVICES SYSTEM 32 (2001) (noting that if a caseworker is not allowed into a home, a Family Court judge can order the parent to permit entry if the judge concludes by a fair preponderance of the evidence that probable cause exists to believe that the child has been abused or neglected); *see also* Telephone Interview with Official, Communications Division, Ohio Department of Job and Family Services (July 8, 2003) (on file with author) (explaining that if denied entry into a home, CPS generally contacts law enforcement for assistance, who in turn, must obtain a search warrant to gain access to the child and home, and noting that although court orders are not usually used, they would vary from county to county depending on the local court rules). Some states formally require CPS to obtain a warrant on a finding of probable cause, but then define probable cause as being met by the filing of a report. *See, e.g.*, FLA. STAT. ANN. § 39.301 (West Supp. 2005) (requiring court order in certain circumstances); Telephone Interview with Official, Florida Department of Children and Families (June 24, 2004) (on file with author) (explaining that probable cause for the court order is met by receiving a report of abuse).

B. The Nature and Scope of the Investigation Itself

Once reports are screened in, the authorities are required to investigate their allegations.⁴⁴ In 2002, the states screened in approximately 1.8 million referrals involving the welfare of approximately 3.2 million children.⁴⁵ The investigation's purpose is to gather evidence to determine if the report can be substantiated. This evidence is typically used by civil authorities whose ultimate objective is to assure the safety of the child, and by law enforcement

44. See FLA. STAT. ANN. § 39.301(1) (West Supp. 2005) ("Upon receiving an oral or written report of known or suspected child abuse, abandonment, or neglect, the central abuse hotline shall determine if the report requires an immediate onsite protective investigation."); GA. CODE ANN. § 49-5-8(a), (a)(B) (Supp. 2004) ("The Department of Human Resources is authorized and empowered ... to establish, maintain, extend, and improve throughout the state ... [p]rotective services that will investigate complaints of deprivation, abuse, or abandonment of children."); 325 ILL. COMP. STAT. ANN. 5/2 (West Supp. 2005) ("The Illinois Department of Children and Family Services shall, upon receiving reports [of abuse or neglect], protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect, offer protective services in order to prevent any further harm ..., stabilize the home environment, and preserve family life whenever possible."); MICH. COMP. LAWS ANN. § 722.628(1) (West Supp. 2004) ("Within 24 hours after receiving a report ... the department ... shall commence an investigation of the child suspected of being abused or neglected."); MO. ANN. STAT. § 210.145 (West Supp. 2005) ("All child abuse and neglect reports shall be initiated within twenty-four hours and shall be classified based upon the reported risk and injury to the child.... The division shall immediately communicate all reports that merit investigation to its appropriate local office."); N.C. GEN. STAT. § 7B-302(a) (2003) ("When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile...."); N.Y. SOC. SERV. LAW § 422(2)(b) (Consol. 1994) ("Any telephone call made by a [mandated reporter], ... which if true would constitute child abuse or maltreatment shall constitute a report and shall be immediately transmitted ... to the appropriate local child protective service for investigation."); OHIO REV. CODE ANN. § 2151.421(F)(1) (West Supp. 2004) ("[T]he public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect ... to determine the circumstances surrounding the injuries, abuse, or neglect ... and the person or persons responsible."); TEX. FAM. CODE ANN. § 261.301(a) (Vernon Supp. 2004-2005) ("With assistance from the appropriate state or local law enforcement agency, the department ... shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a [caregiver]."); STATE OF CAL. ET AL., MANUAL OF POLICIES AND PROCEDURES: CHILD WELFARE SERVICES § 31-101.1 (1993), available at <http://www.dss.cahwnet.gov/getinfo/pdf/cws2.pdf> ("The county shall respond to all referrals for service which allege that a child is endangered by abuse, neglect, or exploitation [by conducting an investigation]."); *id.* § 31-125 (setting out the requirements for an investigation).

45. CHILD MALTREATMENT 2002, *supra* note 8, at 5 n.3, 21.

authorities who seek to monitor violations of the criminal code and sometimes to pursue charges against the offending parent.⁴⁶

To achieve these objectives, investigations generally include a home visit, an interview with the child's parents or guardians, and an interview with and examination of the child.⁴⁷ The investigations

46. See U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., NATIONAL STUDY OF CHILD PROTECTIVE SERVICES SYSTEMS AND REFORM EFFORTS: SUMMARY REPORT ch. VII (2003), available at <http://aspe.hhs.gov/hsp/CPS-status03/summary/index.htm#Looking> (highlighting the prevailing "competing ideas" that the state's child welfare effort "should primarily function as a service to assist families in meeting the needs of their children" and should work to "assist[] law enforcement to gather the evidence to punish parents who do not meet societal norms of caring for their children"); *infra* notes 48-49, 236-42 and accompanying text (describing the role of law enforcement in the child welfare investigatory scheme). Compare U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 36, at ch. IV (explaining purposes of investigation including "determining whether abuse or neglect had occurred or the child was at risk," "determining a disposition," "assessing or remediating safety ... [and/or] risk," "determining need for services," "protecting the child," and "maintaining the family"), with U.S. DEP'T OF JUSTICE LAW ENFORCEMENT RESPONSE TO CHILD ABUSE, PORTABLE GUIDES TO INVESTIGATING CHILD ABUSE 1 (2001) (emphasizing, in offering an overview, that "[t]he role of law enforcement in child abuse cases is to investigate to determine if a violation of criminal law occurred, identify and apprehend the offender, and file appropriate criminal charges"), and Robert B. Kean, *Search and Seizure Law: A Primer for the Child Abuse Investigator*, in USING THE LAW TO PROTECT CHILDREN 129, 131 (1989) (stating that "[t]he challenge presented to police and other law enforcement investigators is how to protect the battered or abused child while at the same time gathering evidence which will be admissible in a criminal trial").

47. See, e.g., FLA. STAT. ANN. § 39.301 (West Supp. 2005) (requiring that the investigation include (1) a generally unannounced visit to the family home; (2) an overall assessment of the child's residential environment; and (3) face-to-face interviews with the alleged child victim, the child's siblings, parents, and other adults in the household); N.Y. SOC. SERV. LAW § 424 (Consol. Supp. 2005) (requiring that all screened-in reports be investigated; that the investigation include an evaluation of the alleged child victim's home environment and any other children who live in the same environment; a determination of the risk to the children if they remain in the home; and a determination of the nature, extent, and cause of the alleged maltreatment); TENN. CODE ANN. § 37-1-406 (Supp. 2004) (providing that investigations be made promptly and include a home visit; a determination as to the nature, extent, and cause of the harm; the identity of the perpetrator and others responsible for the child; the home environments condition; the condition of other children in the home; an interview with and physical observation of the child; and an interview with the child's parent or guardian); STATE OF CAL. ET AL., *supra* note 44, §§ 31-101, 31-110, 31-125 (2003) (requiring state officials to conduct an initial investigation of screened-in reports that, unless the official determines that an in-person investigation is not necessary, includes in-person contact with the alleged child victim or victims, and with at least one adult who has information concerning the allegations; if, after this initial investigation, the official concludes that the allegations are not unfounded, the official must conduct a more thorough investigation that includes a second round of in-person interviews with the child or children present at the initial in-person investigation, and with all parents who have access to the child alleged to be maltreated; additionally, the state must have contact with other persons having

are generally conducted by officials from CPS, either alone or with the assistance of law enforcement.⁴⁸ Depending on the jurisdiction and the circumstances, some investigations or aspects of investigations may be staffed exclusively by law enforcement.⁴⁹

knowledge of the child or children's condition); STATE OF TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES §§ 14.3, 14.5 (2002) (setting out procedures based on code provisions); SILVER & GREEN, *supra* note 43, at 6, 31 (explaining that during the mandated "home visit," CPS look specifically for unattended children, "immediate observable symptoms" of abuse such as bruises, ongoing parental mistreatment of a child, and parental intoxication).

48. In many jurisdictions, CPS is authorized to and in fact does investigate cases without the assistance of law enforcement. On the other hand, even in these states a substantial degree of collaboration often exists amongst the two agencies. In some jurisdictions, the fact that child maltreatment is often both a civil and criminal violation drives collaboration designed "to eliminate unnecessary duplication of effort, to promote proper and expeditious collection and preservation of evidence, and to 'develop a coordinated system for identifying and investigating appropriate calls [sic].'" DONNA PENCE & CHARLES WILSON, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT 8 (1992) (quoting D.J. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 3 (1988)) available at <http://nccanch.acf.hhs.gov/pubs/usermanuals/law/law.pdf>; see also Leroy D. Baca et al., "Silent Screams"—One Law Enforcement Agency's Response to Improving the Management of Child Abuse Reporting and Investigations, 22 J. JUV. L. 29, 41-47 (2001-2002) (detailing five programs and projects undertaken in Los Angeles County that "allow[ed] all of the county's child protective agencies to [better] respond to allegations, address the most critical aspects of investigations and, hopefully, resolve them to the victims' benefit"). In others, collaboration between the two agencies occurs to assure the safety of the CPS officials or to maximize "voluntary" compliance rates as parents are typically more likely to consent to an investigation faced with the *in terrorem* effect of police presence. PENCE & WILSON, *supra*, at 6. For example, Illinois law requires CPS to seek the assistance of law enforcement where "serious physical or sexual abuse has been alleged" or where there is reason to believe that the home is unsafe because, for example, the parent is violent or has a lot of weapons. Telephone Interview with Linda Williams, Illinois Department of Children and Family Services (June 12, 2003) (on file with author); see generally U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 36, at ch. IV tbl.4-D (providing an overview of law enforcement involvement in child abuse investigations in all fifty states and showing that in almost every state, law enforcement participates in circumstances involving allegations of severe abuse and/or cases of emergency removal); *infra* notes 237-41 (describing thoroughly the relationships between CPS and law enforcement in this context).

49. This may be the case, for example, where CPS is understaffed and requests that law enforcement conduct the investigation so that the state's mandatory timelines are met. See, e.g., *Franz v. Lytle*, 997 F.2d 784, 785 n.1 (10th Cir. 1993) (noting that police were asked to investigate the welfare of a child who had excessive diaper rash because no CPS official was available to do so). Or CPS and law enforcement both may be authorized or required to respond collaboratively to child maltreatment reports. This could result in officials from the two agencies actually conducting each aspect of the investigation together, or in the officials parsing out the work and conducting aspects of the investigation separately. See, e.g., *Wallis v. Spencer*, 202 F.3d 1126, 1131-35 (9th Cir. 2000) (describing CPS and police in California

During the home visit, officials searching for evidence may enter the home; walk from room to room; open refrigerators, cupboards, closets, and drawers; and request that the adults and children cooperate to locate and examine items or conditions that may be relevant to the investigation.⁵⁰ For example, if a child is reported to have been neglected, officials may look to see if the home is relatively clean, and if there are responsible adults, food, clothing, and other necessities on the premises.⁵¹ If the child is reported to have been excessively disciplined, officials may seek out, in addition to the child herself, objects or other conditions in the home that might have been used in such discipline.⁵²

collaborating on investigations); CMTY. ALLIANCE OF PALM BEACH COUNTY, CHILD ABUSE PROTECTIVE INVESTIGATION PROTOCOL (2002) (defining roles and responsibilities for law enforcement and CPS in child abuse protective investigations; protocol includes a detailed “wire diagram” that maps out the investigation’s steps, the responsibilities of each agency at each step, and points at which key decisions, such as whether to remove the child, should be made).

50. For example, North Carolina explains, in most general terms, that “[a] home visit provides firsthand knowledge of the home environment and observations of family interactions in their everyday setting. The home visit allows an assessment of the physical environment, problems and resources within the neighborhood, and family access to community and family resources.” N.C. DIV. OF SOC. SERVS., N.C. DEPT OF HEALTH & HUMAN SERVS., 1 FAMILY SERVICES MANUAL § 1408(III)(C)(5) (2002), available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1408.pdf>; see also *infra* notes 51-52 (detailing the scope of the home visit). *But see* Telephone Interview with Linda Williams, *supra* note 48 (during home visits, investigators are allowed to view the home, but not to search it—that is, they may look for signs of abuse or neglect such as broken glass or feces on the floor, but cannot go through any personal papers, drawers, or cabinets).

51. See, e.g., Janine Tondrowski, *Intake and Investigation: Initial Stages of the CPS Process*, in *HELPING IN CHILD PROTECTIVE SERVICES: A COMPETENCY-BASED CASEWORK HANDBOOK* 185 (Charmaine R. Brittain & Deborah Esquibel Hunt eds., 2004) (stating that, in cases of chronic child neglect, “[a]ssessing whether the physical living conditions are hazardous for the children is an important process to ensure safety”). In recommending how a caseworker should proceed, the author further notes that

[h]aving an adult give [the caseworker] a ‘tour’ is necessary if [the caseworker] is to actually observe the conditions throughout the house. [The caseworker] must determine whether community living standards are met, noting such items as whether the utilities are functional, the home has hot water, the plumbing works, and there is a functioning heater. [The caseworker is] also looking for safety hazards such as exposed wiring, broken glass, and unsanitary conditions. Only by observing each room in the home can [the caseworker] assess if there are obvious structural problems that pose a hazard.... Visiting the kitchen and actually looking for food in the refrigerator and pantry are necessary in making a complete assessment of well-being.

Id.

52. See, e.g., *Calabretta v. Floyd*, 189 F.3d 808, 811-12 (9th Cir. 1999) (describing a social

Broad discretion is given to state officials undertaking these investigations for two reasons. First, reports often are unspecific, alleging, for example, that a younger child was heard crying, or that a child was left at home alone. In such cases, officials are given the latitude to determine the circumstances that led to the report.⁵³ Second, even specific reports may be evidence of further and different maltreatment. For example, a report indicating that a child appears to be malnourished might lead to information that the child also is being physically and emotionally abused, as multiple forms of maltreatment sometimes coexist.⁵⁴ In such cases, merely investigating and even confirming the allegations of malnourishment would result in an incomplete picture of the child's circumstances and needs. Thus, for example, North Carolina requires its investigating officials not only to determine whether the allegations in the report can be substantiated, but also "to assess ... [w]hether the specific environment in which the child is found meets the child's need for care and protection."⁵⁵ Recently, the state has added the requirement that every investigation, regardless of the allegations in the report, also assess the possibility that the child has been exposed to domestic violence.⁵⁶

worker during a home visit examining children for bruises and insisting on seeing the "piece of Lincoln log roofing" that the mother allegedly had used to discipline the children in the past); GA. DEP'T OF HUMAN RES., *supra* note 36, § 2104.1 (giving the state enormous discretion in discovering evidence of physical abuse by calling for all children subject to an abuse or neglect report who are under age one to be undressed and examined for physical signs of maltreatment, as well as children four years and under who are the subject of a physical abuse allegation; in the course of this examination, investigators should "[c]onsider asking the parent's assistance when undressing a young child"); DIANE DEPANFILIS & MARSHA K. SALUS, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 42 (2003) (recommending that, in cases of suspected physical abuse, "[c]aseworkers ... examine the nature of the injury, such as bruises or burns in the shape of an implement, e.g., a welt in the shape of a belt buckle or a cigarette burn").

53. See Tondrowski, *supra* note 51, at 155 (suggesting to "always remember that it is better to have too much information than too little, since the more comprehensive information provided the reported, the better able [the caseworker is] to decide to accept the referral and provide follow-up"); *see also id.* at 160 (noting that "[a] report may raise serious safety concerns but otherwise offer limited information on the whereabouts of a child. In this situation, the worker should be creative about finding ways to locate the child").

54. CHILD MALTREATMENT 2002, *supra* note 8, at 22 (noting that "[t]he maltreatment type percentages total more than 100 percent because many children were victims of more than one type of maltreatment and were coded multiple times").

55. N.C. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 50, § 1408(III)(C)(5).

56. *Id.* § 1409(IV) (providing in the context of an overall effort both to reduce the state's incidence of domestic violence in the state and to assure that children who witness domestic

Interviews with and examinations of children may be conducted at school or away from the family home to assure, to the extent possible, that parents will not interfere by coaching, intimidating, or otherwise influencing their children's response.⁵⁷ Indeed, one California official suggested that this investigatory strategy is additionally useful as a way for the state to conduct its investigation without ever having to enter the family home.⁵⁸ Like home visits, investigations of the child herself may be relatively narrow in scope, initially including only a private discussion with the

violence are not unnecessarily separated from their nonabusive parent, that there is "universal screening for domestic violence during CPS Intake for all reports of alleged child maltreatment ... Assessment for the presence of domestic violence and its impact on the safety of children is an ongoing activity throughout CPS Intake, Assessment, Case Planning and Case Management, and Placement Services").

57. See, e.g., CAL. PENAL CODE § 11174.3 (West Supp. 2005) (identifying school as a site where a child can be investigated; during the investigation, the child may choose to have a school staff member present, but that person may not participate in the interview); MICH. COMP. LAWS ANN. § 722.628 (West Supp. 2004) (requiring schools and other institutions to cooperate with child abuse investigations, including allowing access to the child without parental consent for the purposes of conducting an investigation and/or preventing the abuse or neglect of a child so long as CPS notifies the parent or guardian at the time of the contact or "as soon afterward as the person can be reached," unless such notification "would compromise the safety of the child or ... the integrity of the investigation"); GA. DEPT OF HUMAN RES., *supra* note 36, § 2104.11 ("Interview and observe separately each allegedly maltreated child Make every attempt to make the interview setting a private location where the child can be interviewed alone."); Telephone Interview with Official, California Child Protective Services (July 23, 2003) (on file with author) (stating that school is a preferred location for examining a child because it avoids parental interference); see also JAN MCCARTHY ET AL., A FAMILY'S GUIDE TO THE CHILD WELFARE SYSTEM 21 (2003) (informing families that "[t]he CPS worker has the authority to talk to your child ... without your consent and outside of your presence.... [T]he CPS worker decides who should be present during the interview. Although your child can be interviewed and physically examined without your permission, your cooperation and permission may be requested").

58. Telephone Interview with Official, Legal Division, California Child Protective Services (July 19, 2003). According to this official, "usually kids are interviewed without the parent even knowing it. Very rarely does CPS actually go to the home, so we just don't need" to worry about parental noncompliance and obtaining a warrant to search the family residence. *Id.* As a result of a series of decisions out of the Ninth Circuit, California is one of the states where—until further review by the United States Supreme Court—a warrant on a traditional finding of probable cause is clearly necessary to conduct a home visit in circumstances where the parents refuse consent. See *infra* note 170.

child.⁵⁹ On the other hand, contact with the child may be pervasive, including a strip search and a gynecological exam.⁶⁰

State officials generally are cautioned to respect the child's dignity and the family's sanctity as they engage their thorough investigations.⁶¹ However, while most agencies undoubtedly expect their officials to act in good faith, these two tasks—respecting privacy and conducting the sort of comprehensive investigation the

59. *E.g.*, *Doe v. Heck*, 327 F.3d 492, 503-04, 510 (7th Cir. 2003) (describing state officials in Milwaukee, Wisconsin, taking a fourth grade boy from his classroom, placing him in an empty nursery, and interviewing him alone about intimate details of his family life).

60. *E.g.*, *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1199-200 (10th Cir. 2003) (describing state officials in Tulsa, Oklahoma, putting group of Head Start children together on tables in a classroom, separated only by partitions, and conducting full medical examinations including gynecological examinations and blood tests); *see also* CAL. PENAL CODE § 11171.2 (West Supp. 2005) (setting out the right of doctors acting without parental consent to x-ray a child to determine if the child has been abused); *id.* § 11171.5 (setting out the right of state officials to obtain a court order directing the x-ray procedure); N.Y. SOC. SERV. LAW § 416 (Consol. 1994) (allowing investigators to take photographs of visible areas of trauma and order radiological examinations for a child); FLA. DEP'T OF CHILDREN & FAMILIES, CF OPERATING PROCEDURE § 175-21 (2001) (depending on the circumstances, the assessment may include a medical evaluation, psychological/psychiatric evaluation, or other assessment); STATE OF MICH. GOVERNOR'S TASK FORCE ON CHILDREN'S JUSTICE, FIA PUB. 794, A MODEL CHILD ABUSE PROTOCOL: COORDINATED INVESTIGATIVE TEAM APPROACH (1998) (requiring a medical examination when an allegation exists involving sexual and/or severe physical abuse which occurred in the past 72 hours, and strongly recommending such examination when an allegation involves abuse which did not occur in the past 72 hours); Telephone Interview with Linda Williams, *supra* note 48 (explaining that investigators are permitted to observe a child's body, but they must have parental consent before removing any clothing and explaining that a child cannot be transported to see a physician without parental consent unless in departmental custody).

61. *See, e.g.*, DEPANFILIS & SALUS, *supra* note 52, at 9 (stressing that “[a] safe and permanent home and family is the best place for children to grow up,” cautioning that “[m]ost parents want to be good parents,” and admonishing that “CPS agencies and practitioners must be responsive to and respectful of [differences in families’ structure, culture, race, religion, economic status, beliefs, values, and lifestyles]”); CAL. SOC. WORK EDUC. CTR., FUNDAMENTAL ISSUES IN PUBLIC CHILD WELFARE 14 (Ray Liles ed., 2001) (identifying as critical the need for state officials to “balanc[e] ... the rights of a child to minimum levels of care and freedom from harm, with the rights of parents to retain custody of, and authority and responsibility for, their children”); CAL. SOC. WORK EDUC. CTR., WORKING EFFECTIVELY WITH FAMILIES (Martha Carlson ed., 2001) (offering guidelines and best practices on issues such as “cultural factors in the casework relationship,” working with family strengths, promoting family involvement in case planning, and working with children and resistant clients); N.C. DIV. OF SOCIAL SERVS., *supra* note 50, § 1412(II), *available at* <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1412.pdf> (“Family centered practice focuses on the family with full knowledge and appreciation for its dynamics.... The family-centered social worker values family resources, respects diversity among families, supports parental efforts to care for their children.”)

system contemplates—are inherently irreconcilable, at least when delegated to a single official.⁶² As one commentator wrote, “[t]he parent-investigator relationship is likely to be adversarial, not mutually supportive. The two parties seek conflicting ends: the parent seeks to preserve family unity and privacy, whereas the investigator is obligated to violate the family’s privacy, the child’s privacy, and, if necessary, disrupt the family unit.”⁶³ The fact that law enforcement is also typically involved in the investigatory scheme and/or in the conduct of the investigation itself necessarily increases the process’ intrusiveness.⁶⁴ Thus, in the best

62. See U.S. GEN. ACCOUNTING OFFICE, NO. GAO/HEHS-97-115, CHILD PROTECTIVE SERVICES: COMPLEX CHALLENGES REQUIRE NEW STRATEGIES 3 (1997) (offering an overview of challenges faced by caseworkers and noting that they “must balance the often conflicting roles of investigator and social worker. As investigators, CPS caseworkers collect evidence and work with law enforcement officials; as social workers, they work with families to identify services needed to improve conditions in the home and provide a safe environment for the child”); Troy Anderson, *Foster Care Cash Cow: “Perverse Incentive Factor” Rewards County for Swelling System*, L.A. DAILY NEWS, Dec. 7, 2003, at N1 (reporting that in a two-year investigation, the newspaper found a “perverse incentive factor” resulting in “states and counties earn[ing] more revenues by having more children in the system—whether it is opening a case to investigate a report of child abuse and neglect or placing a child in foster care” (quoting a report by the State Department of Social Services Child Welfare Stakeholders Group)). The *L.A. Daily News* article also quotes David Sanders, the director of the Department of Children and Family Services (DCFS), as believing that caseworkers were sometimes overly eager to remove children from their homes:

At the extreme, there are clearly parents who never should have had their children. They torture their children and everyone in the community would agree that they should not have their children. On the other end, you clearly have situations where families have done things, but may be under stress one day, have every intention of taking care of their children and are not dangerous, but involvement by child protective services ends up being much too intrusive.

Id. Bruce Robenstein, a previous DCFS deputy director, also goes on record as saying that high-profile child fatality cases increased pressure for removals: “The word was, ‘Remove everybody. Remove all the kids.’ It’s pretty fundamental that the county was breaking up families that didn’t need to be broken up.” *Id.* As will be argued *infra*, it is precisely for these reasons that the Fourth Amendment’s neutral magistrate is essential to include in this scheme. The warrant process assures that this balancing is done by a person who is not bound to follow state law, but rather, who is bound to weigh the privacy rights of individuals against the state’s need to conduct a specific investigation. See *infra* notes 136-38, 323-34 and accompanying text (describing the rationale for the warrant process and applying that rationale to the child welfare context).

63. Beeman, *supra* note 23, at 1052 (footnote omitted).

64. See *infra* notes 190-220, 273 and accompanying text (describing the Supreme Court’s view that law enforcement involvement in a civil investigation adds to its intrusiveness quotient); *supra* notes 46, 48-49 and accompanying text (setting out the dual motivations that underlie the investigations and discussing the role of law enforcement in conducting child

of circumstances, state officials may choose to be kind as they conduct their thorough investigations, but it nevertheless remains a required aspect of their job to complete them.⁶⁵

C. The Impact of the Prevailing Approach to Investigations

Although child maltreatment investigations clearly serve an essential purpose in the overall CPS scheme, the reporting and investigations process is also an enormous intrusion on individual and family privacy: Once CPS screens in a report of maltreatment, the state typically seeks to enter into and examine the family home, and to seize and separate the children from their parents or the school setting in which their parents have placed them so that they can be interviewed and examined, either by CPS, the police, or medical personnel designated by these officials. Generally, state officials are authorized to exercise extraordinarily unfettered discretion when they engage these intrusions. Approximately 70 percent of the time no abuse or neglect is found by the conclusion of the investigations.⁶⁶ Even recognizing that some unknown portion of the unsubstantiated cases involves maltreatment that cannot be proven, the majority of intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm.⁶⁷ The table immediately below demon

welfare investigations).

65. See Anderson, *supra* note 62 (quoting a California Department of Social Services Child Welfare Stakeholders Group report as “[finding] the vague definition of neglect, unbridled discretion and a lack of training [to] form a dangerous combination in the hands of social workers charged with deciding the fate of families,” and ultimately that thousands of children were unnecessarily removed from their homes). In this regard, it has been noted that

CPS workers, who are the first decision-makers in a child welfare case, are the ones who have the most power to keep children in their families or to remove them.... [E]ven the best family preservation program could not be an effective resource unless the CPS worker decided to use it.

INSOO KIM BERG & SUSAN KELLY, BUILDING SOLUTIONS IN CHILD PROTECTIVE SERVICES 6-7 (2000).

66. See *infra* notes 68-74 and accompanying table (setting out the national data on this issue).

67. It is noteworthy in this regard that poor and minority children are significantly overrepresented in the child welfare system. Consequently, these already-stressed children and their families bear the brunt of the states’ prevailing approach to solving the child maltreatment problem. According to the Children’s Bureau, “[a]lthough African-American[] [children] account for 15% of all children in the United States, they account for 25% of

strates the numbers at issue in this regard, both nationally and for the ten states with the highest annual number of maltreatment reports.

substantiated maltreatment victims.... [and] comprise 45% of the total number of children in foster care." SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 3 (2003). This study was commissioned "[i]n response to concerns about [this] over-representation." *Id.* at 1. It identifies a number of theories to explain this data, including "disproportionate need," "racial bias and child welfare decision making," and "substantially greater risks of child abuse and neglect for children of color and their families due to a variety of risk factors (e.g., poverty)." *Id.* at 4-5. The study found that social workers perceive the problem to be based on factors such as "poverty, lack of resources in poor communities, discriminatory practices in the larger society, the characteristics of the families entering the system, and the media," as well as factors internal to the child welfare system, such as worker bias and agency practices. *Id.* at 19-28. The National Clearinghouse on Child Abuse and Neglect Information also identified poverty as a major risk factor for maltreatment, particularly neglect. NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., RISK AND PROTECTIVE FACTORS FOR CHILD ABUSE AND NEGLECT 1 (2003), available at <http://nccanch.acf.hhs.gov/topics/prevention/emerging/riskprotectivefactors.pdf>. As the Children's Bureau noted, "[t]here has been a persistently strong relationship between poverty and minority status in the United States." CHIBNALL ET AL., *supra*, at 4. The study goes on to say, "[s]pecifically, African-American and Hispanic children are more than twice as likely to live in poverty as non-Hispanic white and Asian-Pacific Islander children. Almost one-third of African-American (30%) and Hispanic (28%) children live in poverty." *Id.* (citation omitted). Because "abuse [has been found to be] 14 times more common in poor families and neglect is 44 times more common in poor families" and "the incidence rate [of child mistreatment] is 26.5 times higher in lower income families," it follows that, "[t]he greater incidence of maltreatment among low-income families combined with the over-representation of families of color living in poverty suggests a plausible explanation for the disproportional representation of minority children in the child welfare system." *Id.*; see also Wald, *supra* note 22, at 1020-21 ("All commentators agree that the great majority of neglect cases involve very poor families who are usually receiving welfare.... [M]any of these parents can best be described as extremely 'marginal' people."). Wald cites another study indicating that "probably 75% of neglecting families seen by agencies have incomes below the poverty level; half may be on welfare. Blacks are highly overrepresented." *Id.* at 1021 n.186; see also Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023 (2003) (arguing that the child protective system disproportionately affects low-income parents in part because poverty is confused with neglect due to vague definitions, no legal right to counsel and the lack of financial resources to secure representation, a lack of training or knowledge to understand the issues involved, and a reporting bias in that professionals are more likely to report low-income families to CPS).

Annual Data on Maltreatment Investigations:
Percentage of Unsubstantiated Claims⁶⁸

Jurisdiction	Child Population ⁶⁹	Investigations ⁷⁰	Children Investigated ⁷¹	Children Found To Be Victims ⁷²	Unsubstantiated Claims ⁷³
U.S. ⁷⁴	72,894,483	1,811,835	3,134,694	879,726	71.4%
California	9,452,391	260,924	512,880	132,181	74.2%
New York	4,613,251	155,678	262,643	79,049	69.9%
Texas	6,102,316	129,956	210,375	48,808	76.8%
Florida	3,882,271	142,547	254,856	122,131	52.1%
Ohio	2,879,927	68,236	110,495	50,141	54.6%
Michigan	2,570,264	72,999	190,164	28,830	84.8%
N. Carolina	2,068,840	63,747	127,702	35,523	72.2%
Illinois	3,254,523	58,704	137,321	28,160	79.5%
Georgia	2,268,477	69,108	126,677	41,206	67.5%
Tennessee	1,404,661	28,348	37,525	8,494	77.4%

68. In those states where the CPS system is state-supervised but county-administered, the percentage of unsubstantiated claims likely represents an average of the precautionary policies that prevail at the local level. Thus, for example, North Carolina's index of 72.2 percent, as derived from data reported to the National Clearinghouse, is quite close to the average of 69.3 percent calculated from its 2001-2002 state report of the precautionary policies of its one hundred counties. *See* N.C. CHILD ADVOCACY INST., *supra* note 13 (providing data for fiscal year 2001-2002 on all one hundred North Carolina counties, including data on the number of reports, the number of reports screened in and out, and the number of screened-in reports investigated and substantiated; the aggregate numbers vary slightly from what is presented here because of the different data sources). The one hundred counties had indexes that ranged from a low of 5.1 percent substantiation to a high of 59.4 percent substantiation, with a standard deviation of 8.7 percentage points. *See id.* Such wide disparities in substantiation rates among counties may be accounted for by differences in staffing and support for the system's overall programmatic purposes; the interpretation of legal definitions of abuse and neglect and thus in screening policies; investigation protocols; and substantiation requirements. North Carolina is relatively unique in having such detailed data. However, because child maltreatment is in important respects a culturally relative designation and because the inclination of officials to intervene in the privacy of the family can also differ by region, one can safely assume that such variation among localities exists across the country.

69. CHILD MALTREATMENT 2002, *supra* note 8, at 28 tbl.3-1.

70. *Id.* at 17 tbl.2-5.

71. *Id.* at 29 tbl.3-1.

72. *Id.* at 30 tbl.3-2.

73. These percentages reflect the number of children affected by unsubstantiated investigations or other nonvictim findings.

74. Because data on investigated children are unavailable for Maryland, the state is excluded from all of the national data.

The states' decision to adopt standards for screening in and investigating allegations that allow overly broad discretion is rationalized primarily on the ground that their officials need this discretion to ferret out even subtle and hidden forms of maltreatment.⁷⁵ The fact that some maltreatment experts believe that many more abused and neglected children exist than we know about, and that many unsubstantiated reports actually involve abuse or neglect, likely explains the perceived need for this broad tool.⁷⁶ This policy choice is also justified by the belief that, on balance, maltreatment is clearly worse than the intrusions that are necessary to find it. As one court explained:

[T]he "balance of harms" tips strongly in favor of [the state's broad authority to conduct investigations]. If [this authority were restricted], it is likely that "some child abuse would go undetected and some innocent lives unprotected." This harm ... is much greater than the loss of privacy in cases where [the state's approach] produces a false alarm.... "[T]he life of even one child is too great a price to pay for the possible increased degree of parental privacy."⁷⁷

The sentiments expressed in this excerpt are obviously weighty, for it is a fact that approximately 1400 times a year in this country, families and officials must confront a dead child who is the victim of an abusive parent or guardian.⁷⁸ The child is often younger than

75. See *supra* notes 32-35 and accompanying text (explaining the rationale for the broad legal definitions of maltreatment) and note 62 (explaining CPS's enthusiasm for this excessively precautionary approach to removals especially after a child fatality).

76. See, e.g., LEVESQUE, *supra* note 22, at 3-7 (summarizing studies that describe children as maltreated when maltreatment is either actually substantiated or merely indicated).

77. *Darryl H. v. Coler*, 801 F.2d 893, 897, 899 (7th Cir. 1986) (quoting earlier district court opinion in same case); see also *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (stating that the "liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents"); *Franz v. Lytle*, 997 F.2d 784, 784-85 (10th Cir. 1993) (in response to claims that he had violated a child's and family's Fourth and Fourteenth Amendment rights, the officer argued that "[a]gainst the societal imperative to protect children, particularly young children suspected of being victims of neglect or abuse, plaintiffs' interests in privacy must yield"); *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) (holding that "[t]he right to family integrity clearly does not include a constitutional right to be free from child abuse investigations").

78. FATALITIES, *supra* note 27.

one, and in the overwhelming number of cases, younger than eight.⁷⁹ The child's death usually results from physical abuse or neglect, including battered child syndrome, drowning, suffocating, shaking, and extended malnourishment.⁸⁰

The facts in the North Carolina case *State v. Wilkerson*⁸¹ are emblematic of those that the states are anxious to avoid. The victim in this case was two-year-old Kessler Wilkerson.⁸² His father killed him after a long period of serious physical abuse. On the morning Kessler died, "neighbors heard loud sounds 'like something was being thrown [sic] inside the trailer'" where Kessler lived with his mother, Nancy, and his father, Kenny. Neighbors then heard "the voice of a little boy crying, and defendant shouting at him to shut up." Later that day, his father "delivered the child's limp body to ambulance attendants"; the boy was pronounced dead on arrival at the hospital. An initial examination of his body revealed "[b]ruises ... on his chest, shoulders, upper arm and forearm." The autopsy showed "multiple bruises all over the child's body and, internally, significant bleeding and a deep laceration of the liver." The medical examiner determined that Kessler actually died as a result of "abdominal hemorrhage from a ruptured liver." In the criminal trial of Kenny Wilkerson for the death of his son, witnesses testified that they had observed him "frequently kick[ing] the child and on occasion [making] him stand 'spread eagle' against a wall for long periods of time."⁸³ Wilkerson was observed two days before his son's death kicking the child "with such force that his chest hit the wall."

There are no words to describe the outrageousness of such senseless abuse.⁸⁴ It took me several years to learn to teach this case and others like it without overwhelming emotion; they always

79. *Id.* at 2.

80. *Id.* at 3.

81. 247 S.E.2d 905 (N.C. 1978). The following factual narrative is derived entirely from the case of *State v. Wilkerson*.

82. *Id.* at 907.

83. *Id.* at 908.

84. The fact that witnesses observed Kessler's father abusing his baby but did not report it merely adds to the outrageousness of the abuse. The reluctance of many witnesses to report child abuse is an important obstacle to solving the child maltreatment problem. This reluctance may come from an individual's desire not to become involved in other people's problems, or it may stem from a more general cultural or community bias against invading family privacy.

cause students extraordinary discomfort.⁸⁵ At the same time, despite their compelling power, they do not explain the routine failure to give anything more than a nod to the intrusive impact—on family privacy and on the children’s own well-being—of the official interventions designed to prevent them. That is, we understand the extraordinarily harsh message that on one side of the scales there is the real possibility of a dead baby like Kessler. It is not so obvious, however, that on the other side of the scales there is nothing more than a “possible [de]creased degree of parental privacy.”⁸⁶ Indeed, the use of such impersonal rhetoric by advocates of the current system to describe the calculus on the other side does the society and especially the children a huge disservice by obscuring the reality that fully functioning real-life families often pay a steep and very personal price for this approach. Like Kessler, the children in these other families also have names, faces, and stories that ought not to be hidden from view.

Throughout this Article, I will use these previously obscured faces alongside Kessler’s to illustrate the complex dynamic that must be acknowledged in any legitimate analysis of the child welfare exception to the Fourth Amendment. Fortunately, like Kessler, the particular children I focus on for this purpose do not represent the norm for state officials who investigate suspicions of child maltreatment.⁸⁷ They are also clearly more fortunate than Kessler because their lives were not sacrificed to private or public violence. Nevertheless, as Kessler does, they serve as appropriate “poster children” for the important issues raised by their stories.

85. For example, in my experience it is not unusual for a student who is also the mother of a young child to ask to be excused from class, because she does not believe she can remain composed during the discussion of this case.

86. *Darryl H. v. Coler*, 801 F.2d 893, 899 (7th Cir. 1986) (quoting earlier district court opinion in same case).

87. Thus, for example, investigations concerning severe and sexual abuse comprise only a small bit of the work of officials who work in this area. Specifically, while sexual abuse is initially implicated in a larger percentage of cases, only about ten percent of substantiated maltreatment cases are attributed to sexual abuse. *See supra* note 26 (describing this category). And although approximately 800,000 children annually are victims of maltreatment, only about 1400 of these are child fatalities. Notably, most child fatality cases involve child victims who were previously unknown to the system. *See supra* notes 27-28 and accompanying text (setting out this data).

1. *The Story of John Doe, Jr.*⁸⁸

In September 1998, CPS in Milwaukee, Wisconsin received a written report from a ten-year-old girl's guardian alleging that the principal at the girl's private Christian academy had spanked her.⁸⁹ For two months, CPS did nothing: It did not screen the report in or out; nor did it assign the report to an investigator. Only after the child's guardian sent a second letter was the case assigned to John Wichman, who was characterized as "an experienced Bureau caseworker."⁹⁰ Wichman visited the family's home and the guardian, who told him that the child's principal swatted the child on two occasions, the second swatting leaving a bruise mark. She also gave him a copy of the school handbook which explained that children who received "[t]hree marks [for bad behavior] in one day or four marks in one week" would get one swat from the principal.⁹¹ Wichman then spoke to the girl who told him that "the second paddling was administered above the rear area, approximately six inches above her tailbone, and that she had struggled to get away from [the principal]." The girl also told Wichman that she knew of

88. *Doe v. Heck*, 327 F.3d 492 (2003). The following factual narrative is derived entirely from this case.

89. *Id.* at 500. In general, spanking by a parent or by a private school teacher acting *in loco parentis* is not against the law. Specifically, in most states it is only when a spanking exceeds the scope of "serious physical harm" that CPS and/or the police can substantiate a claim of physical abuse based on that conduct. See SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* 334, 507 (3d ed. 2004) (setting out California rule excluding reasonable corporal punishment from definition of physical abuse and discussing modern criticism of legality of corporal punishment).

90. *Doe*, 327 F.3d at 500.

91. *Id.* at 501 n.2. According to the handbook, swats were administered based on a "mark system." This system was "used for enforcing discipline and control in the classroom. Penalties for marks [were] at the discretion of the individual teacher. Marks [were] accumulated weekly for students in all elementary grades, and they beg[an] each week with a clean record. Three marks in one day or four marks in one week [would] result in one swat to be administered the same day the last mark was given." The handbook provided for a "verbal reprimand" on the first mark, parental notification on the second mark, detention on the third mark (unless it was given on the same day as the first two), and a swat on the fourth mark. The handbook also indicated that the school would attempt to notify a child's parents in advance of a swat, "however, a swat will be given regardless if the parent can be reached or not." Finally, the handbook provided that "[p]arents should deal with each mark at home to deter getting enough marks for a swat." The academy served children from kindergarten through fourth grade, although the handbook provided that only "elementary" aged children were subject to the swatting. *Id.* at 500-01 & nn.2-3.

at least one other child, a fourth-grade boy named John Doe, Jr., who also had been swatted, but she did not know if he had been hurt.

Based on these two interviews, Wichman told his supervisor, Christine Hansen, that “the principal may have been out of control.” And he suggested that the parents of the children who attended the academy also were appropriate child abuse suspects based on their acquiescence to the swatting policy, and the possibility, which Wichman apparently imagined out of thin air, that they might have been the subject of maltreatment reports in the past.⁹² Without requiring any further investigation, Hansen substantiated the girl’s allegations against the principal⁹³ and asked Wichman to report the allegations concerning John Jr.⁹⁴ That case was assigned to Carla Heck, another Bureau caseworker.⁹⁵

On December 16, Heck and Wichman went to the academy to interview John Jr. The associate pastor of the affiliated church “asked [the social workers] whether he was legally required to allow them to interview the boy” without a court order.⁹⁶ In response, the Heck and Wichman explained that “the [relevant] statute gave them the authority to interview the child at school without notice or parental consent,” and that if the school refused to comply, they would “call the police, who would then force the school to allow the

92. No evidence existed in the record that otherwise explains this suspicion.

93. This decision to substantiate was

contrary to Bureau’s Investigation Standards, which provide that substantiation can occur only after the assigned caseworker has obtained statements from all “pertinent persons,” including the alleged maltreater and any eyewitnesses. At the time Hansen made the decision to substantiate [the principal], Wichman had not interviewed [him] or [the girl’s] teacher ... who was present during both of the girl’s spankings.

Id. at 501-02. Additionally, no physical evidence of excessive corporal punishment existed, as the bruises that were alleged to have appeared on the girl’s back had disappeared by then, and her guardian had not taken any pictures of them when they were still present. *Id.* at 501.

94. *Id.* at 502.

95. At the time, state law “technically require[d] a 24-hour response to all screened-in reports.” *Id.* at 499. Nevertheless, CPS “guidelines separate[d] reports into three categories: (1) 0-2 hour response; (2) 24-hour response; and (3) 2-5 day response.” *Id.* In this case, the months-long delay was the result of CPS’s failure, whether deliberate or not, to screen in the reports when they were first made. The guidelines for investigatory response times are only invoked once a report is screened in. *Id.*

96. *Id.* at 503.

interview in short order.” Heck and Wichman also refused to disclose the reason for the investigation, or to permit anyone from the school to accompany John Jr. as he was being examined. Because of this, the assistant pastor told the social workers that he would not allow them to proceed without a court order. And so they called the police.

The police officer who arrived on the scene was “[u]nsure of how to proceed.” He called his captain, who in turn “called the local district attorney’s office, and received confirmation that [the state statute] gave caseworkers the authority to interview children suspected of abuse on school premises without having to notify or obtain the consent of their parents or the school.” The captain, joined by two other police officers, then went to the school to assist the original officer and the two social workers to gain access to the boy. The assistant pastor initially continued to resist the efforts of the now six state officials to enter the premises to see John Jr., asking again whether a court order was needed before the interview could proceed. Although no such conditions existed, the captain responded that “a court order was not needed for an interview under exigent circumstances.”⁹⁷ The associate pastor finally acquiesced to the investigation.

“John Jr. was then escorted to the [empty] nursery section of the church for the interview.”⁹⁸ He was “questioned by Heck and Wichman, with the uniformed police officer present, for twenty minutes about intimate details of his family life.”⁹⁹ During the interview, the social worker asked the boy a series of questions, including whether he had been physically disciplined at school, whether his parents knew about the principal’s spanking, whether he was physically disciplined at home, about “his father’s military

97. The Seventh Circuit’s opinion notes that “[a]lthough [the captain] made reference to ‘exigent circumstances,’ neither the caseworkers nor the police officers indicated that they believed John Jr. was under any threat of immediate harm.” *Id.* at 503 & n.7. In fact, nothing in the report on John Jr. suggested that such a threat was present, because the girl who told CPS about the boy was unable to say whether he had been hurt by the swat he received from the principal. The fact that the state waited a full three months before screening in the initial report and investigating the case further undermined the state’s ability to make out exigent circumstances on these facts. This suggests that at least the police knew that they were not proceeding on lawful authority.

98. *Id.* at 503.

99. *Id.* at 510.

history, where his father worked ... where his sister attended school,” and “whether he knew of any other students at school who had been spanked.”¹⁰⁰ John Jr. responded that the principal had spanked him once, that he had “held back tears” during the spanking, and that “after the spanking [the principal] and his teacher ... (who had witnessed the spanking), prayed with him.”¹⁰¹ He also confirmed that his parents knew he had been spanked, and that his parents spanked both him and his sister with a paddle or a spatula. Finally, he indicated that he knew of “at least six other students, whom he identified for Heck,” who also had been spanked at school.¹⁰²

Meanwhile, CPS launched a parallel investigation of John Jr.’s family based on the social workers’ suspicion that John Jr.’s parents, John and Jane Doe, also were abusing him and his sister. Heck and Wichman pursued this investigation for over a month. During this period, the Does hired an attorney who communicated with CPS but who would not allow the agents to meet with the family or to interview or examine the children without a court order. CPS responded by going to “several private schools in the area in an attempt to interview John Jr.’s sister.”¹⁰³ CPS also threatened the family with “tak[ing] this whole thing up a notch,” by “go[ing] to the District Attorney,”¹⁰⁴ and “tak[ing] steps to ... protect the children in [the family’s] home”¹⁰⁵ if the parents did not

100. *Id.* at 503-04.

101. *Id.* at 503.

102. *Id.* at 504.

103. *Id.* at 505.

104. *Id.* at 504.

105. *Id.* at 506.

voluntarily comply with the investigation.¹⁰⁶ John and Jane Doe explained that, throughout this period, they

“lived in constant fear that Ms. Heck or one of her associates would come to [their] home and remove [their] children,” and that this fear caused them: (1) to maintain “a continual watch for strange vehicles, believing that Ms. Heck or an associate might come in an unmarked car or van”; (2) not to let their children play outside ... without one of them present to “guard to [e]nsure no [CPS] case worker came for them”; (3) to put up blankets over their windows to prevent Heck or anyone else with [CPS] from monitoring their activities; and (4) to purchase a caller identification system to screen any calls from [CPS] caseworkers.¹⁰⁷

They also “took their children to a friend’s house [one evening] to spend the night, fearing that someone from [CPS] would come to their home and attempt to remove their children from their custody”; ... “purchased a cellular phone [so that they could] keep in constant contact ... regarding [CPS’s] ongoing investigation of their family”; and Jane Doe, “overwhelmed that [CPS officials] had interviewed her son at school” and by CPS’s conduct otherwise “took a leave of absence from work from December 17, 1998 through January 19, 1999 because she ‘was afraid to be away from her children for any length of time ... not knowing what [CPS] might do.’”¹⁰⁸

106. The Does “interpreted [these expressions] as a threat to remove their children from their custody” if they did not voluntarily comply with CPS’s investigation as Heck and Wichman saw fit to conduct it. *Id.* The validity of this interpretation was confirmed by Wichman, who told the police that “if the Does did not have their attorney contact [CPS] within the next 24 hours, he and Heck planned to go to [the family] residence and physically remove the children from their custody so they might be interviewed.” *Id.* Wichman’s supervisor, Christine Hansen, “testified in a deposition that Wichman’s stated intention to the police that he would seek to remove the Doe children from their parents’ custody, if true, would have been illegal, a drastic step, and inconsistent with [CPS] protocol.” *Id.* at n.11. In light of this, the social workers’ threats can be interpreted in one of two ways. First, it could be that they intended to violate either knowingly or unknowingly the CPS protocol described by Hansen. Second, it could be that they intended to use the threat of removal—just as they had used the police in the original visit to John Jr.’s school—to force compliance with their investigation.

107. *Id.* at 506 & n.10.

108. *Id.* at 507 & n.12.

During this same period and without any new evidence, CPS also launched investigations of the other children John Jr. had identified as having been spanked by the principal; as in John Jr.'s case, these investigations included interviews with the children conducted without parental notification or consent.¹⁰⁹ And it "opened a file on the corporation, 'Greendale Baptist Academy.'"¹¹⁰ In the course of this last investigation, CPS "ran background checks (for prior contacts with [CPS]) on every family listed in the [church membership] directory, whether they had children enrolled at the school or not." Its officials met with the police to update them on the investigation, and to supply them "with copies of [CPS] reports ... a copy of the [school's] handbook, the church directory and some information [CPS] received off of the Internet in regards to Bob Jones University."¹¹¹ And it returned to the school with another social worker and two police officers to interview the other children, a visit during which the school's attorney refused to allow the state officials' entry without a court order and the police threatened to arrest the principal "for obstruction of justice."¹¹²

All of the investigations ultimately were closed in early- to mid-1999.¹¹³ No action was taken against the school, the principal, or the parents of the children who were the alleged victims of maltreatment. CPS's lawyer sent the Does' lawyer a letter "advising that the investigation of [their family] was being closed because '[i]n discussing the matter with you, we have been assured that there is no safety, nor service needs for the ... family.'" CPS's internal files read differently. They "indicate[] that the investigation had been closed because of the Does' refusal to cooperate, thus preventing caseworkers from substantiating abuse." At no point in the investigation did CPS or the police seek a court order to conduct the investigation. This baffled the school's lawyer, who said, "I don't know why they don't just get an order from a judge. If they [can] get the order then we can't do anything about it."¹¹⁴ Ultimately, the Seventh Circuit Court of Appeals found that the investigation had

109. *Id.* at 505.

110. *Id.* at 504.

111. *Id.* at 506.

112. *Id.* at 506-07.

113. *Id.* at 508.

114. *Id.* at 507.

proceeded in the absence of “definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.”¹¹⁵

2. *The Story of Jessie and Lauren Wallis*¹¹⁶

In the latter part of 1991, the Wallis family, comprised of Bill, Becky, and their two children, five-year-old Lauren and two-year-old Jessie, lived in San Diego, California.¹¹⁷ Many months had passed since they last had contact with Bill’s sister, Rachel, “who suffer[ed] from a long history of psychiatric problems, including severe dissociative and multiple personality disorders.” The family’s estrangement from Rachel stemmed from a false report she had filed with the San Diego County CPS “in April of 1990, alleging that Bill was sexually abusing Lauren. CPS had investigated the report and found that there was no credible evidence to support the allegations and no action was taken against the Wallises.” Nevertheless, “Bill and Becky remained angry at Rachel ... and terminated their relationship with her.”

115. *Id.* at 515. When the investigations were closed, the Doe family, the school, and other parents sued the social workers under 42 U.S.C. § 1983 alleging, inter alia, that the state officials had violated their Fourth Amendment rights to be free from unreasonable searches and seizures. *Id.* at 508. Specifically, they alleged that the officials had “conducted an unreasonable search of [the school’s] premises” and “illegally seized John Jr.” *Id.* They also alleged that the state law provision pursuant to which the officials claimed authority to conduct an investigation that included interviewing the children outside the presence of and without notifying or obtaining consent from their parents was unconstitutional. *Id.* The district court granted summary judgment to the defendants on the ground that if these were constitutional violations, the doctrine of qualified immunity, which applies where a constitutional right is not clearly established, barred the suit against them. *Id.* On appeal, the Seventh Circuit “th[ought] it clear that [the state’s entry onto the school’s property and its taking of John Jr. to interview him] constitute[d] both a search and a seizure under the Fourth Amendment.” *Id.* at 509. It also found that the school and John Jr. both had reasonable expectations of privacy as against state intrusions at school, *id.* at 511, and that the searches were conducted without “definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse,” *id.* at 515. Finally, the court held that although the investigation and the statutory provision that authorized them were unconstitutional under the Fourth Amendment, the suit against the state officials was properly dismissed under the doctrine of qualified immunity. *Id.* at 515-16.

116. *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000). The following factual narrative is derived entirely from this case.

117. *Id.* at 1131.

Rachel was subsequently “hospitalized in a psychiatric facility because she was suicidal and was afraid she would be murdered.” During her stay there, “[s]he reported to her therapist ... that Bill Wallis was planning to sacrifice his young son Jessie to Satan at the ‘Fall Equinox ritual,’ and that Bill had told her that Jessie’s ritual murder would be covered up by staging a car accident in which his body would be burned.” Rachel added that “both her parents [Lauren and Jessie’s grandparents] were in a satanic cult, and that Bill Wallis was also in the cult, but that Becky was not, and indeed ‘might not know’ about her husband’s and parents’ cult membership.” In the course of this recitation, “Rachel recounted her recently recovered memory ‘of being with her father in the woods, with him wearing a cult robe reciting hypnotically ‘On the third full moon after two blue moons a child will be killed.’” Then, “[o]ne of Rachel’s ‘alter’ multiple personalities told [the therapist] that the incantation referred to Jessie and meant that he would be sacrificed to Satan on the ‘Fall Equinox,’ supposedly one of the Satanic ‘High Holidays.’” The court later explained that “[i]n 1991, the Fall Equinox evidently fell upon September 23.”¹¹⁸

California law requires therapists to report suspected abuse and neglect.¹¹⁹ Acting on this requirement, Rachel’s therapist wrote CPS a letter on September 19 detailing what she could of her consultations with her patient. This letter formed the basis for CPS’s call to the state’s child abuse and neglect hotline. That same day, CPS also called the police department, and provided the responding officers with the information contained in the report. On September 20, the police assigned two detectives to the case. CPS separately assigned a caseworker to its own investigation.¹²⁰

In the evening of September 22, 1991, the detectives “stake[d] out” Becky Wallis’s car, tailed her as she began her drive home, and

118. *Id.* at 1131-32.

119. *Id.* at 1132.

120. At the same time, the CPS caseworker who had received the initial report from the therapist “wrote up her recommendations for the ... caseworker who would be assigned to the matter, stating that she felt ‘we have no choice but to take the children into protective custody until an investigation can be done.’” *Id.* And in a subsequent communications with that caseworker, she indicated “that a district attorney ... told [her] that ‘we have enough to pick up the kids.’” *Id.* Whether anyone at CPS that day ever communicated with anyone at the Police Department concerning the possibility of removing Lauren and Jessie from the custody of their parents is entirely unclear from the record.

eventually pulled her over in the parking lot of a local 7-11 convenience store.¹²¹ There, they “told her that they needed to ‘check on’ [her two children, Lauren and Jessie], and said that if she took them to her house, they would be able to ‘sit down and talk about it.’” In fact, the officers’ intent was to remove the children from the Wallis’s home. “In response to the officers’ [mis]representations, Becky took the officers to the family’s home and agreed to their entry.”

When Becky and the officers reached the family home, it was “around midnight, [and] her children were asleep,” in the care of their father, Bill Wallis.¹²² According to the officers, “[t]he children appeared well-cared for,” and “there was no sign of anything suspicious.” Despite this, one of the officers

decided to “interview” Lauren. She required Bill and Becky [Wallis] to awaken Lauren so that she could question her. According to [the officer], the sleepy five year old was “evasive,” but told her that they had to move from the apartment in which they had previously lived because of “spiders on the walls.” Although [the officer] acknowledged that she had no information from any source that Lauren had ever been sexually abused, she asked her whether “anybody had ever given her bad touches or abused her.” Lauren denied that anyone had.

Without interviewing either Bill or Becky Wallis, the officers then announced that they were taking the children away because “there was a pickup order” that CPS had obtained.¹²³ This was untrue;

121. *Id.* at 1134.

122. *Id.*

123. *Id.* at 1133. In the course of the subsequent litigation, CPS disavowed police claims that they had been notified by CPS that “there was a pick up order.” See *id.* at 1132-33 (describing the controversy concerning whether CPS told the police it had an order, and in particular the principals’ changing stories concerning the controversy). Clearly, no one at CPS got a court order to remove the children that day, and no one at the police department ever checked to see whether the department’s actions were authorized by such an order. *Id.* Officers and supervisors from the police department testified in the ensuing litigation that at the time ... the Police Department had in effect a practice of taking “at face value” telephonic representations from CPS that there was a court order to remove children from their parents’ custody. Claytor testified that “it was not unusual for CPS workers to call and ask for our units to respond to a particular scene, and tell them that ‘we have a petition that’s been filed,’ or [that] kids have already been made a ward of the court in response to a petition. That

there never was such a document.¹²⁴ Nevertheless, at 1:00 a.m. on September 22, Lauren and Jessie were awakened, taken away from their parents and the family home, and brought to “a county institution.” In the following days, “[t]he children were not allowed to see their parents and cried for them constantly.”

Again without obtaining a court order or advising Bill or Becky Wallis so that they would have an “opportunity to object to the intrusive examinations, to suggest conditions under which they might take place, or to be present,” the police arranged for Jessie and Lauren to be taken from the institution to a local hospital for “an evidentiary physical examination ... to determine whether either child had been sexually abused.”¹²⁵ Dr. Mary Spencer conducted both children’s examinations, which

included internal body cavity examination of the children, vaginal and anal. Dr. Spencer also took photographs of both the inside and the outside of Lauren’s vagina and rectum and Jessie’s rectum. These examinations were conducted on Jessie’s third birthday. A social worker who observed the examinations reported, not surprisingly, that Lauren was very upset by the procedures and asked for her parents.¹²⁶

happened fairly often.”

Id. at 1133. A supervisor testified that

the Police Department did nothing to verify that a pickup order existed because “there’s been a longstanding agreement between law enforcement agencies, that if I tell you I have a search warrant, up until recent times, you would be taken at face value that you did, in fact, have a search warrant. Same way as when I call down to verify that there is a warrant in the system for someone and make the arrest, I don’t physically see it.”

Id. Also in dispute was whether anyone at CPS that day discussed with anyone at the Police Department the previous allegations of sexual abuse that had been investigated and dismissed, and whether the Police believed they were investigating the case or simply locating the family to enforce the (nonexistent) pick-up order.

124. *Id.* at 1134. The record is replete with different and sometimes contradictory explanations from the officers involved in the investigation concerning the basis for their belief that a court order in fact existed that mandated the removal of Lauren and Jessie that night. Some of the court’s analysis suggests that the judges did not believe at least some of the officers’ statements. In any event, all that is clear is that there never was such a court order, that CPS never requested one, and that the court’s ultimate view was that the officers were, if not prevaricating, at least unreasonable in their belief that a warrant existed.

125. *Id.* at 1134-35.

126. *Id.* at 1135.

Dr. Spencer subsequently told the social worker “that the results disclosed medical evidence that both children had been molested, and that Dr. Susan Horowitz, a specialist from Children’s Hospital’s Sexual Abuse Unit concurred with her findings.”

Based on this representation and the allegation that “Bill was going to sacrifice Jessie to Satan,” the social worker requested an order from the juvenile court—the first contact with a court in this case—to have the children placed in the county’s custody. The judicial officer reviewing the request “specifically rejected the allegations regarding occult sacrifice as a basis for retaining custody of the children, but determined that Dr. Spencer’s report provided sufficient evidence of sexual abuse to keep them in county custody.” The order further provided that the children’s parents were to be allowed “only one supervised visit per week.”

According to the court:

Two months went by. Then, on November 25, Dr. Horowitz sent [the social worker] a letter that changed the lives of the Wallis family. It informed CPS that Dr. Spencer’s statement in her report that Dr. Horowitz supported the finding of sexual abuse was false. In fact, Dr. Horowitz wrote, as of the time of Dr. Spencer’s report, she [Dr. Horowitz] ... had not performed a full review, and had not offered any conclusion. Dr. Horowitz’s letter further stated that she now had reviewed the full file and, based on all the evidence, she did not agree with Dr. Spencer’s conclusion that the children had been abused. To the contrary, Dr. Horowitz concluded that there was no evidence of abuse, and that there were alternative, normal physiological explanations for what Dr. Spencer had observed. Dr. Horowitz’s explanations were based on Lauren’s history of vaginal irritation and infection, as documented in her medical records, as well as other information contained in those records.¹²⁷

Based on this letter, the social worker “to his credit, immediately released [Lauren and Jessie] ... to their maternal grandmother.” CPS then

moved swiftly to dismiss the case in Juvenile Court. [And on] December 6, 1991, Lauren and Jessie were returned by court

127. *Id.* at 1135.

order to the custody of their parents. No one now contends that either child was ever sexually or physically abused, that there was ever any evidence of any abuse by their parents, or that Bill Wallis had ever had any intention of sacrificing Jessie to Satan.

II. THE DOCTRINAL VALIDITY OF THE STATES' RELIANCE ON A CHILD WELFARE EXCEPTION TO THE FOURTH AMENDMENT

States have developed and implemented the approach to the child maltreatment problem described in Part I in substantial reliance on the existence of a child welfare exception to the Fourth Amendment. Specifically, they annually conduct over a million investigations on the assumption that the reasonableness of the ultimate goal (or perhaps some individualized suspicion) suffices to authorize them; and they often exercise broad discretion in their conduct on the assumption that the particularized warrant that would otherwise fetter them is not required in this context. Part II of this Article begins to explore the validity of these reliances.

A. The Amendment's Presumptive Protections

The Fourth Amendment provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.¹²⁸

“[T]he essence of a Fourth Amendment violation is ‘not the breaking of [a person’s] doors, and the rummaging of his drawers,’ but rather ‘the invasion of his infeasible right of personal security, personal liberty, and private property.’”¹²⁹ Consistent with this account,

128. U.S. CONST. amend. IV.

129. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); *see also* ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 97 (2d ed. 2003). The personal security, personal liberty, and private property aspects of this right have been described as encompassing notions of autonomy, dignity, and locomotion. Thus, as Fourth Amendment scholar Andrew Taslitz explains:

“[t]he basic purpose of this Amendment as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Fourth Amendment thus gives concrete expression to a right of the people which ‘is basic to a free society.’”¹³⁰ Much of the Supreme Court’s Fourth Amendment doctrine and a significant portion of the related scholarship is concerned with fixing the point at which an invasion by government officials ceases to be reasonable and becomes unlawfully arbitrary. In this regard, the prevailing view of the text presumes that absent “a few specifically established and well-delineated exceptions” a warrant and probable cause are necessary to constitutionalize, or to make “reasonable,” a Fourth Amendment search or seizure.¹³¹

Privacy is essential to the flourishing of human relationships and free thought. Property adds to the independence and security that give us a measure of freedom from state and private coercion. Free movement—the right of locomotion—allows us to travel, work, visit friends, and participate in community and educational activities unmolested, in ways essential to human autonomy and diversity. The inviolability of these interests is central to our sense that we are being treated with dignity.

Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2266-67 (2002) (footnotes omitted); see also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 79 (2000) (asserting that the Amendment implies “values of bodily autonomy, privacy, and free expression” as well as “issues of bodily integrity, dignity, and liberty”); David Meyer, *The Paradox of Family Privacy*, 53 *VAND. L. REV.* 527, 595 (2000) (explaining that Fourth Amendment privacy, like the privacy protected under the Fourteenth Amendment’s Due Process Clause, is concerned with safeguarding the dignity of the individual against state incursion).

130. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

131. *Katz v. United States*, 389 U.S. 347, 357 (1967). This view of the Amendment’s presumptive protections is based in general agreement amongst constitutional historians and Fourth Amendment scholars about the relationship between its two clauses; specifically, it reflects the sense of these scholars that “the ‘reasonable’ search is one which meets the warrant requirements specified in the second clause.” JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 42-43 (1966). Landynski further described this interpretation thusly:

The first clause ... recognized [an] already existing ... right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second clause, in turn, defines and interprets the first, telling us the kind of search that is *not* “unreasonable,” and therefore not forbidden, namely, the one carried out under the safeguards there specified.

Id.; see also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 103 (1937) (same); Tracey Maclin, *The*

The probable cause requirement is generally thought to have been intended to assure that “common rumor or report, suspicion, or even ‘strong reason to suspect’” would be insufficient to support a warrant application.¹³² Because “[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,”¹³³ the Court has consistently refused to quantify this formula. Nevertheless, some judges have suggested that “probable cause hovers somewhere just over or just under the 50% mark, depending upon the court and the situation.”¹³⁴ In any event, it is clearly “more than ‘reasonable suspicion’” which a judicial “survey[] ... pegged ... at about a 30% certainty.”¹³⁵

Central Meaning of the Fourth Amendment, 35 WM. & MARY L. REV. 197 (1993) (same); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (same); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with Duke University School of Law) (same). The most notable academic opponent of this view is Professor Akhil Reed Amar, who has interpreted the Amendment’s history as suggesting that searches and seizures are presumptively more reasonable without a warrant. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772-85 (1994). His different historical interpretation of the text has been flatly rejected as “simply wrong” and “delusive” by Professor Maclin, who is joined in this view by the other scholars already mentioned in this footnote. Tracy Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 5-6, 21-23, 45-47 (1994).

132. *Henry v. United States*, 361 U.S. 98, 101 (1959). But see Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003) (detailing in Parts IV and V the historical evolution of the meaning and evidentiary value of probable cause). See also James Etienne Viator, *The Fourth Amendment in the Nineteenth Century, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 176 (Eugene W. Hickok, Jr. ed., 1991) (arguing that The Collection Act of 1789 codified “the narrow contemporary understanding of probable cause” which in essence required the magistrate to issue the requested warrant “once the oath or affirmation of suspicion was made to him”).

133. *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). According to the modern Court, “the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Pringle*, 540 U.S. at 370 (internal citations omitted) (quoting *Gates*, 462 U.S. at 232). Thus, it “is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.” *Id.*; see Lerner, *supra* note 132, at 995-97 (discussing the “[i]llusion of [m]athematical [p]recision” inherent in the probable cause inquiry).

134. TASLITZ & PARIS, *supra* note 129, at 180; see also Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 62 (1996) (suggesting that in the Founding Era and with respect to writs of assistance in particular, probable cause meant “a high likelihood ... that a particular place contained stolen goods”).

135. TASLITZ & PARIS, *supra* note 129, at 180-81 & n.110; see also Beeman, *supra* note 23,

The particularized warrant requirement ensures that the question of “[w]hen 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.”¹³⁶ In this context, “[t]he magistrate’s duty is to ... [conduct an] inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other,” to determine whether, taking these circumstances into consideration, the officer’s warrant request is reasonable.¹³⁷ In the case of an administrative search, the answer will turn on such factors as “the purpose, frequency, scope, and manner of conducting the inspections.”¹³⁸

B. The Traditional Consent and Exigent Circumstances Exceptions

Traditionally, the two most relevant exceptions to the presumptive protections of the Warrant Clause have been consent and exigent circumstances.

Consent will justify a warrantless search or seizure when it is “freely and voluntarily given.”¹³⁹ The Court, balancing the “competing concerns [of] ... the legitimate need for ... searches and

at 1040 (exploring the difference between the probable cause standard as traditionally applied in the criminal search and seizure context, and its incarnation—as reasonableness, reasonable suspicion, etc.—in other (including administrative) contexts); Lerner, *supra* note 132, at 996-1003 (discussing efforts to quantify the evidentiary weight of probable cause, contrasting that with the weight ascribed to reasonable suspicion, and exploring the “[b]irth of [r]easonable [s]uspicion”).

136. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

137. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978).

138. *Id.* Where such a search is “not programmatic but ... responsive to individual events, a more particularized inquiry may be necessary.” *Id.* Although some administrative searches are inevitable given how “vital [the] social objective” in issue, “the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum.” *Id.* at 507-08. This gateway procedure also serves to reassure the individual that a contemplated search or seizure is lawful. *See id.* at 508.

[W]hen the inspector demands entry [without a warrant], the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector’s power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

Id.

139. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). This means that it must not be “coerced, by explicit or implicit means, by implied threat or covert force.” *Id.* at 228.

the equally important requirement of assuring the absence of coercion," has held that "the question whether 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."¹⁴⁰ Among the factors that must be taken into account in evaluating those circumstances are "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."¹⁴¹ In this regard, courts will consider the age, education, and intelligence of the person in issue, as well as any advice that may have been given concerning her constitutional right to refuse to give consent.¹⁴² Mature minors have been found capable of giving lawful consent to enter and search premises over which they have common access and regular exclusive control for certain portions of the day,¹⁴³ and to searches and seizures of their own persons.¹⁴⁴ Nevertheless, the

140. *Id.* at 227.

141. *Id.* at 229.

142. *Id.* At the same time, "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Id.* at 227. The Court reasoned that imposing such a requirement would "create serious doubt whether consent searches could continue to be conducted," because in most cases, "where there was no evidence of any coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent." *Id.* at 229-30.

143. *See, e.g.*, *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1233 (10th Cir. 1998) (affirming that the defendant's minor child had the legal capacity to grant third-party consent to enter the defendant's motel room); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995) (finding as a matter of law that minors do have the capacity to give third-party consent to police officers because, among other reasons, consent searches serve a legitimate purpose properly balanced against the possible harm of limiting a child's ability to consent); *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990). The *Clutter* Court found that

[u]nder the circumstances of this case, where children twelve and fourteen years of age routinely were left in exclusive control of the house, and defendants' possession of large quantities of marijuana was so open and patently non-exclusive that its odor pervaded the house, the government satisfied its burden of demonstrating the initial warrantless search of the bedroom was by consent, since the boys enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house.

Id.; *see also* *Gregoire v. Henderson*, 302 F.Supp. 1402 (E.D. La. 1969) (holding that a seventeen-year-old boy, a permanent resident in his brother's home, was capable of giving valid consent to law enforcement to search the premises).

144. *See, e.g.*, *Fare v. Michael C.*, 442 U.S. 707, 728 (1979) (finding that, under the totality of the circumstances, a sixteen-year-old juvenile familiar with the criminal justice system understood his *Miranda* rights and knowingly waived them in making a murder confession

authorities may not “mislead the consenting party as to the nature of the crime under investigation and, consequently, the character of the objects for which they desire to conduct a search,” then “subsequently use that consent ... to conduct a general exploratory search.”¹⁴⁵ Finally, although consent in this context usually does not need to be knowing, and the mere presence of police ordinarily will not vitiate voluntary consent, the Court’s recent decision in *Ferguson v. City of Charleston* suggests that where family privacy concerns are involved, a more rigorous test involving a requirement of “knowing waiver” may be applied.¹⁴⁶

to the police); *Gachot v. Stalder*, 298 F.3d 414, 420-21 (5th Cir. 2002) (holding that the state court had adequately considered the “totality of the circumstances” in determining that a fifteen-year-old’s murder confession was voluntary after four hours of police questioning and repeated notice of his *Miranda* rights); *Hardaway v. Young*, 302 F.3d 757, 765 (7th Cir. 2002) (applying the “totality of circumstances” test, and upholding as voluntary the confession of a fourteen-year-old child, but stating nonetheless that “the younger the child, the more carefully [the court] will scrutinize police questioning tactics to determine if excessive caution or intimidation or simple immaturity that would not affect an adult has tainted the juvenile’s confession”). *Cf. In re David W.*, 163 Cal. Repr. 87 (1980), *cert. denied*, 449 U.S. 1043, 1043 (1980) (Marshall, J., dissenting) (arguing that the questioning of a thirteen-year-old, with permission from his mother but no arrest warrant or probable cause, “presents an important question concerning a parent’s authority to waive her minor child’s right under the Fourth and Fourteenth Amendments to be free from ‘unreasonable seizures’”).

Contrary to Hardin’s view, *supra* note 23, at 552-53 (arguing that because children can talk to whomever they want at school, they have the right to consent to being interviewed and examined by the state in connection with child welfare investigations), the notion that immature minors cannot give lawful consent to the authorities to seize and to search their person (including to interview and examine them) should not be particularly controversial, as the law generally presumes that children lack the capacity to make legally relevant decisions for themselves. DAVIS ET AL., *supra* note 89, at 1 (setting out as the foundational premise of law concerning children that “[l]egal policy affecting children is shaped by presumptions about particular attributes of childhood that set children apart from adults. Because children are immature, the law assumes that they are unable to care for themselves and incapable of making important decisions affecting their lives”).

145. LAFAVE, *supra* note 21, § 8.2(n), at 707.

146. 532 U.S. 67, 85 (2001) (noting that when state hospital employees “undertake to obtain [evidence of criminal conduct] from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require”) (emphasis in original); *id.* at 93-96 (Scalia, J., dissenting) (attacking the majority’s apparent suggestion that consent in such cases henceforth should be both knowing and voluntary, and exclaiming that this expansion of the consent requirements “opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate”). On remand on this issue, the Fourth Circuit held that the general consent given to a state hospital by pregnant women for medical treatment in connection with pregnancy was invalid to immunize the state from a Fourth Amendment challenge to the hospital’s subsequent

Exigencies or emergencies also will justify warrantless searches and seizures. This exception is intended to assure the right of the authorities to intrude where a person's welfare is believed to be in immediate jeopardy, and otherwise to "protect[] officer safety and the integrity of evidence in circumstances in which time is of the essence."¹⁴⁷ These have been defined as circumstances where "there is compelling need for official action and no time to secure a warrant."¹⁴⁸ Thus, the exception applies where probable cause exists to search or seize, and the conditions are sufficient to meet the exigency requirement.¹⁴⁹ The scope of this exception often depends on "the nature of the underlying offense."¹⁵⁰ When the offense is "relatively minor,"¹⁵¹ for example, where it involves at most a misdemeanor with no threat of jail time, or where no imminent physical harm is involved, the courts will often hesitate to ratify a warrantless search or seizure on the basis of the exception.¹⁵²

urinalysis that, unbeknownst to the women, was intended for use by law enforcement. *Ferguson v. City of Charleston*, 308 F.3d 380, 404 (4th Cir. 2002). As one scholar has argued, this decision has potentially "radical implications" for the Fourth Amendment's consent doctrine, as it suggests that "in addition to voluntariness," it may now also require that consent in similar circumstances be "knowingly and intelligently made." Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 2-3 (2002). Professor Taslitz's article provides a thorough examination of the ramifications of *Ferguson* in this regard.

147. TASLITZ & PARIS, *supra* note 129, at 344.

148. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

149. *Id.*

150. *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984).

151. *Id.* at 750.

152. *Id.* at 750-53 (explaining that "[t]he exception is limited to the investigation of serious crimes; misdemeanors are excluded"). Thus, as Justice Brennan wrote for the Court in *Welsh v. Wisconsin*, a case that involved a warrantless, nighttime entry into the home of an individual suspected of the then misdemeanor offense of drunk driving,

[t]his method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat on the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.... When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

Id. at 751. The defendant in *Welsh* was, at the time of the warrantless entry into his home, reported by one witness to have "driven [his car] erratically ... chang[ed] speeds and veer[ed] from side to side, the car eventually swerv[ing] off the road and c[oming] to a stop in an open

Courts generally scrutinize carefully a state actor's assertion of exigent circumstances, as the exception is "narrowly drawn to cover cases of real and not contrived emergencies."¹⁵³

States rely heavily on these two exceptions when they conduct child maltreatment investigations. Indeed, over ninety percent of investigations are said to be based on consent.¹⁵⁴ Certainly authorities intrude without a warrant or consent when a child appears to be in imminent danger of important abuse or neglect. To the extent they are appropriately employed, these exceptions will continue to be available to state officials who wish or need to avoid the Fourth Amendment's particularized warrant and probable cause requirements. There is reason to suspect, however, that the exceptions are frequently misused, for example, by officials who obtain consent from a parent in part by misleading her about the law enforcement aspects of an investigation,¹⁵⁵ or who obtain "consent" from a child who does not have the capacity to give it,¹⁵⁶ or who falsely claim the right to intrude on the basis of exigent circumstances,¹⁵⁷ or where the report does not concern serious maltreatment or establish probable cause to believe the allegations are true.¹⁵⁸ Depending upon the jurisdiction—California, for example—the most problematic use of the exceptions in terms of the number of investigations conducted and the doctrine's clarity may be investigations of younger children at school without the knowledge of their

field. No damage to any person or property occurred.... the driver [subsequently] walked away from the scene," and eventually went home. *Id.* at 742-43.

153. *Id.* at 752 (quoting *State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983)).

154. *See supra* note 38 and accompanying text (discussing this statistic in the context of the states' use of consent).

155. *See supra* notes 40, 140-46 and accompanying text (discussing the Supreme Court's concern about the validity of consent obtained in this circumstance).

156. *See supra* notes 39, 143-44 and accompanying text (discussing children's incapacity generally to give lawful consent).

157. *See supra* notes 147-48 and accompanying text (discussing the requirements of the exigent circumstances doctrine).

158. *See supra* notes 149-53 and accompanying text (discussing these prerequisites).

parents.¹⁵⁹ For these reasons, they are not the child welfare exception to the Fourth Amendment that states claim to need.

C. The Special Needs “Administrative Search” Exception

To the extent that a child welfare exception exists, it does so because the special needs “administrative search” exception applies in this context. The following discussion outlines the historical contours and use of this doctrine, describes its most recent iteration, and analyzes its compatibility with typical child maltreatment investigatory procedures. It concludes that investigatory schemes and investigations that are insufficiently divorced from law enforcement, as when their purpose is to discover evidence that would support both a civil and criminal charge, likely do not meet the requirements of the special needs exception.

1. The Historical Contours and Use of the Doctrine

The Court has held that “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable ... a court [is] entitled to substitute its balancing of interests for that of the Framers.”¹⁶⁰ In other words, when this exception applies,

159. *See supra* notes 57-58 and accompanying text (describing the states’ use of the in-school interview as a way to avoid parental involvement and interference with their investigation of the child, and at least some California officials’ use of this tool in particular to avoid having to obtain conducting a home visit); *infra* notes 170, 177, 181 and accompanying text (explaining the Ninth Circuit’s position that the presumptive requirements of the Fourth Amendment apply to child welfare investigations). As a practical matter, until the constitutionality of this strategy reaches the courts, there is nothing (other than the potential for legislative action) to prevent the states from proceeding in this fashion. And even where the issue does reach the courts, unless they find that the children’s right to be free from the investigations was “well established” at the time of the investigations, the officials who engaged in them will be entitled to qualified immunity as against any claims for damages. *Doe v. Lebbos*, 348 F.3d 820, 826 (9th Cir. 2003) (quoting *Soucier v. Katz*, 533 U.S. 194, 200 (2001)). In other words, the only apparent risk to the states that have adopted this approach is the possibility that in the future, the federal courts will determine that the children’s rights were in fact well-established, and will require the officials at issue in those cases to compensate their victims. I suggest that the states likely assume this is a small price to pay for the ability in the meantime to continue to interview and examine children at school.

160. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., dissenting).

the Amendment's presumptive protections are discarded and replaced by the courts' own assessment of the relative value of individual rights as against the government's need to conduct an investigation unfettered by those protections.¹⁶¹ Over time and based on varying standards,¹⁶² the Court has applied the special needs exception to inspections of highly regulated industries,¹⁶³ routine regulatory health and safety inspections,¹⁶⁴ public school

161. *Id.* at 341.

162. Compare *New York v. Burger*, 482 U.S. 691 (1987), and *Chandler v. Miller*, 520 U.S. 305 (1997) (defining special needs as "substantial" and "important" and related to public safety), with *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (defining special needs as those involving primarily civil or administrative rather than law enforcement concerns, and requiring a focus on the investigation's "immediate" or "primary" rather than "ultimate" purpose in this context). These varying standards explain the conclusion reached by Hardin and Beeman, writing in the late 1980s, that the special needs administrative search exception was applicable to child welfare investigations. See Hardin, *supra* note 23, at 522 n.109 (assuming that the administrative search exception applies to child welfare investigations even though its "ultimate purpose ... is to rehabilitate the family [and its] primary initial concern ... is to uncover possible abuse and neglect" (emphasis added)); Beeman, *supra* note 23, at 1049-52 (assuming that "as long as the administrative function of the search is not a 'mere pretext' the search will be judged on administrative terms," and finding that child maltreatment investigations meet this standard despite that they are "true search[es] for violations," that "the ultimate objective of state intervention may be to 'stabilize the home environment and preserve family life'" and that "the investigator's immediate objective is to determine 'if credible evidence of abuse or neglect exists'" (citations omitted)).

163. See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (holding that the Federal Railroad Administration's promulgation of regulations for alcohol and drug testing of railroad employees is not a violation of their Fourth Amendment rights in part because the industry is highly regulated for safety); *New York v. Burger*, 482 U.S. 691 (1987) (allowing an exception to the warrant requirement for administrative inspections of businesses that implicate public safety and that traditionally have been closely regulated); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding provisions of the Gun Control Act of 1968 that authorized warrantless searches of gun store premises because such owners chose to engage in a highly regulated industry and thus have a reduced expectation of privacy).

164. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) ("[S]earches pursuant to a regulatory scheme need not adhere to the usual warrant or probable cause requirements [of the Fourth Amendment]."); *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967) (recognizing that the warrant requirement would be impracticable and perhaps "frustrate the governmental purpose behind the search," but holding nevertheless that the Fourth Amendment applied to such searches); *Palmieri v. Lynch*, 392 F.3d 73, 85-86 (2d Cir. 2004) (holding that an inspector's entry onto a landowner's property was not a violation of his Fourth Amendment rights because his permit was conditioned on such regulatory inspections and the state's interest in protecting tidal wetlands constituted a special need). In *Camara*, the Court did find that "a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections," and that system, based on "reasonable

order and discipline-based searches,¹⁶⁵ highway roadblocks,¹⁶⁶ routine monitoring of probationers,¹⁶⁷ and drug testing of public school children and government employees.¹⁶⁸

legislative or administrative standards” has been found to meet probable cause requirements without individualized suspicion for such inspections. *Camara*, 387 U.S. at 538; *see also* TASHLITZ & PARIS, *supra* note 129, at 363-64.

165. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding as constitutional the suspicionless and warrantless drug testing of public high school students involved in any extracurricular activity); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding a suspicionless, warrantless random drug testing program of high school athletes to be constitutionally valid because of the compelling need to combat drug use among students and their decreased expectation of privacy in school); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding a warrantless search based on reasonable suspicion of a public high school student as constitutionally valid because of the special need for discipline in the schools, quick action with respect to the student, and a lowered expectation of privacy among public school students).

166. *See, e.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding a checkpoint program that stopped drivers to check for drunk driving, the Court finding the public interest to be compelling enough and the invasion of privacy minimal enough to overcome the lack of individualized suspicion). *But see* *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000) (striking down as unconstitutional a city program that established checkpoints whose “primary purpose” was the “discovery and interdiction of illegal narcotics”).

167. *See, e.g.*, *United States v. Knights*, 534 U.S. 112 (2001) (holding that the government could enter probationer’s home without a warrant where there was reasonable suspicion that he had been involved in a crime, even though that crime was unrelated to the one for which he had received probation, but leaving open the question whether the government could enter a home in these circumstances on less than reasonable suspicion); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (upholding a local statute allowing warrantless searches of probationers’ homes only if the search was based on “reasonable grounds” to suspect possession of contraband goods, a violation of probationary terms).

168. *See supra* note 165 (setting out the cases involving drug testing amongst the cases involving public school searches and seizures of children); *see also* *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding that the warrantless, suspicionless drug testing (urinalysis) of U.S. Customs Services employees who applied for positions relating to drug interdiction or that required the use of firearms is constitutional where positives are not disclosed to law enforcement without employees’ consent (so that the program falls outside of the realm of normal law enforcement), employees have a diminished expectation of privacy, and the government’s needs are compelling); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621 n.5 (1989) (holding that a warrantless, suspicionless program to drug (urinalysis or blood) and alcohol (breathalyzer or blood) test railway workers who had previously been involved in train accidents was constitutional because individuals’ privacy interests are slight in comparison with the government’s compelling interest in ensuring railway safety; the Court in *Skinner* recognized that the “record [did] not disclose that [the provision allowing for retention of samples] was intended to be, or actually has been ... used [to authorize the release of samples to law enforcement]” and thus “[left] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext”).

The Court has yet to rule on the applicability of the special needs exception to child welfare investigations. The federal appellate courts, however, began their examination of the broader relationship of the Fourth Amendment to these investigations in the mid-1980s.¹⁶⁹ As of this writing, only a sparse patchwork of law

169. Notably, a survey of state supreme court decisions shows that they are largely silent on the subject. A few have implicitly adopted a child welfare exception to the Fourth Amendment or to its particularized warrant and probable cause requirements, ruling that the reasonableness of an investigation determines its lawfulness. *See, e.g.*, *Tate v. Sharpe*, 777 S.W.2d 215, 216 (Ark. 1989) (finding that reasonable cause is sufficient for an order compelling compliance with a child neglect investigation); *Wildberger v. State*, 536 A.2d 718 (Md. 1988) (finding reasonable, without engaging in any discussion of Fourth Amendment, a warrantless search of a couple's daughter in the family home for signs of physical abuse); *N.J. Div. of Youth & Family Servs. v. Wunnenberg*, 408 A.2d 1345 (N.J. App. 1979) (holding that, to compel parents to comply with investigation, a showing of probable cause was not required, just reasonableness based on the best interests of the child). A few others have considered but avoided ruling directly on the issue, with the same result. *See, e.g.*, *In re Stumbo*, 582 S.E.2d 255, 261 (N.C. 2003) (deciding case on alternative grounds and thus leaving intact the appellate decision that apparently holds the Fourth Amendment inapplicable to child maltreatment investigations, which could presumably proceed on mere reasonableness standard); *H.R. v. State Dep't of Human Res.*, 612 So.2d 477, 478-79 (Ala. Civ. App. 1992) (avoiding the Fourth Amendment question by construing the words "upon cause shown" in the relevant state statute as allowing an investigatory entry into a private home to mean reasonable or probable cause to believe that there was maltreatment); *Parents of Two Minors v. Bristol Div. of the Juvenile Court Dep't*, 494 N.E.2d 1306 (Mass. 1986) (refusing to engage the Fourth Amendment issues involved in forcing compliance with a child abuse investigation and instead holding that the juvenile court lacked the statutory or common law authority to order compliance with a non-emergency home visit).

Finally, a few have explicitly rejected arguments in favor of a child welfare exception that would shield state officials from the particularized warrant and probable cause requirements. *See, e.g.*, *Chavez v. Casarez*, 31 P.3d 1027, 1036-37 (N.M. Ct. App. 2001) (holding that police had to obtain a warrant before entering a home in the context of a child abuse investigation where no exigent circumstances permitted a warrantless search); *F.K. v. Iowa Dist. Court*, No. 99-0095, 2000 WL 1593391, at *8 (Iowa Ct. App. Oct. 25, 2000) (holding in part that the "Warrant Clause must be complied with ... '[i]n the context of a seizure of a child by the State during an abuse investigation'" (quoting *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999))), *vacated on other grounds*, 630 N.W.2d 801 (Iowa 2001); *In re A.R. & C.P.*, 937 P.2d 1037 (Utah Ct. App. 1997) (finding no basis to hold that the Fourth Amendment is inapplicable in the child maltreatment investigations context); *State v. Freed*, No. A-95-196, 1995 WL 663603, at *5 (Neb. Ct. App. Nov. 7, 1995) (holding in part that "the duty to investigate imposed by [state law does not] eclipse[] the Fourth Amendment"); *H.R. v. State Dep't of Human Res.*, 612 So.2d 477, 479 (Ala. Civ. App. 1992) (recognizing the difficult task of social workers, but refusing to "empower[] [them] to enter private homes, poor or rich, without reasonable cause to believe that the charged acts are occurring," and holding that the unsworn hearsay of two anonymous reports does not meet that requirement); *State v. Boggess*, 340 N.W.2d 516 (Wis. 1983) (holding that searches and seizures conducted in context of child maltreatment investigations are subject to the Fourth Amendment); *N.J. Div. of Youth & Family Servs. v. B.W. & V.W.*, 398 A.2d 611, 613 (N.J. Juv. & Dom. Rel. Ct. 1978)

exists in the area. Nevertheless, eight of the twelve circuits have resolved at least some of the questions that arise in this context.¹⁷⁰

(“It is also clear that the Fourth Amendment ... protect[s] [parents] from invasion of their right to privacy within their home[s].”). None of the opinions in these cases expressly considers the applicability of the special needs exception by that or any other name.

Where the cases do include discussion of Supreme Court doctrine and federal appellate case law, this discussion is often weak as a result of the failure to cite (and thus to acknowledge the existence of) the most relevant cases, and to distinguish between Fourth and Fourteenth Amendment doctrines. *See, e.g., In re Stumbo*, 582 S.E.2d 255, 257 n.1 (N.C. 2003) (in declining to decide the case on Fourth Amendment grounds, making only one, brief reference to the Seventh Circuit’s decision in *Doe v. Heck* to apply the Fourth Amendment to child abuse investigation); *Chavez v. Casarez*, 31 P.3d 1027, 1035-36 (N.M. Ct. App. 2001) (discussing the treatment of the Fourth Amendment in child abuse investigations in the federal circuits, without mentioning the Supreme Court’s special needs cases); *In re A.R. & C.P.*, 937 P.2d 1037, 1040-42 (Utah Ct. App. 1997) (citing Supreme Court decisions regarding the applicability of the Fourth Amendment in civil contexts and the reasonableness requirement, but only with respect to child protective proceedings).

170. *Wojcik v. Town of N. Smithfield*, 76 F.3d 1 (1st Cir. 1996) (using reasonableness analysis to find school’s actions in reporting suspicions of abuse and agency’s actions in investigating the reports to be constitutional); *Nicholson v. Scoppetta*, 344 F.3d 154, 172-73 (2d Cir. 2003) (holding that the removal of a child is a seizure under the Fourth Amendment, with requirements at least equal to those of ordinary arrests and perhaps even more restrictive); *Kia P. v. McIntyre*, 235 F.3d 749, 762 (2d Cir. 2000) (holding that the Fourth Amendment applies to the seizure of a child in the context of a child abuse investigation but that the seizure was reasonable in this case; the court offered “three modes of determining whether a seizure was ‘reasonable,’” including probable cause, the less stringent requirements under the special needs doctrine, and exigent circumstances); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (holding that the examination of a child was subject to the Fourth Amendment requirements of consent or probable cause and a court order, as exigent circumstances were not present); *Hurlman v. Rice*, 927 F.2d 74 (2d Cir. 1991) (holding that seizures in the home are presumptively unreasonable without a warrant or exigent circumstances); *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093 (3d Cir. 1989) (holding that under the Fourth Amendment, the strip search of a child in the family home can be justified only by a warrant, consent, or exigent circumstances); *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993) (holding that the entry into and search of a foster mother’s home and children is “not subject to the same scrutiny as searches in the criminal context” so the state did not need a warrant or probable cause); *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002) (holding that the Fourth Amendment applies to strip searches of children but finding consent for the home visit and explicitly rejecting the applicability of the special needs doctrine); *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000) (holding in a child custody (not maltreatment) case that the warrantless seizure of a child was a violation of the Fourth Amendment because none of the exceptions were present); *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) (holding that searches and seizures of children on private property can be effected only with probable cause, a warrant, or exigent circumstances, and explicitly rejecting the applicability of the special needs doctrine to child maltreatment investigations); *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000) (holding that the seizure of a child from the family home requires a warrant, probable cause, or exigent circumstances, and probable cause is not met by non-specific allegations of child abuse); *Landstrom v. Ill. Dep’t*

All eight circuits agree that maltreatment investigations constitute Fourth Amendment “searches” and “seizures,”¹⁷¹ and that CPS and the police participating in such investigations are state

of Children & Family Servs., 892 F.2d 670, 676-77 (7th Cir. 1990) (holding that state actions in verbally and physically examining a child without parental knowledge or consent may be a constitutional violation); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (finding on a motion for a preliminary injunction that where child protective services regulations appear to guarantee the Fourth Amendment reasonableness of an investigation, a warrantless strip search of a child in the public school is constitutional if it is reasonable, while a search in the home requires a warrant based on probable cause); Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000) (holding that the standard for removal is the same under either the Fourth or Fourteenth Amendments and requires a court order, consent, or a reasonable belief in exigent circumstances and narrow action to eliminate only that emergency); Calabretta v. Floyd, 189 F.3d 808, 814 (9th Cir. 1999) (making an explicit statement that no social worker exception to normal search and seizure law exists, and that the Fourth Amendment’s presumptive requirements apply to child maltreatment investigations); White by White v. Pierce County, 797 F.2d 812, 815-17 (9th Cir. 1986) (disallowing the warrantless entry into a home, even to investigate child abuse, unless exigent circumstances are present); Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) (holding that the Fourth Amendment’s presumptive requirements apply to child maltreatment investigations both inside and outside of the home, and that the special needs doctrine does not apply because the program could have secured consent of parents for genital examinations and blood tests of children); Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1240-42 (10th Cir. 2003) (holding that the warrantless entry of a home to remove a child was a violation of the Fourth Amendment, as neither the exigent circumstances nor special needs exception applied); Malik v. Arapahoe County Dep’t of Soc. Servs., 191 F.3d 1306 (10th Cir. 1999) (holding that a court order to seize a child that was based on distortion, misrepresentation, and omission was a violation of the Fourth Amendment); J.B. v. Washington County, 127 F.3d 919 (10th Cir. 1997) (holding that the state had probable cause to remove the child, but that seizures implicate the Fourth Amendment and could be subject either to its strict requirements or to the special needs exception); Lopkoff v. Slater, 103 F.3d 144 (10th Cir. 1996) (unpublished table decision) (holding that the Fourth Amendment warrant requirement, not the special needs exception, applies both to police and social workers investigating child maltreatment reports and intervening in families to protect children); Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994) (holding that a ten-minute interview with a principal to determine if child had abused another was reasonable even if it was a seizure under the Fourth Amendment); Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993) (holding that the special needs exception does not apply to a child maltreatment investigation that included a genital examination by the police, rather than social workers).

171. *See, e.g.*, Doe v. Heck, 327 F.3d 492, 509-10 (7th Cir. 2003) (discussing definitions of “search” and “seizure” and concluding that both apply in the context of the removal of a child from his private school classroom for the purpose of interviewing him about possible corporal punishment); Kia P. v. McIntyre, 235 F.3d 749, 762 (2d Cir. 2000) (“We have observed that the Fourth Amendment applies in the context of the seizure of a child by a government-agency official during a civil child-abuse or maltreatment investigation.”); Wildauer v. Frederick County, 993 F.2d 369, 372 (4th Cir. 1993) (assuming, without discussing, that a CPS visit to a residence constituted a search, albeit not an unreasonable one); *see also supra* note 170 (listing decisions from all circuits that have addressed the issue).

actors.¹⁷² Moreover, courts that have had occasion to address the issue have held that although certain aspects of parental privacy are protected under the Fourth and Fourteenth Amendments, the child has enforceable Fourth Amendment rights separate from her

172. Despite the tendency of litigants to raise the issue of whether state officials acting with a civil administrative purpose qualify as state actors under the Fourth Amendment, it is clear that they do. As the Tenth Circuit explained, “[t]he ... Amendment protects the right of the people to be ‘secure in their persons’ from government intrusion, whether the threat to privacy arises from a policeman or a Head Start administrator. There is no ‘social worker’ exception to the Fourth Amendment.” *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003). A particularly clear statement of the more general proposition that civil officials fall within the Fourth Amendment’s state action requirement can be found in *New Jersey v. T.L.O.*, in which the United States Supreme Court rejected the state’s argument that the Fourth Amendment “was intended to regulate only searches and seizures carried out by law enforcement officers” and thus that “although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.” 469 U.S. 325, 334 (1985). Indeed, the Court “has never limited the Amendment’s prohibitions on unreasonable searches and seizures to operations conducted by the police. Rather, [it] has long spoken of the Fourth Amendment’s strictures as restraints imposed upon ‘governmental action’—that is, ‘upon the activities of sovereign authority.’” *Id.* at 335 (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). In *Camara v. Municipal Court*, the Court explained that this broad view of “state action” arises out of “[t]he basic purpose of this Amendment ... [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” 387 U.S. 523, 528 (1967). Thus, [b]ecause the individual’s interest in privacy and personal security “suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,” it would be “anomalous to say that the individual and his private property are fully protected by the Fourth Amendment [only] when the individual is suspected of criminal behavior.”

T.L.O., 469 U.S. at 335 (quoting *Camara*, 387 U.S. at 530, and *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312-13 (1978)). Every federal appellate court that has reached the issue has agreed that CPS officials are state actors under this doctrine. *See Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (holding that the doctrine “protects against warrantless intrusions during civil as well as criminal investigations by the government.... Thus, the strictures of the Fourth Amendment apply to child welfare workers, as well as all other government employees.”); *Roska ex rel Roska v. Peterson*, 328 F.3d 1230, 1241-42 (10th Cir. 2003) (holding that social workers are covered by the Fourth Amendment and its Warrant Clause); *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 401 (5th Cir. 2002) (“[T]he Fourth Amendment regulates social workers’ civil investigations.”); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (noting that there is no “child welfare exception to normal search and seizure law”).

parents.¹⁷³ This is consistent with the Supreme Court's approach in cases where children are subject to official searches and seizures.¹⁷⁴

The circuits disagree about whether child maltreatment investigations trigger the Fourth Amendment's particularized warrant and probable cause requirements, or whether they come within the

173. Most of the federal appellate decisions discussed in this section arise on Fourth Amendment grounds from the outset, so this distinction is unnecessary to the courts' analysis or outcome. On the other hand, the distinction does arise in cases where plaintiffs raise claims under both the Fourth and Fourteenth Amendments. The claims under the Fourth Amendment involve arguments that certain searches and seizures were conducted in violation of that doctrine's standards. The claims under the Fourteenth Amendment involve arguments that certain aspects of the investigation process were in violation of the rights of parental autonomy, or family integrity, or procedural due process. It is in reviewing these different arguments that the courts have noted that the child's own right to privacy in the context of maltreatment investigations is to be addressed under the Fourth rather than the Fourteenth Amendment. *See, e.g.*, *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (holding that the scope of an infant's right to privacy is to be reviewed under the specifically applicable terms of the Fourth Amendment, and not the general terms of the Fourteenth); *Kia P. v. McIntyre*, 235 F.3d 749, 757-58 (2d Cir. 2000) (same). This result is reached using the standard rule of textual interpretation that where there is a provision that on its terms is specific to the circumstances, it is to be used in lieu of general provisions that can be interpreted to encompass the circumstances. Because children in general are recognized as having objectively reasonable expectations of privacy sufficient to trigger the Fourth Amendment's terms, and because the various things that happen to them in the context of maltreatment investigations—they are forcibly interviewed, examined, (re)moved, and held away from their families—otherwise fit the operative (search and seizure) definitions to the letter, the courts refer to the Fourth Amendment's standards, including its procedural requirements, when addressing their related constitutional complaints. Older children are seen as having a subjective expectation of privacy that is legitimized under the doctrine. *Darryl H. v. Coler*, 801 F.2d 893, 899-900 (7th Cir. 1986) (citing *T.L.O.*, 469 U.S. at 325; *Terry v. Ohio*, 392 U.S. 1 (1968)) (noting that a thirteen-year-old child's "legitimate expectation of privacy" is substantially violated by a nude body search (quoting *T.L.O.*, 469 U.S. at 325)). Children who are too young to exhibit a subjective expectation of privacy may be permitted to sue in their own right, substituting their parents' expectations of privacy for their own. *Doe v. Heck*, 327 F.3d 492, 511-12 (7th Cir. 2003) (holding that elementary-aged children at a private Christian academy were permitted to sue for violations of Fourth Amendment substituting their parents' expectations of privacy in that setting for their own).

174. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (acknowledging and applying the children's own Fourth Amendment rights in a public school drug testing context); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (same); *T.L.O.*, 469 U.S. at 325 (acknowledging and applying the children's own Fourth Amendment rights in the context of a public school search concerning disciplinary violations). These cases all involved searches and seizures of children in the public schools. The Court applied the special needs exception to judge the constitutionality of the intrusions because law enforcement did not motivate any aspect of the searches, and because the warrant and probable cause requirements were found to be impracticable in the context of public schools' enforcement of their order and discipline obligations.

special needs exception. Only a few circuits have explicitly discussed “special needs.”¹⁷⁵ In effect, however, only the First and Fourth Circuits appear to recognize the exception’s applicability at least to certain kinds of child welfare investigations.¹⁷⁶ Five other circuits, the Second, Third, Fifth, Ninth, and Tenth, either categorically or probably have rejected its applicability in this setting.¹⁷⁷ The position of the remaining circuit, the Seventh, is equivocal; it has suggested, in different cases, both that the special needs

175. See *supra* note 170 and accompanying text (reviewing all of the cases and noting especially those that use special needs language).

176. See *Wojcik v. Town of N. Smithfield*, 76 F.3d 1, 2-3 (1st Cir. 1996) (finding that the intrusion standard under both the Fourth and Fourteenth Amendments was “reasonableness”; and holding that CPS acted reasonably when it removed a child without a warrant from her classroom and transported her to her sister’s school so that they could both be interviewed together as part of an investigation of a report alleging that the girls may have been excessively disciplined by their parents); *Wildauer v. Frederick County*, 993 F.2d 369, 372-73 (4th Cir. 1993) (holding that CPS and the police could conduct a warrantless entry into and search of a state-authorized foster home as part of an investigation to assure that the foster children were not being neglected, on the basis that foster parent had a “substantially attenuated” privacy interest because of her relationship with the state (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 847 (1977))).

177. In these jurisdictions, this rule attaches whether the search or seizure is conducted by CPS acting alone, CPS acting in concert with the police, or the police acting alone in the context of a child maltreatment investigation. See, e.g., *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000) (unreasonable seizure conducted by police, on orders from social workers); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (unreasonable search and seizure conducted by social worker); *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993) (unconstitutional search conducted by police officer). See also *supra* note 170 (reviewing all of the cases including those from these five circuits).

exception¹⁷⁸ and the arrest standard—a warrant or probable cause or exigent circumstances¹⁷⁹—applies.

Notably, courts that favor the Fourth Amendment’s particularized warrant and probable cause requirements reject the argument that state officials need unfettered discretion to conduct this class of investigations simply because they concern children.¹⁸⁰ Instead,

178. See *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). *Darryl H.* is frequently used for the proposition that the Seventh Circuit has validated the constitutionality of strip searches of children in public schools in the context of child maltreatment investigations. See, e.g., *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 403 (5th Cir. 2002) (“The Seventh Circuit has held that a child protective services worker need only satisfy the lesser special needs test and not the more rigorous probable cause requirement.”); *Tenenbaum v. Williams*, 193 F.3d 581, 603 (2d Cir. 1999) (citing *Darryl H.* as standing for the proposition that “neither warrant nor probable cause [is] necessary for visual inspection of child’s body for signs of abuse so long as relatively stringent state regulations [are] followed”). In fact, the appellate court in *Darryl H.* merely affirmed two *preliminary* rulings to that effect by the district court (involving the denial of a preliminary injunction and the granting of a summary judgment on qualified immunity grounds), expressly reserving for later consideration the question whether the official acts at issue were constitutional. See *Darryl H.*, 801 F.2d at 904-05 (“We have some misgivings about the final product. However, those misgivings may be answered at trial. Until the trial judge has had an opportunity to deal with this matter at a more mature stage of the litigation process, we cannot fault him for avoiding the most costly error of all—loss of human life. Accordingly, we affirm the district court’s decision to deny the preliminary injunction.”). In the course of its decision, however, the appellate court emphasized its discomfort with the district court’s preliminary judgment that a state screening procedure used in maltreatment cases was sufficient to assure the Fourth Amendment reasonableness of the strip searches. *Id.* at 901 (“[W]hile we do not believe it is outcome determinative at this early stage of the litigation, we are somewhat less convinced, at least on this record, that a nude body search may be constitutionally conducted in every instance in which the hot-line criteria are met.”); see *id.* at 903 (“[A]t this point in the litigation, we remain unconvinced that the *Handbook* will ensure, in all cases, the reasonableness of the visual inspection.”). Thus, for reasons of both substance and procedure, I believe that it is inaccurate to characterize *Darryl H.* as many courts have done, that is, as a decision in support of the constitutionality of reasonableness-based official strip searches of children on public school grounds. For authorities recognizing this point, see *Franz v. Lytle*, which notes the Seventh Circuit’s emphasis in its decision on the “very preliminary stages of the litigation process” and the fact that final decision in the case could not be reached “without a more fully developed record.” 997 F.2d 784, 789 (quoting *Darryl H. v. Coler*, 801 F.2d 893, 895, 908 (7th Cir. 1986)).

179. See *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) (suggesting in dicta that this is the appropriate standard to apply in child maltreatment investigations).

180. The best example of this apparently losing argument in the federal appellate case law is found in *Darryl H.*, 801 F.2d 893, in which the court of appeals recounts (but does not adopt) the district court’s rationale for upholding the constitutionality of strip searches of children by social workers in the public schools setting on mere reasonableness grounds:

Not only would [application of the Fourth Amendment’s traditional standard in these cases] require more manpower and a larger budget, the more serious

they equate child abuse with other violent crimes for which no exception exists to the the Fourth Amendment's usual strictures; they find that the exigent circumstances exception is an adequate tool to protect children who the government legitimately perceives to be at risk; and they recognize that in many of the cases in which the government intrudes, not only does it fail to find abuse or neglect, but it often itself causes substantial harm to children and families through its intervention.¹⁸¹

problem with the procedure is that a delayed examination of a child may simply come too late to protect a child in imminent danger of grave bodily harm or even death. Unfortunately, there is no quicker way of knowing whether a child is at grave risk than by an actual examination of the child. Even assuming that most abuse situations are not life-threatening, this court finds that the life of even one child is too great a price to pay for the possible increased degree of parental privacy through additional preliminary investigation which [the traditional requirements] would demand.

Id. at 899 (quoting from the district court's opinion below); *see supra* note 178 (discussing the courts' frequent misuse of *Darryl H.*) and *supra* note 75 (explaining that this is a principle rationale for the states' "take no chances" approach to maltreatment investigations).

181. *See, e.g.*, *Wallis v. Spencer*, 202 F.3d 1126, 1130-31 (9th Cir. 2000) (finding that, in the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the Constitution. The fact that the suspected crime may be heinous—whether it involves children or adults—does not provide cause for the state to ignore the rights of the accused or any other parties. Otherwise, serious injustices may result. In cases of alleged child abuse, governmental failure to abide by [traditional] constitutional constraints may have deleterious long-term consequences for the child and, indeed, for the entire family. Ill-considered and improper governmental action may create significant injury where no problem of any kind previously existed);

Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1094 (3d Cir. 1989) (finding that

[i]t evidences no lack of concern for the victims of child abuse or lack of respect for the problems associated with its prevention to observe that child abuse is not sui generis in this context. The Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending upon the court's assessment of the gravity of the societal risk involved);

White v. White v. Pierce County, 797 F.2d 812, 817 (9th Cir. 1986) (emphasizing that "[c]hild abuse is a heinous crime. So are murder and rape. Just as the repulsiveness of the latter two crimes does not affect the constitutional restrictions placed on police officers, neither should our repugnance to the former crime cause us to condone police procedures that infringe constitutional protections."); *cf. Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1207 (10th Cir. 2003) (commenting that

[t]he defendants' argument seems to be based, at bottom, on the view that in the absence of a criminal or other investigatory purpose, medical exams such

Because of its particular relevance to this Article, Part II.C.2.a below discusses the Supreme Court's 2001 decision in *Ferguson v. City of Charleston* at some length.¹⁸² It is important to note here, however, that the few federal appellate cases that have been decided since then interpret *Ferguson* to preclude application of the special needs exception to child maltreatment investigations. The Fifth Circuit's *Roe v. Texas Department of Protective and Regulatory Services*,¹⁸³ from which the introductory illustration is taken, typifies these recent cases. In rejecting CPS's argument that the constitutionality of the intrusion should be evaluated under the special needs test, the Fifth Circuit panel noted that "[t]he [Supreme] Court only rarely [in the prisons setting] has permitted 'special needs' searches in the face of a person's strong subjective privacy interests."¹⁸⁴ It also noted that "[t]he Court has *never* upheld a 'special needs' search where the person's expectation of privacy was as strong as [this child's] interest in bodily privacy."¹⁸⁵ Most significantly, it distinguished earlier circuit court cases applying the exception to child maltreatment investigations on the ground that these had been decided before the Court's critical decision in *Ferguson*: "Identifying the goal of protecting a child's welfare and removing him from an abusive home is easy; disentangling that goal from general law enforcement purposes is difficult."¹⁸⁶ This is because the law in Texas, as elsewhere, requires a thorough investigation both to satisfy this public welfare goal, and to assure that the criminal law consequences of abuse and neglect cases are treated efficiently and effectively.¹⁸⁷ Thus, even when

as those [required by the Head Start program in issue] are for the good of the children and should not be hamstrung by legalistic requirements like warrants or consent. We do not doubt that [this program] was acting in the interests of children, as it understood them. But the requirement of patient consent, or parental consent in the case of minor children, serves important practical as well as dignitary concerns, even when a social welfare agency, like [this one], believes it is acting for the good of the child).

182. 532 U.S. 67 (2001); *see generally infra* Part II.C.2 and accompanying text (describing the modern special needs doctrine and the place of *Ferguson* in that doctrine).

183. 299 F.3d 395 (5th Cir. 2002).

184. *Id.* at 406.

185. *Id.* The Fifth Circuit explained that the Court has "permitted visual body cavity searches only in the prison setting." *Id.* at 406 n.14.

186. *Id.* at 406-07.

187. *Id.* at 407.

conducted entirely without the police, “social workers’ investigations [are] ... a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child.”¹⁸⁸ It concluded, “*Ferguson* teaches that we must apply traditional Fourth Amendment Analysis where a child protective services search is so intimately intertwined with law enforcement.”¹⁸⁹

Finally, because all of these appellate decisions have been reached on facts that involve either intrusions into the personal residence—in the guise of investigatory home visits—or interviews coupled with examinations of the children who are the subject of maltreatment reports, we know very little about how the courts would rule in cases involving less intrusive searches and seizures. The fact that the decisions often fail to distinguish between their special needs and reasonableness analyses compound this uncertainty. Thus, for example, the cases tell us little about whether a student’s brief detention at school by a state official, such as a teacher, an administrator, a social worker, or a police officer, would trigger the Fourth Amendment’s particularized warrant and

188. *Id.*

189. *Id.*; see also *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (noting that in “special needs” cases, the nature of the need addressed makes particularized suspicion impossible or otherwise renders the warrant requirement impractical, the court found that “no special need ... renders the warrant requirement impracticable when social workers enter a home to remove a child, absent exigent circumstances”; “individualized suspicion is at the heart of a removal of a child from a home, distinguishing the instant case from the various drug testing cases that have been addressed by the Court”; “unlike the situation in [the Supreme Court’s heavily regulated industry cases] ... there is no need for surprise or sudden action that renders obtaining a warrant counterproductive”; “this situation [is also not] similar to the [Court’s special needs probationary decisions]—the Roskas were not [already] in the criminal justice system, there was no deterrent function being served by the threat of a sudden, warrantless search, and there was no immediate need for a quick response”; and “[s]imply put, unless the child is in imminent danger, there is no reason that it is impracticable to obtain a warrant before social workers remove a child from the home”); *Doe v. Heck*, 327 F.3d 492, 517 n.20 (7th Cir. 2003) (declining to decide “the propriety of a generalized ‘special needs’ exception to the Fourth Amendment” but nevertheless citing *Ferguson* and noting that “there is no apparent justification for carving out a ‘special needs’ exception for child abuse investigations in this context”); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1214-15 (10th Cir. 2003) (rejecting the applicability of the special needs doctrine to medical—including genital and blood—examinations of preschool children who were enrolled in a state-administered Head Start program, and emphasizing the government’s failure to demonstrate that obtaining consent to conduct these examinations was “impracticable” in the circumstances).

probable cause requirements in jurisdictions that already use that standard in more intrusive contexts.

2. *Modern Principles*

The special needs exception's parameters and requirements have evolved significantly since many of these cases were decided. Today the exception applies potentially to insulate the government from the Warrant Clause's strictures only in circumstances where the government is able to show that an investigation or investigatory scheme's immediate and "primary programmatic purpose" is civil or administrative rather than law enforcement. Under this test, which requires an objective analysis of the official motive that predominantly drives the particular investigation or scheme, a civil program and investigation may have incidental criminal implications without losing its special needs status.¹⁹⁰

The same may be true of programs that have a dual purpose that is, both a civil and law enforcement purpose. As the Court explained in *Burger v. New York*,¹⁹¹ "a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem."¹⁹² In *City of Indianapolis v. Edmond*¹⁹³ and *Ferguson v. City of Charleston*,¹⁹⁴ however, the Court cautioned that where the "primary programmatic purpose" of a dual-purpose scheme is law enforcement, or where the investigation itself is insufficiently "divorced" from law enforcement motives, the special needs exception will not apply.¹⁹⁵

190. See generally *Ferguson*, 532 U.S. 67 (stating that mere incidental implications will not pose a problem for conferring special needs status); *Camara v. Mun. Court*, 387 U.S. 523 (1967) (finding that the question of criminal consequences is relevant to the requirement of a warrant, but not dispositive of special needs status, as the standard to get a warrant is reasonableness of administrative scheme as applied to the subject individual).

191. 482 U.S. 691 (1987).

192. *Id.* at 712.

193. 531 U.S. 32 (2000).

194. 532 U.S. 67 (2001).

195. *Ferguson* and *Edmond* mark a shift in the Court's special needs jurisprudence. Principally, this is because of the Court's precise enunciation in these cases of the "primary

Recognizing that the primary programmatic purpose inquiry can be a slippery one—a gross understatement at best—the Court emphasized its intention to scrutinize carefully in the future the government’s assertions of special needs to ensure that they meet these standards.¹⁹⁶ However, beyond suggesting that the inquiry is an objective one, the Court did not explain how to determine the primary purpose of a dual-purpose program.¹⁹⁷ Some indication of the methodology that is likely to prevail may be gleaned from cases and scholarship that have addressed the issue. These suggest that where a reasonable outside observer concludes that a dual-purpose search or seizure is heavily steeped in or “excessively entangled” with ordinary criminal law enforcement, and/or that the law

programmatic purpose” test. *Ferguson*, 532 U.S. at 81, 83-84; *Edmond*, 531 U.S. at 44. As applied to dual purpose investigations, this test is a means to distinguish a program’s “ultimate” purpose from its “immediate” or “direct” purpose. *Ferguson*, 532 U.S. at 84; *Edmond*, 531 U.S. at 32. In turn, it is a means to rein in the special needs exception, especially in circumstances where law enforcement is involved and thus, where the investigation is deemed particularly intrusive. *Edmond*, 531 U.S. at 54; *see also infra* notes 251-53 and accompanying text (concluding that my reading of *Ferguson*’s applicability to maltreatment investigations is consistent with the Court’s recent narrowing of the exception’s applicability). Courts since *Edmond* and *Ferguson* have noted this shift, although they have disagreed as to its application. Remarkably, however, other than student commentators, only a few scholars have considered its implications. *See* Lucinda Clements, Note, *Ferguson v. City of Charleston: Gatekeeper of the Fourth Amendment’s “Special Needs” Exception*, 24 CAMPBELL L. REV. 263 (2002) (discussing at length the distinctions between multiple or ultimate purposes and a primary purpose, and the implications of this distinction for a special needs search); Jonathan Kravis, Case Comment, *A Better Interpretation of “Special Needs” Doctrine After Edmond and Ferguson*, 112 YALE L.J. 2591 (2003) (using the DNA Analysis Backlog Elimination Act as an example, arguing that special needs analysis should focus on the context for the search, rather than on its purpose); Christopher Mebane, Note, *Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 HOUS. L. REV. 177 (2003) (analyzing the impact of *Ferguson* on special needs searches, including the extent to which law enforcement may be involved); *cf.* Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777 (2004) (arguing that the special needs exception should apply to searches for bombs and other weapons of mass destruction, as their primary purpose is to thwart a terrorist attack not to further traditional law enforcement purposes).

196. *See Ferguson*, 532 U.S. at 84 (stating that this case did not fit within the closely guarded category of “special needs”).

197. In applying this test, the articulated goals of the program’s and investigation’s administrators are relevant in determining programmatic purpose, but they are not dispositive. *Id.*; *see also* Taslitz, *supra* note 146, at 27-28 (noting that in this ruling is an implicit rejection of its holding in *Whren v. United States*, 517 U.S. 806, 810 (1996), that “an officer’s subjective intentions [are] irrelevant under the Fourth Amendment, *except, when determining that a search is an administrative one*”).

enforcement aspect is dominant or highly stigmatic, special needs will not apply.¹⁹⁸ In this regard, the Court has emphasized that investigations intended from the outset to gather evidence for law enforcement purposes will be especially suspect.¹⁹⁹

198. *Ferguson* itself is particularly useful for this purpose. *See infra* notes 214-26 and accompanying text (describing the Court's analysis of these factors); *see also* *Illinois v. Lidster*, 540 U.S. 419 (2004) (involving the constitutionality of a law enforcement-administered roadblock designed to gather evidence from possible witnesses to an earlier hit-and-run accident that killed an elderly man on a bicycle, in which the Court held that the roadblock was reasonable and thus constitutional because its purpose was to seek information from willing witnesses and not to inspect the stopped vehicles and their drivers to determine if they had committed the crime, thus minimizing if not eliminating the stigma associated with a targeted criminal investigation; the government had an important interest in apprehending the hit-and-run driver and thus in seeking any information it could gather from possible witnesses as to his/her identity; and the investigation was well-tailored, thus the intrusion on the drivers was minimal in time and scope); *infra* note 224 (comparing *Ferguson* and *Edmond* on the one hand, and *Lidster* on the other, to explain the Court's apparent interest in the stigmatizing effects of investigations in the context of its special needs analysis). Only one scholar thus far has sought to interpret the Court's newest twist on the special needs exception. *See* Taslitz, *supra* note 146, at 4-6, 28-30 (suggesting that the only way to make sense of the Court's primary programmatic purpose test in light of its related precedents is to look to the meaning "attributed to the state actors *by their audience*" which itself "turn[s] on the common social meaning of particular conduct in our political culture"; the Court has not allowed special needs to apply where this social meaning is particularly stigmatic). Others have written about *Ferguson* in particular, but in ways that seek to avoid rather than understand the new test. *See* Kravis, *supra* note 195 (arguing, in effect, that a useful way to interpret this test is to collapse it with the reasonableness test's practicability inquiry, i.e., asking "[d]oes the context of the search at issue create a special need for warrantless searches?"); Mebane, *supra* note 195 (analyzing the impact of *Ferguson* on special needs searches, including the extent to which law enforcement may be involved); Rosemary Missisian, Note, *The True Need of the Special Needs Doctrine: Individual Rights—Ferguson v. City of Charleston*, 33 U. TOL. L. REV. 879, 911-12 (2002) (offering an overview of how lower courts have decided special needs cases in the wake of *Ferguson*, and how the role of law enforcement has been distinguished in different fact patterns).

199. *See Ferguson*, 532 U.S. at 83-84, 88 (Kennedy, J., concurring) ("The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (resting the approval of the public school drug testing program in part on the fact that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function"). Note that an authority's intent to discover evidence also for law enforcement purposes goes both to proving the extent of the intimate relationship between civil and law enforcement authorities and to demonstrating the particular intrusiveness of an investigation.

a. Ferguson v. City of Charleston

Ferguson v. City of Charleston sets out the Court's most modern iteration of the special needs doctrine in the context of the type of dual-purpose scheme that the states have adopted in the child welfare area more generally. For that reason, some lower courts have concluded that the case is determinative of when the Fourth Amendment's warrant and probable cause requirements apply to child maltreatment investigations.²⁰⁰ In the Court's own words, *Ferguson* involved the issue "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if it is not authorized by a valid warrant."²⁰¹ By a majority of six-to-three,²⁰² the Court found that the state's policy of warrantless, suspicionless searches of pregnant patients' urine violated the Fourth Amendment.²⁰³ Five of the Justices in the majority found that the state's articulated "special needs" to protect the patient and her fetus were secondary to its normal law enforcement functions.²⁰⁴

200. See *supra* notes 182-89 and accompanying text (discussing these cases).

201. 532 U.S. at 70.

202. Justice Stevens wrote for the majority, in an opinion which was joined by Justices O'Connor, Souter, Ginsburg, and Breyer. Justice Kennedy concurred. See *infra* note 204 (discussing his opinion). Justice Scalia wrote a dissenting opinion, which was joined by the Chief Justice and Justice Thomas. See *infra* notes 204, 223 and accompanying text (discussing this dissent).

203. 532 U.S. 67. As a threshold matter, the Court found that the hospital's personnel were state actors, *id.* at 76; the drug tests were searches, *id.*; and the profile the hospital had developed to determine which pregnant patients were to be tested for illegal drugs met neither the probable cause nor reasonable suspicion tests, *id.* In this regard, the Court noted that while the state argued that the searches were not suspicionless, it failed to "point to any evidence in the record indicating that any of the nine search criteria was more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency." *Id.* at 77 n.10; see *infra* note 208 (setting out hospital's search criteria). I would add that there are also many individuals who are not drug users who choose for various personal reasons not to seek routine and periodic prenatal treatment. In any event, the Court emphasized the irrelevance of the state's posture in this respect, based on its position that "the policy would be valid even if the tests were conducted randomly." *Id.*

204. *Id.* at 83-84. As of this writing, there is on the Court a majority of five in support of what a disgruntled Chief Justice Rehnquist called the "non-law enforcement primary programmatic purpose test" for the special needs doctrine. The Justices who comprise this majority are Justices Stevens, O'Connor, Ginsberg, Souter, and Breyer. The stability of this group is unclear, as Justice O'Connor has announced her retirement and it is possible that

The drug-testing program in *Ferguson* originated from the hospital's concern about "an apparent increase in the use of cocaine by patients who were receiving prenatal treatment."²⁰⁵ The staff concluded that adding a cocaine metabolite screen to the standard prenatal urinalysis would allow it to refer patients who tested positive to substance abuse treatment and counseling services, both of which were designed ultimately to protect the growing fetus's health.²⁰⁶ To enhance the likelihood that drug-abusing pregnant women would enter counseling and treatment, the hospital entered

she will be replaced by a jurist whose views are more in line with those of the dissenters on this issue. Nevertheless, it remains the majority view. It is also not a weak majority, as Justice Kennedy concurred in *Ferguson*, expressing his view that a program's "ultimate goal" rather than its "immediate purpose" is the proper starting point for the special needs inquiry, *id.* at 86-87, and that its focus ought instead to be on the degree of "law enforcement involvement" in the program. *Id.* at 87-89 (describing the Court's analysis in *Skinner*, *Von Raab*, and *Vernonia* as resting on the government's ultimate health, welfare, and safety objectives in each instance, rather than on the immediate motivations for evidence-gathering toward those ends). Specifically, he wrote that

[t]he special needs cases we have decided do not sustain the active use of law enforcement, including arrests and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.

Id. at 88. The dissent in *Ferguson* was written by Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas. Scalia wrote that in assessing the applicability of the special needs doctrine, the Court was bound by "the District Court's finding of fact that the goal of the testing policy 'was not to arrest patients but to facilitate their treatment and protect both the mother and the unborn child.'" *Id.* at 98. In other words, in his view, the purpose of the policy was established below by the state's assertion (and the lower court's acceptance of the assertion) that it was administrative and not law-enforcement. He argued that the program's additional (and in this case later-acquired) goal related to law enforcement was irrelevant to the outcome of the special needs inquiry, as this doctrine "contains no such exclusivity requirement." *Id.* at 98 n.8. He wrote, "the *addition* of a law-enforcement-related purpose *to* a legitimate medical purpose [cannot] destroy[] applicability of the special needs doctrine" because "the special needs doctrine was developed, and is ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective." *Id.* at 100 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 870-72 (1987)) (describing the warrantless search of a probationer's home by a civil probation officer after the probation officer received a tip that the probationer had a gun in violation of the terms of his probation). Thus, while "the doctors [in *Ferguson*] do not 'ordinarily conduc[t] searches against the ordinary citizen,' and they are 'supposed to have in mind the welfare of the [mother and child]," the fact that "they have in mind in addition the provision of evidence to the police should make no difference" to the outcome of the special needs inquiry. *Id.* at 101.

205. *Id.* at 70.

206. *Id.*

into an agreement with the local prosecutor, who believed that women who used drugs during pregnancy were committing child abuse, to “prosecut[e] mothers whose children tested positive for drugs at birth.”²⁰⁷ Thus, the policy provided (as it had before the local prosecutor became involved) that pregnant patients were to have their urine screened for illegal drugs in circumstances where the hospital had some reason to suspect they might be drug users.²⁰⁸ Initially, the policy provided that when a newborn tested positive for cocaine metabolites, “the police were to be notified without delay and the patient promptly arrested”;²⁰⁹ but this aspect of the protocol was later amended to exempt mothers from arrest who promised to enter treatment and counseling.²¹⁰ When the patient herself tested positive during pregnancy, the police were to be informed of the results but were not to take any action and the patient was to be urged to enter treatment and counseling.²¹¹ Only if the patient tested positive a second time were the police authorized to arrest her.²¹² Finally, the policy established “procedures for the police to follow when a patient was arrested” as well as “the precise offenses with which a woman could be charged, depending on the stage of her pregnancy.”²¹³

Examining the hospital’s argument that its program qualified for special needs status, the Court explained that to constitute “special needs,” the motives that primarily or most immediately animate its investigations must be “divorced from the State’s general interest in law enforcement.”²¹⁴ Applying this standard, the Court noted the

207. *Id.* at 70-71.

208. *Id.* at 71. The profile provided that women with *one or more* of the following nine characteristics would be subject to the illegal drug screen: “1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5. Intrauterine fetal death; 6. Preterm labor “of no obvious cause”; 7. IUGR [intrauterine growth retardation “of no obvious cause”]; 8. Previously known drug or alcohol abuse; 9. Unexplained congenital anomalies.” *Id.* at n.4.

209. *Id.* at 72.

210. *Id.*

211. *Id.*

212. *Id.* Nevertheless, in the early phases of the program, the police immediately arrested a patient who had tested positive. *Id.* at n.5.

213. *Id.* at 72.

214. *Id.* at 79. In this regard, and by analogy to its previous drug testing decisions, the Court described the degree of divorce from law enforcement that is necessary for the doctrine to apply. Thus, in *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989), the government “prescribed toxicological tests, not to assist in the prosecution of employees, but

extent to which the hospital's written policy was dominated by its law enforcement aspects, and the fact that it failed to focus on the patient's and the fetus's health care.²¹⁵ It further noted the extensive involvement of the local police and prosecutor's offices in the development of the policy at its outset, as well as their involvement throughout its administration.²¹⁶ For example, the Court observed that

[i]n the course of the policy's administration, [law enforcement] had access to [the principal nurse's] medical files on the women who tested positive, routinely attended the [hospital's own] substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress. Police took pains to coordinate the timing and circumstances of the arrests with [the hospital's] staff, and, in particular, [the principal nurse].²¹⁷

Holding that this degree of entanglement between administrative and law enforcement authorities and motivations was fatal to the government's claim of special needs, the Court concluded:

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have

rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Ferguson*, 532 U.S. at 80 n.16 (internal quotation omitted). In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court concluded that "it was clear that the ... program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." *Id.* (internal quotations omitted). In *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the Court rested its approval of the program "in part on the fact that the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function." *Id.* (internal quotations omitted). In other words, in its previous drug testing cases, the Court had approved the warrantless—and in some instances suspicionless—searches in circumstances where the individual subject to search had a reduced expectation of privacy, and the evidence was sought for objectives other than law enforcement.

215. *Ferguson*, 532 U.S. at 82.

216. *Id.*

217. *Id.*

been intended as a means to an end, but the direct and primary purpose of [the hospital's] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under [the government's] view, virtually any non-consensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate rather than immediate purpose. Such an approach is inconsistent with the Fourth Amendment.²¹⁸

In so holding, the Court emphasized

[t]he fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the “special needs” balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.²¹⁹

218. *Id.* at 83-84. The Fourth Circuit, apparently viewing the collaboration between the hospital and the prosecutor in this case as a classic dual-purpose program, had earlier held that the special needs exception attached because the hospital “conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts” and because on balance “the interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use outweighed ... a minimal intrusion on the privacy of the patients.” *Id.* at 75.

219. *Id.* at 84-85. The Court further noted that some hospital staff members “made this distinction themselves.” *See id.* at n.24 (citing Pl. Ex. No. 14, Hulse, 11-17-89, Coke Committee, 1-2:

The use of medically indicated tests for substance abuse, obtained in conventional manners, must be distinguished from mandatory screening and collection of evidence using such methods as chain of custody, etc.... The question is raised as to whether pediatricians should function as law enforcement officials. While the reporting of criminal activity to appropriate authorities may be required and/or ethically just, the active pursuit of evidence to be used against individuals presenting for medical care may not be proper).

The hospital's administrators were probably surprised that the Court's "objective view" of their primary programmatic purpose was law enforcement, and that their health and safety motivations were only "indirect" and "ultimate."²²⁰ As the Court itself noted, the hospital employed a number of means to protect fetuses by ensuring the health and safety of their mothers, including collecting and analyzing the women's urine for the presence of illegal drugs, and counseling them to attend rehabilitation programs to remediate the fetal environment.²²¹ The *in terrorem* effect of possible law enforcement action likely was seen by the hospital staff as merely an additional tool, albeit an important one, in its arsenal of persuasive, compensatory, and punitive tactics.²²² Given that

220. See Raju Chebium, *High Court to Decide if Hospital Erred in Sharing Medical Test Results with Police*, CNN.com, Oct. 3, 2000, <http://archives.cnn.com/2000/LAW/scotus/10/03/scotus.prenataltesting/index.html> ("MUSC officials, local prosecutors and the Charleston, South Carolina Police Department all said the policy was designed to safeguard the lives of the fetuses, citing medical studies definitively linking birth defects and other problems to cocaine use by the expectant mothers."). Robert Hood, the hospital's attorney, also stated that, "[m]edical criteria underlie the program. The law enforcement's only role was as a tool ... by which the health care providers were trying to prevent pregnant women from using cocaine." *Id.*

221. Despite the hospital's insistence that the threat of prosecution was designed to protect the health and safety of the fetuses, over 100 leading medical professionals sent a letter to the U.S. Surgeon General expressing their opinion that such a policy was ultimately more harmful to the fetus, as mothers were less likely to seek prenatal care and medical attention in such circumstances. Sign on Letter: Ferguson v. City of Charleston, Letter from American Acad. of Physician Assistants et al., to David Satcher, Surgeon Gen. of the U.S. (Oct. 2000), available at http://www.drugpolicy.org/library/ferguson_letter2.cfm. A number of women's groups submitted amicus briefs on behalf of the petitioners; the hospital had no briefs filed in its support. *Ferguson*, 532 U.S. at 67.

222. See *supra* note 220 (setting out the hospital's lawyer's views in this regard). Nevertheless, it is worth noting that it was Nurse Shirley Brown, the case manager for the MUSC obstetrics department, who initiated contact with the prosecutor's office after hearing of such prosecutions on the news. *Ferguson*, 532 U.S. at 70-71. Although very few women were actually arrested and prosecuted for drug use under the hospital's program, supporting the proposition that such law enforcement purposes were secondary in the hospital's actions, the plaintiffs' attorney alleges that "whenever a woman seriously challenged the legality of the prosecution, the prosecutor would drop the charges. They did not want to risk losing in court." Interview by Christian Harlan Moen with Lynn Paltrow, *The Fight for Reproductive Rights: Hard-Won Protections for Reproductive Freedom Are Increasingly Under Attack, Says This Advocate for Pregnant Women*, 39 TRIAL 48 (Aug. 2003). In addition, during the trial it was revealed that Nurse Brown held racist views, including that interracial relationships were "against God's way;" that she had noted on white patients' charts if their partners were African-American; and "[s]he also raised the option of sterilization for black women testing positive for cocaine, but not for white women." Petitioner's Brief at 13 n.10, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 728149.

hospitals generally have longstanding systematic approaches to prenatal care, many of which were part of the program in this case, it is understandable that the joint protocol's emphasis would be on the novel law enforcement component, and not on its established parts.²²³

Viewing the program this way begs the question why the Court ruled as it did. Why was this not a classic "dual-purpose" scheme whose civil component qualified for special needs status? Although the answer is not obvious in the opinion, one could reasonably conclude that the Court was swayed by the highly stigmatizing nature of law enforcement's involvement in the development and administration of the policy.²²⁴ As one Fourth Amendment scholar has explained, the program allowed a set of particularly vulnerable women to be labeled "potential child abusers" based on quite

223. Dissenting in the case, Justice Scalia remarked on these same inconsistencies and asserted that the majority's characterization of the searches was incompatible with the true facts, including as found by the district court. *Ferguson*, 532 U.S. at 98-100.

224. The idea that the stigma associated with law enforcement might be a basis for distinguishing amongst at least the Court's most recent special needs decisions is based in a comparison of its decisions in *Ferguson* and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), on the one hand, and *Illinois v. Lidster*, 540 U.S. 419 (2004), on the other. The Court found that the special needs exception was inapplicable to insulate the government from the presumptive requirements of the Fourth Amendment in both *Ferguson* and *Edmond*, but later allowed its application in *Lidster*. Compare *Lidster*, 540 U.S. at 426-28, with *Ferguson*, 532 U.S. at 83-84, and *Edmond*, 531 U.S. at 32. To the extent the cases can be distinguished, it is in the absence of stigma associated with the search and seizure in *Lidster*. 540 U.S. at 425. In *Lidster*, the majority noted that unlike evidence-gathering highway stops, information-seeking ... stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as "responsible citizen[s]" to "give whatever information they may have to aid in law enforcement."

Id.; see also *id.* at 423-25, 428 (discussing the difference between evidence and information-gathering searches and seizures). On the other hand, the searches and seizures at issue in *Ferguson* and *Edmond* involved individuals whom the government suspected might be implicated in both civil and criminal law violations. See *Ferguson*, 532 U.S. at 70-72 (state suspected pregnant women of using illegal narcotics); *Edmond*, 531 U.S. at 34 (discussing legality of city roadblocks designed to find illegal drugs). Thus, objective observers of the searches in *Lidster* would not conclude that the targets were suspects, whereas objective observers of the searches in *Ferguson* and *Edmond* could not help but come to that conclusion. Thus, it is this problem of being considered a suspect of both civil and law enforcement authorities that distinguishes these most recent decisions. Notably, the police were responsible for staffing both the *Edmond* and *Lidster* investigations, which makes clear that it is the law enforcement motivation underlying a search or seizure rather than its staffing that is determinative for the Court.

meager evidence.²²⁵ In the end, this label may have been too incendiary for the Court, especially in a country that still views mothers and motherhood as sacred.

Ultimately, *Ferguson's* place in the Supreme Court's modern special needs jurisprudence may be marked by the attention given to stigma, and by its special facts: Women who would be mothers, vulnerable because of their pregnancy and their poverty, targeted for a deeply demeaning investigation by civil and law enforcement authorities who often proceeded with little evidence to support their suspicions of maltreatment and guilt. These facts distinguish the case from the Court's other special needs precedents involving children's health and welfare. For doctrinal purposes, the most important distinction is the presence of a significant law enforcement purpose to the investigations almost from the outset of the program, and the finding that in the factual context, the objective view inevitably sees this purpose as predominant.²²⁶

225. See Taslitz, *supra* note 146, at 5-67 (discussing the stigmatizing effect of being labeled a child abuser and its possible impact on the Court in reaching its decision in *Ferguson*); see also *supra* note 208 (setting out the criteria for screening women into the program).

226. Compare *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (judging a school board's drug testing policy according to reasonableness and finding it to be constitutional because it served the board's important interest in detecting and preventing drug use among its students, its regulation of extracurricular activities diminished the expectation of privacy among students, and its method of obtaining urine samples and maintaining test results was minimally intrusive); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (judging the Fourth Amendment constitutionality of a public school's program randomly to search students' urine for drugs according to its reasonableness rather than its compliance with the requirements of the Warrant Clause, for the same predominant order and discipline reasons upon which it based its decision in *New Jersey v. T.L.O.*; in addition, this program was not suspicion-based, and by its explicit terms, the results of the drug tests would not be provided to law enforcement); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (judging the Fourth Amendment constitutionality of a search and seizure of a child's purse by a public school official in connection with the investigation of a violation of school rules—smoking in the bathroom—according to its reasonableness rather than its compliance with the requirements of the Warrant Clause, because public schools have the responsibility to assure order and discipline in the schools, a responsibility which the Court has long held trumps or substantially diminishes the weight of students' individual constitutional rights; while the inspection in this case was suspicion-based, it was not at the outset associated with law enforcement); *Wyman v. James*, 400 U.S. 309 (1971) (judging the Fourth Amendment constitutionality of a home visit to be conducted by state officials in connection with the Aid to Families with Dependent Children (AFDC) program according to its reasonableness rather than its compliance with requirements of the Warrant Clause because the receipt of AFDC funds was otherwise constitutionally conditioned on the accessibility of the home to the officials who were to assure that they were appropriately used by parents for food and

b. The Applicability of the Modern Special Needs Exception to Child Welfare Investigations

Whether states can rely on the special needs exception to constitutionalize their present approach to child welfare investigations clearly will depend on the nature and degree of law enforcement's involvement in the administrative scheme and in particular investigations. Where a program's or investigation's primary programmatic purpose is obviously law enforcement, the special needs exception will not exempt it from the requirement of a particularized warrant based on probable cause. The paradigmatic example in this category is a police-staffed investigation of a report suggesting that a child may have been sexually or physically abused in such a way that would constitute a criminal offense if substantiated.²²⁷ The incidental participation by civil authorities whose exclusive interest was to prevent any further harm to the child would not affect this result.²²⁸ On the other hand, programs and investigations that are primarily or exclusively motivated by civil concerns likely will pass muster and thus be accorded special

clothing for the children; the home visit, i.e., inspection of the personal residence, was neither based on individualized suspicion nor associated in any way with law enforcement).

227. See, e.g., *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993) (reviewing the actions of a police officer asked by CPS to investigate a case of severe diaper rash who conducted a standard law enforcement investigation into the possibility that the child had been sexually abused; and holding that the special needs exception is inapplicable in these circumstances involving both the appearance and fact of crime control). The trial court in *Franz* found that although the police officers had a "statutory responsibility ... to cooperate with [CPS]," in this case "at all times [Officer Lytle] was conducting a criminal investigation involving searches 'aimed at uncovering incriminating evidence of sexual abuse by one or both parents.'" *Id.* at 786, 788. Specifically, the court found that the officer's "focus was not so much on the child as it was on the potential criminal culpability of her parents. ... [which] is the hallmark of a criminal investigation." *Id.* at 791. The court also noted that the officer "was in uniform and carrying a gun at all times; he recorded his meeting with Mrs. Franz following police policy; he filed standard [state bureau of investigation] reports of his investigation; and he informed his superior that he was investigating a possible child molestation." *Id.* Finally, the court found that because he misled the Franz family concerning the nature of his investigation, he could not "reasonably [have] believe[d] plaintiffs gave [lawful] consent to the searches" that formed the investigation. See *supra* notes 38-41, 139-46, 155-56 and accompanying text (discussing the role that official deception concerning the law enforcement motives underlying an investigation plays in the determination of lawful consent).

228. Thus, in *Franz*, the fact that CPS had originally called on the police to conduct the investigation to assure that the child was safe, 997 F.2d at 785 n.1, was ultimately irrelevant to the court's determination that the investigation's motivation was law enforcement.

needs status. For example, a jurisdiction may choose to track certain allegations of maltreatment to an entirely civil system, and otherwise to treat the individuals targeted for investigation in ways that do not trigger the moral opprobrium that ordinarily is associated with suspicions of abuse or neglect.²²⁹ Note, however, that like in *Ferguson*, the state's exclusive use of civil personnel to staff a program is not dispositive of this inquiry if its purpose in part is to gather evidence for law enforcement; the converse is also true.²³⁰

The more difficult programs to assess are those that lie in between, the arguably true dual-purpose schemes that are or appear to be equally motivated by civil and law enforcement

229. An illustration of such treatment would be where a state or locality tracks simple neglect cases—cases involving allegations about a dirty house or an ill-clothed or dirty child, for example—exclusively to civil authorities who investigate the allegations on their own and exclusively for civil purposes, and where the authority's approach to the family is rehabilitative or therapeutic, rather than adversarial and punitive. These programs likely would pass special needs muster because their advocates could claim what they cannot in the usual context, that their programmatic purposes are divorced from law enforcement; that the investigations are designed to yield evidence in support of civil and not joint civil/criminal ends; that to the extent they land on evidence that is destined also for law enforcement, it is merely incidental in the same sense that it would be when a pediatrician or a schoolteacher lands on similar evidence and reports this as required to law enforcement or to a multidisciplinary team; that their primary civil motivation is objectively evident because law enforcement personnel are in fact nowhere to be seen in the equation; and that the program is run in such a way that substantially diminishes if not eliminates the stigma and fear that attaches to ordinary maltreatment investigations because of their ties to crime control. See, e.g., CHILDREN'S SERVS., N.C. DIV. OF SOC. SERVS., MULTIPLE RESPONSE SYSTEM AND TEAM DECISION MAKING APPROACHES (on file with author); see also DEPANFILIS & SALUS, *supra* note 52, at 50 (offering an overview of "noninvestigative or alternative responses" such as dual-track responses that "permit[] CPS agencies to respond differentially to children's needs for safety, the degree of risk present, and the family's need for support or services"). In such systems, law enforcement personnel become involved only in the more severe cases of physical or sexual abuse. *Id.* According to a North Carolina CPS official, North Carolina, Missouri, and Florida all have begun such dual-track pilot programs. Rebecca Brigham, North Carolina Children's Services, Presentation Before the Duke University Center for Child and Family Policy's Child Abuse and Neglect Working Group (Feb. 26, 2003) (presentation handouts and notes on file with author).

230. Writing before me, Hardin took the position that the special needs exception could not attach where the investigation was either conducted by or involved the substantial participation of the police. See *Hardin*, *supra* note 23, at 536-38. While the involvement of law enforcement clearly continues to have important implications for modern special needs analysis, the mere fact that law enforcement is responsible for staffing an investigation is not dispositive. See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004) (applying the special needs doctrine to roadblock search and seizure conducted by the police).

concerns. (These are also the most important for the purposes of this Article, because the majority of child welfare programs fall into this category.) The investigation in *Wallis v. Spencer* involving allegations of satanic worship and child sacrifice²³¹ and the investigation in *Roe v. Texas Department of Protective and Regulatory Services* involving a social worker's decision to photograph the genitals of a six-year-old girl during a home visit²³² fall into this category. Older precedents suggest that they would qualify for special needs status primarily because their civil objectives are more than pretextual.²³³ More recent cases, *Ferguson* in particular, suggest that the degree of interconnectedness between their civil and law enforcement aspects, and the stigma that consequently arises, create the impression (at least) that the investigations are motivated primarily by law enforcement and thus are inappropriate for special needs treatment.²³⁴

Part I described typical maltreatment schemes and the investigations that are pursued according to their terms.²³⁵ Because in "most States, all or most all forms of reported child abuse or neglect are crimes,"²³⁶ an important relationship inherently exists between CPS and law enforcement. This relationship is diverse and wide-ranging: Many states require CPS and law enforcement to coordinate the development and/or implementation of intake,

231. 202 F.3d 1126 (9th Cir. 2000); *see also supra* notes 116-27 and accompanying text (describing this case).

232. 299 F.3d 395 (5th Cir. 2002); *see also supra* note 1 and accompanying text.

233. *See supra* note 162 (describing older analyses of the application of this doctrine to child welfare contexts).

234. *See supra* Part II.C.2.a (discussing *Ferguson* and the special needs analysis that emerges from that decision).

235. *See supra* notes 25-65 and accompanying text.

236. PENCE & WILSON, *supra* note 48, at 5 (quoting AM. BAR ASS'N ET AL., LAW ENFORCEMENT/CHILD PROTECTION COOPERATION IN HANDLING OF CHILD ABUSE CASES 10 (1989)). Depending upon the state, there is more or less overlap in the civil and penal codes' definitions of abuse and neglect. North Carolina, for example, defines general forms of abuse and neglect in its Juvenile Code, and these definitions are applied by reference "in criminal cases involving a charge of contributing to the abuse or neglect of a minor child." JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA 13, 14 n.7 (2d ed. 2003). On the other hand, child sexual abuse is defined only in the Criminal Code which is cross-referenced in the Juvenile Code. *Id.* at 103 (setting out the text of the Juvenile Code's abuse definition, which references the Criminal Code's definition of the covered sexual offenses). The proper supervision of children also is defined in the Criminal Code. *Id.* at 30 n.8.

screening, and investigatory procedures.²³⁷ This collaborative approach is likely to become more prevalent, as the federal government is actively seeking to “eliminate unnecessary duplication of effort, to promote proper and expeditious collection and preservation of evidence, and to ‘develop a coordinated system for identifying and investigating appropriate calls.’”²³⁸ Toward that end, the government is promoting the use of multidisciplinary “teams” comprised of CPS and law enforcement officers who “shar[e] information, assign[] investigative tasks, and participat[e] in a shared decisionmaking process.”²³⁹ Presently, however, most if

237. For example, Michigan requires each county within the state to assure that its prosecuting attorney and CPS together determine how law enforcement should be involved in investigations, as well as “adopt and implement standard child abuse and neglect investigation and interview protocols.” MICH. COMP. LAWS ANN. § 722.628 (West 2002). These procedures are required to be modeled after protocols developed by a government task force on children’s justice issues. See A MODEL CHILD ABUSE PROTOCOL: COORDINATED INVESTIGATIVE TEAM APPROACH, STATE OF MICHIGAN GOVERNOR’S TASK FORCE ON CHILDREN’S JUSTICE, FIA PUB. 794 (1998). The Model Protocol provides that the purpose of investigations is to determine whether a child has been abused or neglected, to determine whether there is probable cause to believe that a crime has been committed, to minimize trauma to the child, and to ensure fairness to the accused. *Id.* California requires law enforcement and CPS to implement cooperative arrangements to coordinate duties in connection with investigations. CAL. PENAL CODE § 11166.3 (West 2001). Georgia provides that the investigation is to be conducted by CPS coordinating with law enforcement as necessary, but particularly where allegations have possible criminal law implications, or where a CPS investigator finds children at home unattended. GA. DEP’T OF HUMAN RES., SOCIAL SERVICES MANUAL § 2104.1, .16 (1999); see also FLA. STAT. §§ 39.301, 39.306 (2003) (requiring CPS to forward allegations of criminal conduct to law enforcement, which determines if an investigation is required; if so, the two agencies are required to coordinate their investigative activities where feasible, with law enforcement assuming the lead where the allegations involve death, aggravated abuse, or sexual abuse); OHIO REV. CODE ANN. § 2151.421 (West 2004) (providing that required investigation “shall be made in cooperation with law enforcement”); STATE OF WISCONSIN, DEP’T OF HEALTH & FAMILY SERVS., DIV. OF CHILDREN & FAMILY SERVS., COLLABORATION WITH LAW ENFORCEMENT AGENCIES ON CHILD ABUSE AND NEGLECT REPORTS (Feb. 2004), available at http://dhfs.wisconsin.gov/dcfs_info/num_memos/2004/2004-05.htm (containing revision of existing Child Protective Service Investigation Standards to provide for collaboration with law enforcement in compliance with the Seventh Circuit’s decision in *Doe v. Heck*, 327 F.3d 492 (2003)).

238. PENCE & WILSON, *supra* note 48, at 8 (quoting D.J. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 3 (1988)).

239. *Id.* The government has “encouraged [local officials] to establish formal CPS/law enforcement protocols” to achieve these coordinated ends. *Id.* In support of this approach, the Clearinghouse cites the 1984 final report of the Attorney General’s Task Force on Family Violence and the conclusions of the Tennessee’s Child Sexual Abuse Task Force, which in 1986 found as follows:

not all states contemplate that the evidence-gathering function may be conducted by officials from either agency, or both working together,²⁴⁰ and that relevant evidence will be shared between the

The team representatives of each discipline (law enforcement, child protective services, and in some cases prosecutors and mental health) bring their various expertise to be utilized as part of the total investigative process. By applying their expertise as part of a coordinated effort the Team members can work more efficiently and effectively. The independent goals of each discipline are still met with the only difference being that the investigative process will be coordinated through the Team. All Team members will not actually work all aspects of the investigation, but will actively coordinate the total process drawing from the resources available through all involved disciplines and other disciplines as needed.

Id. The Department of Health and Human Services advocates this team approach to the investigation of child maltreatment reports, and describes the complete team (including the police, CPS, and others) this way:

Law enforcement brings to the team “expertise in the collection and preservation of evidence, in crime scene examination, and in taking statements and confessions.” Law enforcement can also make arrests and present the criminal case in a lawsuit through obtaining warrants, presenting the case at a preliminary hearing or grand jury and in criminal court. CPS caseworkers often have greater experience in interviewing children (victims and siblings), in assessing the risk of further abuse, in arranging for medical or psychological exams and services, and in working with the protective alternatives of juvenile or family court. Law enforcement can also place children in custody, but the CPS agency generally must provide foster care services. Other members of an investigative team might include the prosecutor or agency attorney who assesses the evidence as it is collected and then formally prosecutes the case. The prosecutor can assist in drafting search warrants, preparing witnesses, and providing general direction and guidance. Mental health professionals also provide consultation to investigators on the clinical needs of the victim and others involved in the investigation, help interpret psychological information secured, and offer guidance on interviewing strategies with children and adults.

Id. “Participation in ... [multidisciplinary teams] is mandated for Federal agencies under the Victims of Child Abuse Act of 1990 and the Indian Child Protection and Family Violence Prevention Act (Public Law 101-630).” NAT’L INDIAN JUSTICE CTR. FOR THE OFFICE OF VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, IMPROVING TRIBAL/FEDERAL PROSECUTION OF CHILD SEXUAL ABUSE CASES THROUGH AGENCY COOPERATION, *available at* <http://www.ojp.usdoj.gov/ovc/publications/infores/pdftxt/tribalbult.pdf>.

240. Typically, the police are used to provide direct “law enforcement support to CPS.” *See* PENCE & WILSON, *supra* note 48, at 6. In some localities, such support is provided systematically. For example, in Palm Beach County, Florida, a protocol developed by the Department of Children and Families (DCF) and the Law Enforcement Planning Council ensures that all reports of child abuse received through either 911 calls or the state hotline are jointly investigated by DCF and law enforcement.” CMTY. ALLIANCE OF PALM BEACH COUNTY, *supra* note 49. The protocol includes a detailed “wire diagram” that maps out the steps of the investigation, the responsibilities of each agency at each step, and points at which key decisions, such as whether to remove the child, should be made.

agencies for eventual use in both civil and penal proceedings.²⁴¹

In other localities, law enforcement is used to support CPS when its officials “must visit isolated, dangerous locations and deal with mentally unstable, violent, and/or substance controlled individuals.” PENCE & WILSON, *supra* note 48, at 6-7. And Texas provides that, “with assistance from the appropriate state or local law enforcement agency, [CPS] shall make a prompt and thorough investigation of a report of child abuse or neglect committed by a person responsible for a child’s care, custody or welfare.” TEX. FAM. CODE ANN. § 261.301 (Vernon 2002). Specifically, in Texas, CPS must notify law enforcement within one to three days of receiving a report, 40 TEX. ADMIN. CODE § 700.506 (2003).

In other jurisdictions, the police may become involved at the request of CPS, for example, when CPS believes that it needs the *in terrorem* effect of the police to be permitted to conduct the investigation, as “[l]aw enforcement’s authority is ... much more widely accepted than the CPS authority” and “[m]any times CPS caseworkers are denied access to alleged victims of maltreatment while law enforcement’s requests to see the child are honored.” PENCE & WILSON, *supra* note 48, at 6-7. In these jurisdictions, however, police involvement in the investigation of reports that allege particularly severe kinds of maltreatment may be required. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 36, at ch. IV tbl.4D (providing an overview of law enforcement involvement in child abuse investigations in all fifty states, showing that in almost every state, law enforcement participates in circumstances involving allegations of specific types of cases, such as severe abuse and/or cases of emergency removal). For example, Illinois requires CPS to seek the assistance of law enforcement where “serious physical or sexual abuse has been alleged” or where there is “reason to believe that the home is unsafe because, for example, the parent is violent or has a lot of weapons.” Telephone Interview with Linda Williams, *supra* note 48. And Texas requires that reports alleging serious physical or sexual abuse must be investigated jointly with law enforcement. 40 TEX. ADMIN. CODE § 700.506 (2003). Finally, depending on the community and the nature of the formal relationship between civil and law enforcement authorities, the police also respond to routine, emergency, and after-hours calls on their own. PENCE & WILSON, *supra* note 48.

241. See *supra* note 237 (providing, among other things, jurisdictional examples of evidence-sharing among agencies). North Carolina is most specific in this regard, as it requires that

[w]henever an investigation by a social services department reveals that a child may have been abused, the director of social services must make an oral report immediately and a written report within 48 hours to both the district attorney and the appropriate law enforcement agency. The law enforcement agency must begin a criminal investigation immediately ... and must coordinate its investigation with the protective services investigation being done by social services. When the criminal investigation is complete, the district attorney decides whether any criminal charges should be filed.

MASON, *supra* note 236, at 63-64. The threat of criminal sanctions appears to be designed primarily to serve as a deterrent, as refusals to cooperate with investigations, and even substantiated reports do not typically result in criminal prosecutions. See U.S. DEP’T OF HEALTH & HUMAN SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION (1992), available at <http://nccanch.acf.hhs.gov/pubs/usermanuals/courts/courtse.cfm> (noting that “[m]any instances of child maltreatment that rise to a level of criminal behavior are not prosecuted for a number of reasons,” including a lack of full information in that context, a belief that the case cannot be successfully prosecuted, and a fear that such prosecution might interfere with attempts to rehabilitate the family or might further traumatize the child).

Finally, depending on the jurisdiction, the failure to comply voluntarily with an investigation as well as a finding of maltreatment can result in criminal sanctions.²⁴²

The analogies to *Ferguson* in many of these respects are striking and thus they provide the basis for the best argument against special needs status for dual-purpose investigations.²⁴³

The state hospital staff and the local prosecutor developed together the investigatory scheme in *Ferguson*. It was incorporated into a protocol that, among other things, set out the two authorities' respective roles and responsibilities. In the same way, many child welfare investigatory schemes are characterized by protocols that law enforcement and civil officials collaboratively developed to ensure that their respective agencies coordinate intake, screening, and investigatory efforts.

Child welfare investigations, like the investigation in *Ferguson*, are often initiated on the basis of a report containing a suspicion of a violation which does not necessarily reach the level of reasonable suspicion or probable cause. Despite their weak evidentiary basis, the states justify the ensuing investigations on the view that nonaction risks the children enormous harm, either serious bodily and emotional injury or death. In *Ferguson*, the analogous concern was damage from *in utero* exposure to narcotics.

Like the investigation in *Ferguson*, child welfare investigations, including home visits and unsupervised examinations of children, have as their ultimate purpose the safety and health of children. More immediately, however, like the investigation in *Ferguson*, their purpose is to gather evidence to determine if parents are

242. See, e.g., *In re Stumbo*, 582 S.E.2d 255, 259 (N.C. 2003) (explaining that "a non-interference order may be enforced by civil or criminal conduct"); see also *supra* notes 42-43 and accompanying text (describing the implications of refusals to cooperate with investigations); *supra* note 241 (noting that the prohibitions against refusing to comply with investigations, and against maltreatment itself, appear mostly designed as deterrents, because few individuals are in fact charged pursuant to their terms).

243. Indeed, the analogies to *Ferguson* are so striking that it is not surprising that the federal appellate courts that have had an opportunity to review the issue since *Ferguson* have found its holding to be dispositive. See *supra* notes 182-89 and accompanying text (discussing these cases). It is noteworthy that child maltreatment investigations are also distinguishable from the Court's other special needs cases involving children, as well as those that lower courts tended to cite before *Ferguson*. See *supra* note 226 (contrasting these older cases).

violating laws prohibiting maltreatment.²⁴⁴ Both the “delivery” of narcotics to a fetus and the abuse or neglect of a child are violations of the civil and criminal laws. And in both contexts—under the *Ferguson* protocol and typical state protocols—it is known from the outset that all evidence that supports the authorities’ initial suspicions will be provided to law enforcement officials. In the typical child welfare context, this evidence is provided to the police and/or to the prosecutor’s office as a matter of course. Civil child welfare officials, like the state hospital staff in *Ferguson*, thus serve in part as agents for law enforcement when they pursue their investigations; at a minimum, they are conduits.

Child welfare investigations, like the investigation in *Ferguson*, can result in criminal charges if the allegations in a screened-in report are substantiated. However, like in *Ferguson*, criminal charges are rarely pursued. Thus, in both instances, the threat of criminal charges serves primarily to encourage, frighten, or force parents to stop engaging in risky or harmful behaviors.

Finally, the stigma of being officially identified with criminal child abuse, a significant factor in *Ferguson*, is inherent in most child maltreatment investigations. Despite its prevalence in the society, the label “child abuser” or “neglectful parent” carries with it profound negative connotations. Being a “parent” means being a *good* mother or a *good* father, who devotes him- or herself to nurturing, protecting, guiding, loving, and respecting their children. In turn, being a “child” means being positively cherished by a good mother and/or a good father. In American culture, this period lasts a long time if the child is “lucky.” Of course, this standard frequently goes unmet for reasons other than parental maltreatment; nevertheless, it is the expectation that we dare to hold as a central and organizing principle in our lives. It gives parents and children special meaning and a special social and personal status: “This is my *son*, the beaming mother announces as she gazes upon her offspring with obvious love and pride.” “That is my *father*, the adoring child states as she points him out with unconditional love and respect.”

244. While I disagree with Hardin and Beeman in other respects, it is noteworthy that they agree with this analysis, i.e., that the ultimate purpose of child welfare investigations is the health and safety of the child, whereas their immediate purposes are evidentiary. See *supra* note 162.

A knock at the door by an official who suggests that someone—a bystander, a neighbor, a friend, a teacher, or a doctor—has given the state reason to believe that a child in the family is being abused or neglected by the very people who are intended to cherish her is the ultimate challenge to the strength and existence of this central premise in a family, and thus is also the ultimate vehicle for shame for its members. Not incidentally, this knock is also utterly frightening, perhaps particularly if one is indeed a devoted parent or a loved child, as nothing is more earth-shattering to contemplate than the separation a state official can effect in the name of child welfare. When a state treats these matters as both civil and criminal concerns, the potential for shame and fear is enhanced dramatically. Because criminal conduct carries the deepest moral opprobrium, such an investigation implies almost by definition that the authorities believe the parent involved may be a particularly bad mother or father, and that the child may be particularly unloved. This opprobrium understandably overshadows even significant objectives that civil authorities may separately pursue.²⁴⁵

Given the foregoing, the best argument in support of special needs status for dual-purpose child welfare investigations depends on the ability to distinguish *Ferguson*.²⁴⁶ Such an argument would suggest that unlike in the typical child welfare setting, the civil purpose in *Ferguson* was slight.²⁴⁷ A related argument might suggest that even in dual-purpose investigatory schemes, the state's

245. See also Beeman, *supra* note 23, at 1057, 1066 n.220 (noting the stigmatizing effect of maltreatment investigations, and the need for procedures to restrain the discretion of investigating officials to minimize this stigma).

246. As already noted, before *Ferguson* it was possible to argue that dual-purpose investigations could pass special needs muster so long as their civil purpose was not pretextual. See *supra* note 162 and accompanying text. In the absence of a more apposite case, it was also possible to rely on broad propositions contained in decisions such as *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *Wyman v. James*, 400 U.S. 309 (1971), and *Camara v. Municipal Court*, 387 U.S. 523 (1967). Since *Ferguson*, however, such reliance is difficult to justify because this case is closest on the facts to child welfare investigations and because it lays to rest at least some of the ambiguities inherent in that older case law. See *supra* Part II.C.2 (introducing *Ferguson* and explaining its place in the doctrine).

247. It cannot be that *Ferguson* did not involve a dual-purpose scheme or investigation, i.e., that it was exclusively law enforcement motivated. This is because the hospital before, during, and after its affiliation with the local prosecutor used the results also to treat their patients. See *supra* notes 205-23 and accompanying text. Thus, at best, the argument must be that this civil purpose was secondary to the law enforcement motives.

primary programmatic purpose is always the child's health and well-being. This account sees the law enforcement aspects of the multidisciplinary approach to investigations as complementary, not dominant, in both the immediate and ultimate equation. Thus, whether the CPS caseworker examines a child alone or with a police companion, or the police investigate a report on their own, the primary motivation is to ensure the child's safety. When evidence is gathered in this context, its immediate purpose also is to ensure the child's safety. Only secondarily, or even incidentally, is the evidence gathered to advance a criminal law enforcement purpose. In this sense, the investigators, civil or criminal, are no different than teachers and doctors and other mandated reporters who happen upon evidence of maltreatment in the course of ordinary caregiving.

This Article features the argument against special needs status for dual-purpose investigations because these more favorable arguments are likely to fail. The best analogy to *Ferguson* does not exaggerate the civil purpose underlying the urine screens in that case; rather, it reveals and explores the rationales for the Court's own exaggeration of their law enforcement purpose.²⁴⁸ Even if the analogy is shown to be imperfect, however, the *Ferguson* majority made clear that an investigatory scheme entangled with law enforcement, and/or an investigation that is designed at the outset to collect evidence for law enforcement, ordinarily will not pass special needs muster.²⁴⁹ By taking this approach, the Court expressly rejected the argument, which was made by the state and accepted by both the lower courts and the dissenters in that case, that the hospital's overriding beneficent motives required that the investigation be seen as primarily civil, and that its relationship to law enforcement be seen as merely incidental to those health and welfare objectives.²⁵⁰

248. *See supra* notes 220-26 and accompanying text (reconciling the Court's use of the facts with the subjective intent of the hospital staff responsible for implementing the program, and noting that Justice Scalia's dissenting opinion in the case reflects on the majority's recharacterization of the facts as described by the hospital and as adopted by the district court).

249. *See supra* notes 214-19 and accompanying text (discussing the Court's rationale).

250. *Ferguson v. City of Charleston*, 532 U.S. 67, 80-81 (2001). Indeed, in this context, the Court expressly rejected the attempt to analogize the hospital staff to mandated reporters who merely happen upon evidence relevant to law enforcement. *Id.*

Most importantly, the Court's rejection of the hospital's arguments reflects the current majority's recent effort to reign in the special needs exception in both search and seizure contexts. It has done this by rejecting the government's arguments, apparently compelled by past decisions, to describe a program's health and safety objectives as significant and thus as dominant. Relatedly, and again contrary to the precedents, the Court has recast the government's evidence-gathering function in part as simple crime control. This effort is exemplified (and arguably was initiated) in *City of Indianapolis v. Edmond*,²⁵¹ which involved a suspicionless roadblock seizure designed to uncover narcotics and to check for drunk drivers and drivers' licenses and registrations. The city sought to analogize its program to previous roadblocks that had been accorded special needs status because their ultimate purposes were both civil and significant. Writing for the majority that rejected this argument, Justice O'Connor explained:

If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.... There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude.... But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.²⁵²

251. 531 U.S. 32 (2000).

252. *Edmond*, 531 U.S. at 42. *But see id.* at 50-51 (Rehnquist, C.J., dissenting).

Petitioners acknowledge that the "primary purpose" of these roadblocks is to interdict illegal drugs, but this fact should not be controlling.... The District Court found that another "purpose of the checkpoints is to check driver's licenses and vehicle registrations," ... and the written directives state that the police officers are to "[l]ook for signs of impairment" ... Because of the valid reasons for conducting these roadblock seizures, it is constitutionally irrelevant that petitioners also hoped to interdict drugs.

Id. (citation omitted); *see also supra* note 195 and accompanying text (describing the shift in the doctrine which previously accorded special needs status to dual-purpose investigations where the civil objective was not mere pretext for allowing a criminal investigation).

These are the same themes that governed Justice Stevens' majority opinion one year later in the search context at issue in *Ferguson*.²⁵³

D. Reasonableness as the Ultimate Measure of Fourth Amendment Constitutionality

The Court has repeatedly made clear that reasonableness is the ultimate measure of constitutionality under the Fourth Amendment.²⁵⁴ This premise reflects the prevailing approach to the text, which holds that even where an exception to the Amendment's particularized warrant and probable cause requirements applies, the constitutionality of an official search or seizure depends upon its reasonableness.²⁵⁵ The Court's traditional approach to determining the reasonableness of official conduct requires balancing the strength of an individual's expectation of privacy in the circumstances and the degree of intrusiveness involved in the search or seizure, against the government's need for the investiga-

253. Thus, writing for the *Ferguson* majority, Justice Stevens wrote:

As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the ... policy. The stark and unique fact that characterizes this case is that [the policy] was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."

532 U.S. at 85-86 (quoting *Edmond*, 531 U.S. at 42-43); see also *id.* at 86-88 (Kennedy, J., concurring) (explaining his view that the current majority's reconstruction of the ultimate/immediate purposes analysis is inconsistent with the Court's prior special needs cases).

254. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) ("[R]easonableness' ... is the touchstone of the constitutionality of a government search."); *United States v. Knights*, 534 U.S. 112, 118 (2001) ("The touchstone of the Fourth Amendment is reasonableness."); *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) ("As our prior cases hold ... the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests."); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("[T]he central inquiry under the Fourth Amendment [is]—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.").

255. TASHLITZ & PARIS, *supra* note 129, at 169. It is also apparently useful to the dissenters from that approach, who prefer to imagine that reasonableness can be invoked as the constitutional test even in circumstances where there is no exception.

tion and its effectiveness in meeting that need.²⁵⁶ Depending on the circumstances, the result of the reasonableness inquiry at least in theory could be that an official intrusion is unreasonable (1) in the absence of a particularized warrant and probable cause; (2) in the absence of a particularized warrant and reasonable suspicion; (3) in the absence of reasonable suspicion; or (4) in the case of a suspicionless search or seizure, in the absence of a finding that the program pursuant to which the intrusion is made itself is reasonable.²⁵⁷

The Court has emphasized that “[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate.’”²⁵⁸ The reasonable expectation of privacy test requires that “particular attention ... be given to the nature of the place at which the observed objects or activities are located, for this will bear directly upon whether there was justified expectation of privacy as to those objects or activities.”²⁵⁹ Consistent with this attention to context, the government is said to have conducted a Fourth Amendment “search” when it “physically intruded into ‘a constitutionally protected area.’”²⁶⁰ Professor Wayne LaFave explains that “[t]hese areas were those enumerated in the Fourth Amendment itself: ‘persons,’ including the bodies and clothing of individuals; ‘houses,’ including apartments, hotel rooms, garages, business offices, stores, and warehouses; ‘papers,’ such as letters; and ‘effects,’ such as automobiles.”²⁶¹

The law is clearest on official incursions into an individual’s home. Thus, “searches of the dwelling house were the special object of [the] universal condemnation of official intrusion,” and in particular the “[n]ight-time search was the evil in its most obnoxious form.”²⁶² True to these origins, the Court has found that “the

256. *Id.*

257. Taslitz, *A Feminist Fourth Amendment*, *supra* note 146, at 26 (noting that where special needs applies, the “Court eliminates or modifies the warrant requirement, the probable cause requirement, or both”).

258. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)).

259. LAFAVE, *supra* note 21, § 2.2(c).

260. *Id.* § 2.1(a) (quoting *Silverman v. United States*, 365 U.S. 505 (1961)).

261. *Id.* § 2.1(b) (citations omitted).

262. *Monroe v. Pape*, 365 U.S. 167, 210 (1961); *see also* *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (“The Fourth Amendment’s protection of the home has never been tied to

most stringent Fourth Amendment protection” is afforded to “searches [and to] ... the sanctity of private dwellings”²⁶³ so that “searches and seizures inside a home without a warrant are presumptively unreasonable.”²⁶⁴

Individuals’ expectations of privacy with respect to their persons and their substantial interests in mobility and property also have an important pedigree and are well described in the case law.²⁶⁵ For example, Justice O’Connor has described a “long history of outrage at personal searches before 1789.”²⁶⁶ Under the modern doctrine, “[a]ll that is required [to constitute the seizure of a person] ... is that an ‘officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.’”²⁶⁷ Proving that such restraint occurred requires a showing that “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”²⁶⁸ Typical seizures include “full-fledged arrests, ... ‘investigatory detentions’ and any other ‘detention of the [person] against his will.’”²⁶⁹ Most important, the Court made clear in *New Jersey v. T.L.O.*²⁷⁰ that

measurement of the quality or quantity of information obtained.... [A]ny physical invasion of the structure of the home, ‘by even a fraction of an inch,’ was to much.... In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.” (quoting *Silverman*, 365 U.S. at 512); *Wilson v. Layne*, 526 U.S. 603, 609-11 (1999) (noting that “[t]he Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home,” and holding that it is a violation of a suspect’s Fourth Amendment rights to bring the media into his home to witness his arrest).

263. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (internal quotations omitted) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

264. *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984) (internal quotations omitted) (noting that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed” (internal quotations omitted)).

265. *See, e.g.,* TASILTZ & PARIS, *supra* note 129, at 100-42 (describing the law on the expectation of privacy including as it pertains to seizures).

266. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673 (1995) (O’Connor, J., dissenting) (quoting *Cuddihy*, *supra* note 131, at 835, 1518, 1552 & n.394).

267. *LAFAVE*, *supra* note 21, § 2.1(a) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

268. *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544 (1980)).

269. *Id.* (quoting *Cupp v. Murphy*, 412 U.S. 291 (1973)). On the other hand, an individual’s reasonable expectation of privacy may not be violated by brief investigatory detentions, or by the confiscation and analysis of personal attributes which are typically the subject of public display and observation, such as a person’s handwriting, voice, and the like. *Id.* § 2.6(a).

270. 469 U.S. 325 (1985) (involving the detention of a child in the vice principal’s office during a disciplinary action, and the search of the child’s purse for evidence of a violation of school rules, and subsequently of a violation of state law).

children are considered “persons” within the meaning of the search and seizure rule. Specifically, it found that the “search of a child’s person ... no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.”²⁷¹

As distinguished from the reasonable expectation of privacy test, the intrusiveness inquiry requires analysis of the scope and degree of the intrusion to determine whether it is relatively minimal or extensive.²⁷² In this context, the Court has emphasized the intrusiveness of searches that start out with, among other objectives, an intent to provide the results to third parties, especially to law enforcement or other disciplinary authorities.²⁷³ The Court also has considered whether the investigations scheme is over- or underbroad in terms of the number of individuals it captures, overbreadth also being an indicator of intrusiveness.²⁷⁴ Thus, for example, although body searches are prototypical invasions of the individual’s reasonable expectation of privacy, some body searches are clearly more intrusive than others. Strip searches, genital and excretory examinations, x-rays, and surgical operations have been

271. *Id.* at 337-38; *see also* *Doe v. Heck*, 327 F.3d 492, 511-12 (7th Cir. 2003) (explaining that children, even young children, can be found to have “reasonable expectations of privacy” recognizable in the Fourth Amendment context, even where they do not “exhibit[] a subjective expectation of privacy”); *see supra* note 173 and accompanying text (discussing this point in the context of the federal appellate caselaw in the area).

272. *See* *Winston v. Lee*, 470 U.S. 753, 761 (1985) (“Another factor [in analyzing the magnitude of the intrusion] is the extent of the intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.”).

273. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (“The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties.”).

274. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O’Connor, J., dissenting) (explaining that suspicion-based searches are far less intrusive than general searches because they “invad[e] the privacy of a few ... rather than many”); *id.* at 669-71 (explaining the history of the Amendment and its focus on objective probable cause as a check on the use of general warrants which were considered highly intrusive both because they unreasonably captured innocent people and because they captured so many such individuals); *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O’Connor, J., dissenting) (discussing the different roles of the legislator and the judicial officer in authorizing searches and that the former “sweeps broadly, authorizing whole classes of searches,” while the latter “affects one person at a time” rather than “thousands or millions,” which “poses a greater threat to liberty”).

found to be particularly intrusive, whereas simple patdowns have not.²⁷⁵

Finally, the individual's interests and the investigation's intrusiveness are balanced against the "nature and immediacy of the governmental concern at issue ... and the efficacy of [the state's chosen] means for meeting it."²⁷⁶ It is in this context that the "practicability" of the warrant and probable cause requirements and the government's relative "need" to avoid them is most relevant. The Court has sometimes closely scrutinized the nature, immediacy, and efficacy of the government's articulated needs in these respects; at other times it has been quite deferential.²⁷⁷ In any event, although the government's approach does not have to be the best imaginable or the least restrictive, it must at a minimum be an effective strategy.²⁷⁸

275. Compare *Winston v. Lee*, 470 U.S. 753 (1985) (holding that a surgical operation into a robbery suspect's chest to recover a bullet was unreasonable under the Fourth Amendment), with *Schmerber v. California*, 384 U.S. 757 (1966) (ruling that a state may, over a suspect's protests, remove and test his blood based on suspicion of drunk driving without violating his Fourth Amendment rights). In *Schmerber*, the Court added, "[t]hat we today hold that the Constitution does not forbid the States[sic] minor intrusion into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusion, or intrusions under other conditions." *Id.* at 772. The Court distinguished *Winston* from *Schmerber* primarily on the basis of the need for general anesthesia for the operation, the significant medical risks to the suspect's life, and the possible availability of other means to pursue a case against him, as well as the "extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," which would be far greater for an operation than for a commonplace blood test. *Winston*, 470 U.S. at 761-66; see also *Doe v. Groody*, 361 F.3d 232, 238-43 (3d Cir. 2004) (finding "the nature of the intrusion [to be] significant," the court held that a strip search without probable cause was a violation of the Fourth Amendment); cf. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968) (holding that a "patdown" search during a investigatory stop does not violate a person's Fourth Amendment rights). In *Terry*, the Court refused to delve too deeply into the discussion of what constitutes a search or seizure, focusing instead on "recogniz[ing] that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and [mak[ing] the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." *Id.* at 17 n.15.

276. *Vernonia*, 515 U.S. at 660.

277. Compare *id.* at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989))), with *id.* at 680 (O'Connor, J., dissenting) ("[A] suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be as effective as a mass suspicionless testing regime ... just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be.").

278. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449 (1990) (factoring into the

Consistent with this doctrine, the presumption that a warrant and probable cause are needed to constitutionalize a search or seizure is most likely to be overcome in the context of investigations that do not strongly implicate the individual interests protected by the Fourth Amendment. The quintessential examples in this category are highway roadblocks, which have been characterized as brief and suspicionless seizures involving only a minor intrusion on privacy and mobility;²⁷⁹ inspections of highly regulated industries, which have been described as being the historical subject of statutorily based routine and thorough searches, and thus as having a highly reduced expectation of privacy;²⁸⁰ and investigations of probationers for parole violations, public school children for disciplinary violations, and welfare recipients for compliance with the conditions upon which aid is given, all of which the Court has found to involve significantly reduced expectations of privacy and mobility, owing to the subjects' preexisting status relationship with the state.²⁸¹ Conversely, the Fourth Amendment's presumption in favor of a warrant and probable cause is least likely to be overcome in cases involving searches and seizures that implicate important individual interests. Searches of the family home, which are almost always intrusions of the highest order, and of parts of the body that are not typically in plain view, exemplify this category.²⁸²

balancing analysis of the state's interest against the intrusion on individual liberties the effectiveness of the state's sobriety checkpoints in curbing drunk driving).

279. *See, e.g., id.* at 451-52.

280. *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *New York v. Burger*, 482 U.S. 691 (1987).

281. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (public school drug testing); *United States v. Knights*, 534 U.S. 112 (2001) (probation violation); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (public school drug testing); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (probation violation); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (public school disciplinary violation); *Wyman v. James*, 400 U.S. 309 (1971) (public assistance inspection).

282. *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001) (finding that the government's need to protect fetuses from maternal drug use is insufficient to outweigh the mothers' Fourth Amendment rights); *Chandler v. Miller*, 520 U.S. 305, 321-22 (1997) (finding that the "symbolic" act of requiring candidates for state office to undergo drug testing is insufficient as a state interest to outweigh the individual's privacy interest); *Winston v. Lee*, 470 U.S. 753, 765-66 (1985) (finding that a surgical operation to remove a bullet from a suspect's chest was too intrusive as balanced against the government's need to build a case against him, particularly given the availability of other types of evidence); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406 (5th Cir. 2002); *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093-94 (3d Cir. 1989) (holding that privacy intrusions as significant as strip searches can be justified only by a warrant, consent, or

The Court has already established the reasonableness of particular sorts of intrusions using this balancing test; consequently, it is unlikely to reconsider whether a warrant and/or probable cause is required in these contexts.²⁸³ For example, investigations that meet the doctrinal requirements of the Court's consent and exigent circumstances exceptions, as well as certain kinds of special needs investigations, presumptively will meet Fourth Amendment requirements without further review. Recently, the Court also has eschewed this analysis where evidence exists in the historical record that a particular sort of search or seizure was permissible at common law at the time of the founding.²⁸⁴ However, where the program and investigation are *sui generis*—that is, where

exigent circumstances). In *Roe*, the Fifth Circuit noted that

[t]he Court only rarely has permitted “special needs” searches in the face of a person’s strong subjective privacy interests.... The Court has *never* upheld a “special needs” search where the person’s expectation of privacy was as strong as is [this child’s] interest in bodily privacy. The potency of her privacy interest makes us reluctant to apply the “special needs” doctrine.

299 F.3d at 406.

283. TASLITZ & PARIS, *supra* note 129, at 169-70.

284. See Sklansky, *supra* note 131, at 1743, 1745 (describing this doctrinal shift in the Court’s reasonableness analysis, and denominating it “the new originalism”). This “new originalist” methodology was used, for example, in *Vernonia School District 47J v. Acton*, where the Court was asked to review the constitutionality of a public school’s suspicionless drug testing program that targeted student athletes. Writing for the majority, Justice Scalia began his analysis this way:

[T]he ultimate measure of the constitutionality of a governmental search is “reasonableness.” *At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted*, whether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”

515 U.S. 646, 652-53 (1995) (emphasis added) (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989)). Justice Scalia then proceeded to apply that standard, ultimately holding that the program was constitutional because, having met the requirements of the special needs exception, *see id.* at 653-54, the government was persuasive that on balance the program was not particularly intrusive, *id.* at 658-60, did not tread on particularly strong expectations of privacy, *id.* at 654-57, and was effective at meeting the school board’s objectives, *id.* at 660-64. See also *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (applying “new originalist” methodology to uphold a police officer’s extremely frightening and degrading search and seizure of a mother in front of her children based on the officer’s accurate assessment that the mother had violated a law requiring the placement of young children in car seats).

the Court has not yet had occasion to decide a closely related case—reasonableness balancing analysis is generally required.²⁸⁵

Because they ensconce the competing values fundamental to the Fourth Amendment, these methodologies and principles are not only relevant to any doctrinal analysis of child maltreatment investigations; they are also essential to a normative evaluation of the merits of the prevailing approach to solving the nation's abuse and neglect problem. In light of this, my analysis of the reasonableness of this approach and the investigations conducted under its auspices is reserved for Part III, which contains an argument against the child maltreatment exception to the Fourth Amendment.

III. REJECTING A CHILD WELFARE EXCEPTION ON THE BASIS OF FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES

This Part sets out a normative argument against a child welfare exception to the Fourth Amendment. The likely inapplicability of the special needs exception to investigations that have a significant law enforcement aspect forces the doctrinal result that no child welfare exception exists to the Amendment's presumptive requirements. In other circumstances, where the role of law enforcement is not so apparent, the special needs exception's applicability is less predictable. In either case, however, this Article does not rest its argument against a child welfare exception on these doctrinal grounds. Specifically, I do not find the distinctions most relevant for determining special needs status to be compelling rationales for or against a child welfare exception: Whether family privacy can constitutionally be invaded based on no, mere, or even reasonable suspicion in the ways that CPS and/or the police currently conduct investigations ought not rest on the details of law enforcement's involvement in an underlying scheme or a particular search. Rather, this deeply important question ought to be decided based on the value that is placed on privacy, mobility, dignity, and personal security for children and families, and on the government's corresponding need to invade those rights for the public good. As

285. TASILTZ & PARIS, *supra* note 129, at 170 ("If the case does not fit an existing category, then the court must engage in balancing to craft a new categorical rule.")

the introductory illustration to this Article and the cases described in Part I reflect, police and prosecutors are by no means unique in their ability to wreak havoc in the life of a child and her family; indeed, even the more subtle “family-friendly” approaches to interventions adopted by some CPS agencies can be pervasively destructive of the values ensconced in the Fourth Amendment, and consequently of the children’s and the family’s well-being. Thus, I argue from fundamental Fourth Amendment principles that in the absence of consent or exigent circumstances and whether or not the special needs exception applies, it is unreasonable for the state to conduct maltreatment investigations without a particularized warrant and probable cause. Proceeding without these protections reflects an unacceptable bias against individual and family privacy. Nevertheless, to assure this argument’s doctrinal relevance, it is developed within the confines of the Court’s modern reasonableness analysis.

A. *The View from History*

The question whether searches and seizures of children and the family home are reasonable in the context of child welfare investigations has no colonial precedent or analog. Indeed, in the colonial era, it was generally accepted that parents owned their children, and could do with them what they wished, including leasing out their labor to others for long periods of time, and disciplining them in ways that would be considered draconian today.²⁸⁶ For that reason, it rarely if ever would have been the case that the government would have conducted search and seizure operations in connection with child welfare; and thus, common law courts rarely

286. As Barbara Bennett Woodhouse has described, in the colonial era, the father’s power over his household, like that of a God or King, was absolute. Law employed a property theory of paternal ownership and treated children “as assets of estates in which fathers had a vested right.... Their services, earnings, and the like became the property of their paternal fathers in exchange for life and maintenance.”

Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1037 & n.182 (1992) (quoting MICHAEL GROSSBERG, GOVERNING THE HEALTH LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 54 (1985)) (noting also that “[t]he punishment in several Colonies for striking or cursing one’s father was death”).

would have had occasion to deliberate over their reasonableness.²⁸⁷ Consequently, common law precedents from the colonial era do not inform our assessment of the reasonableness of the states' current approach to child welfare investigations.²⁸⁸ The matter therefore must be settled using traditional reasonableness analysis.

At the outset, however, it is useful to recall the broader history of the colonial period as it relates to the Fourth Amendment. Specifically, the Fourth Amendment was developed in principal response to the British authorities' use of the so-called "general warrant," which allowed officers of the executive to conduct unfettered searches of personal residences and indiscriminate seizures of personal papers and property on the basis of mere suspicion.²⁸⁹ The sense of the Framers and ratifiers of the Bill of Rights was that these warrants were so utterly abhorrent that it was important to constitutionalize, rather than merely to leave to tort law, the protection of the individual's right to privacy against such searches and seizures.²⁹⁰ At the same time, the Fourth

287. The modern child welfare movement began in earnest only in the late 1800s. The New York Society for the Prevention of Cruelty to Children, modeled after the Society for the Prevention of Cruelty to Animals, is most often credited with launching the movement. COLUM. ENCYC. (6th ed. 2005), available at <http://www.bartleby.com/65/cr/cruelty.htm>. Of course, this history suggests that such investigations would have been considered absolutely unreasonable in the Founding Era, i.e., that because parents were perceived to own their children and thus to have almost inviolable authority over them, any governmental efforts to question or limit that authority using inspections would be unlawful. Because I reject the property-based model of parent-child relations and its systematic disregard of many if not most of the children's own interests, this Article does not base its reasonableness argument even partly in this history.

288. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (applying the traditional balancing test because a threshold historical analysis by the Court found that "there was no clear practice, either approving or disapproving the type of search at issue [i.e., drug testing of public school students], at the time the constitutional provision [i.e., the Fourth Amendment] was enacted").

289. *Henry v. United States*, 361 U.S. 98, 100 (1959). General warrants permitted the government "to search suspected places, or to apprehend suspected persons, without naming or describing the place or the person in special." *Id.* at 101 (quoting THE MARYLAND DECLARATION OF RIGHTS art. XXIII (1776)). They also permitted the government to "search suspected places without evidence of a fact committed." *Id.* at 100 (quoting THE VIRGINIA DECLARATION OF RIGHTS (1776)).

290. See *Vernonia*, 515 U.S. at 669-70 (O'Connor, J., dissenting); LANDYNSKI, *supra* note 131, at 19-20 (stating that the founders' opposition to the practice of British executive authority's use of general warrants reflected the sense of the common law, "hallowed by the centuries," that governmental intrusions on the sanctity of personal space were inherently wrong).

Amendment's text makes clear that the Framers and ratifiers understood the need to reserve the government's right to conduct reasonable investigations. As I have already noted, the consensus among constitutional historians is that the text presumes the need for a particularized warrant and probable cause to assure the reasonableness of a search or seizure.²⁹¹ Ultimately though, the Amendment's principal thrust was to abolish the general warrant as authority for investigations into suspected individual wrongdoing.

In this regard, the child welfare exception to the Fourth Amendment is a throwback to the broad authority granted the British and colonial authorities under general warrants.²⁹² That is, the exception operates to give the executive branch the unfettered right to enter and to search a person's home and to seize and examine children on mere suspicion of maltreatment. Given how strongly they felt about the unfairness inherent in the general warrant's terms, the Framers and ratifiers are likely rolling over in their proverbial graves.

B. Individual Interests

1. Privacy, Dignity, Personal Security, and Mobility

Child welfare investigations that involve CPS and/or police entry into and search of the family home encroach upon the Fourth Amendment's most sacred ground, and thus conflict with our most deeply held expectations of privacy, dignity, personal security, and mobility. Although it is no longer true—if it ever was—that a family's home is a castle, it is true that in law and culture, the personal residence is expected to be the individual's principal private sanctuary. Indeed, the law allows even the criminal to retreat into his home carrying with him the knowledge that the government generally may not enter without a particularized

291. See *supra* note 131 and accompanying text (discussing this point).

292. For another example of an instance in which the government proceeded under such broad authority, consider the internment of Japanese Americans during World War II, see *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and *Yasui v. United States*, 320 U.S. 115 (1943).

warrant and probable cause.²⁹³ Thus, what is in the family's refrigerator, closets, drawers, or even in plain view, is usually subject to its individual members' most reasonable and highest expectations of privacy.

A narrow exception exists to the high value implicated by intrusions into the personal residence, involving particular persons in preexisting relationships with the state that contemplate home visits. In such circumstances, the Court has considered the individual's expectations of privacy to be substantially diminished, thus opening the door to the possibility that related searches and seizures could be conducted in the absence of a particularized warrant and/or probable cause.²⁹⁴ The only federal appellate court to have applied the special needs exception to a home visit fits within this exception.

Wildauer v. Frederick County involved the constitutionality of a warrantless entry into and search of a woman's home for children the state believed were located inside.²⁹⁵ The woman was the children's foster mother and thus was in a contractual relationship with the state concerning their custody and care. Without elaborating on its reasons, the court applied the reasonableness test to resolve this issue. It is logical to assume, however, that the court was at least partially if not entirely motivated in this approach by

293. See *Silverman v. United States*, 365 U.S. 505, 512 (1961); see also *supra* notes 262-64 and accompanying text (explaining that the personal residence is the paradigmatic personal space the Fourth Amendment seeks to protect).

294. The Court itself has decided only two suspicion-based cases that fall in this category. The first was *Wyman v. James*, in which the Court held that the constitutionality of warrantless and suspicionless home visits by officials from the Aid to Families with Dependent Children program would be judged according to their reasonableness (in other words, the special needs exception implicitly applied to these visits) because the mother had agreed to allow the officials into her residence in exchange for receiving funds under the program and thus could not contend that she had a high expectation of privacy as against these officials. 400 U.S. 309, 318-24 (1971). The second was *Griffin v. Wisconsin*, in which the Court similarly held that the constitutionality of a warrantless and suspicionless home visit by a probation officer would be judged according to its reasonableness because the individual subject to investigation had agreed to periodic inspections of his residence as one of the conditions for probation and thus he could not claim to have a high expectation of privacy as against that officer. 483 U.S. 868, 872-73 (1987); see also *United States v. Knights*, 534 U.S. 112, 118-21 (2001) (finding reasonable and thus constitutional a search conducted pursuant to a probation condition, in part because of the probationer's diminished expectation of privacy and the officer's reasonable suspicion that he was engaged in criminal activity).

295. 993 F.2d 369, 371-73 (4th Cir. 1993).

the woman's preexisting agreement with the authorities which contemplated their right to access her home to monitor her performance. This is not the situation in most child maltreatment investigatory contexts.

Relatedly, the fact that poor and minority families are significantly overrepresented in the child welfare system may influence how maltreatment investigations are approached.²⁹⁶ These groups may be viewed by state officials and maybe even by some of their family members as having an inherently diminished expectation of privacy in this context. There is certainly some historical support for this notion. For example, notwithstanding at least one well-known argument to the contrary,²⁹⁷ poor and minority citizens up to and during the Founding Era could not always expect their homes to be treated as castles.²⁹⁸ And it is certainly beyond dispute that state officials in the late nineteenth and early twentieth centuries disproportionately targeted poor and minority—including immigrant and Native American—families for investigation and intervention, on the grounds that poverty made neglect inevitable and that many minority parenting practices were inherently abusive.²⁹⁹ Whatever this history's legacy in current state practices, poor and minority families obviously do not have a reduced

296. See *supra* note 67 and accompanying text (providing data on the relative representation of poor and minority families in the child welfare system).

297. William Pitt, the first Earl of Chatham, insisted to the English Parliament that [t]he poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

LEFAVE, *supra* note 21, § 1.1(a) (citing LASSON, *supra* note 131, at 49).

William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."

Silverman v. United States, 365 U.S. 505, 511 n.4 (1961).

298. Cuddihy, *supra* note 131.

299. See *supra* note 19 (listing poverty as amongst the reasons historically that children were taken from their parents).

expectation of privacy in law as compared to otherwise similarly situated families.³⁰⁰

Because searches and seizures of children in the family home and at school involve the person herself, they also represent intrusions on the child's own privacy, dignity, personal security, and mobility interests. As I have already noted, the Supreme Court and the lower courts have recognized this and have consistently found that children have reasonable expectations regarding their protection.³⁰¹ Although this view does not appear to be controversial, one could logically argue that children, especially younger ones, are or ought to be considered incapable of having such protected expectations, either because they lack relevant cognitive capacity, or because the law ought to assume so. Such a legal fiction would be consistent with how the law generally regards childhood, namely that it is best to assume a lack of capacity on the part of children so that adults, including parents and the state, continue to have the ability to provide them with adequate oversight and protection during their formative and vulnerable years.³⁰² Nevertheless, I believe that such arguments ought to be rejected in favor of both factual and normative positions supporting continued recognition of children's individual Fourth Amendment interests.

The liberal idea that underlies the requirement of a reasonable expectation of privacy is both objective and normative. Individuals need and thus have a right to a certain personal space or zone of privacy from which the government is generally barred.³⁰³ This right is not grounded in the actual knowledge or expectations of individual members of the society; indeed, to the extent that some

300. *But see* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1824 (1998) (positing as a fact—and not as his own normative position—that “people with money enjoy more privacy than people without. They live in freestanding houses and own more land; they conduct less of their lives in public places like neighborhood streets. Fourth Amendment law accordingly gives them greater protection.”).

301. *See supra* notes 173-74 and accompanying text (discussing this case law).

302. A version of this argument was implied in a Ninth Circuit decision in which the court opined that “[t]here is not much reason to be concerned with the privacy and dignity of the three year old whose buttocks were exposed [during a CPS-ordered strip-search actually conducted by the child's mother], because with children of that age ordinarily among the parental tasks is teaching them when they are not supposed to expose their buttocks.” *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

303. This zone of privacy includes the area around one's body, one's home, and one's most personal things.

people lack an appreciation for this zone of privacy, others who act as surrogates identify it for them. Aside from children, a whole range of adults are subject to and benefit from this approach, from those who in fact are mentally incapacitated and have no subjective expectations of privacy, to those who have an exaggerated subjective sense of where the boundaries of privacy should lie. Because of this, individuals' cognitive capacities and emotional sensibilities ultimately are irrelevant in the analysis. This approach should also govern how children are viewed under the Fourth Amendment. Indeed, the same strand of American political philosophy and jurisprudence that spawned the Fourth Amendment and its reasonable expectation of privacy test also recognizes that children need the government to leave them alone with their families in both physical and decisional respects unless good evidence exists that their families are relevantly dysfunctional.³⁰⁴

Even if cognitive capacity were relevant, however, the scientific evidence is strong that children, even babies, have the ability to develop—and indeed most healthy children do develop—a strong sense of bodily security, intimacy, and privacy. Thus, we know from extensive work in the fields of developmental biology and child psychology that children from a very young age develop a sense of attachment to their primary caregiver(s) and conversely a sense of trepidation if not fear of those whom they do not know. These senses are inherently physical in their manifestations, as all it takes to make many babies—particularly those who are not accustomed to being handled by strangers—whimper or cry is to remove them from the arms and places with which they are familiar. And even as they come to understand that authorities

304. The classic liberal vision of the role of the family as the fundamental unit of society, and its responsibility to inculcate the children in liberal democratic values, was largely responsible for the construction of our present day notions of family privacy and parental autonomy. In turn, these notions rest on the assumptions that parents are the children's first and best caretakers, that they will act in the best interests of their children, that their children need them particularly to succeed, and therefore that the state may only intrude on their authority in cases where they are not performing their expected role. That children have privacy interests recognized under the Fourteenth Amendment, and privacy rights recognized under the Fourth Amendment, is consistent with this philosophical foundation, as it serves to protect their ties to their parents and family as against the state's efforts to separate them. As I have already noted, *see supra* note 9, I will elaborate on this theme in a forthcoming article entitled *Through the Prism of the Fourth Amendment: A New Look at Family Privacy* (work in progress, on file with author).

other than their parents exist, and thus to mediate their physical responses to strangers, older children—beginning as early as two or three—develop an emotional and intellectual appreciation for personal space and zones of privacy that almost by definition recognizes government officials as the quintessential strangers. The fact that these officials are legally tasked with their care and protection under the twin police power and *parens patriae* doctrines and the related maltreatment laws is generally a foreign notion even to older children. These children have been taught (including by their parents, pediatricians, and even the government itself in the public schools context) to elevate privacy as a value, and to allow intimate contact only within the family or close personal associates. Without a doubt, children of most ages know when they are “not free to leave,” and when strangers have otherwise invaded their personal space.

The Court’s separate view that children have a reduced expectation of privacy in school with respect to programs designed to ensure order and discipline and to protect the public against communicable disease, has some potential relevance for child maltreatment investigations. The issue here is whether the cases that reflect this view can be interpreted more broadly to allow the government extensive discretion to conduct whatever searches and seizures of children in the schools they believe are necessary. Or more narrowly, whether they can be interpreted to permit unfettered searches and seizures intended to determine whether a child has been the victim of abuse or neglect. It could be argued in favor of the broadest extension that children themselves likely do not distinguish among the states’ various reasons for searching and seizing them in the public schools, and so they may in fact have reduced expectations of privacy in that setting. For example, as Justice Scalia opined in *Vernonia School District 47J v. Acton*, students at least in many cases are accustomed to seeing the school nurse for routine physicals and vaccinations, to stripping down for gym class or for sports team practices and games, and to having their things searched or at least accessible for search by school authorities to preserve the schools’ ability to maintain order and discipline.³⁰⁵ And it could be argued in favor of the narrower

305. 515 U.S. 646, 653-59 (1995).

extension that searches and seizures conducted to determine abuse and neglect are not significantly different than the same intrusions conducted in connection with a compelled vaccination, routine physical, or even targeted treatment for illness or injury. In both cases, the intrusions, which raise similar privacy implications, are designed at least in part to protect the child's health and welfare, and involve no suspicion of wrongdoing on the child's part.

These arguments ought also to fail. As the data and cases described in Part I reflect, child welfare investigations differ in kind and not just degree from routine vaccination programs, annual checkups, and drug testing programs because of their potential to cause real harm. Indeed, the harm occurs on a regular basis. The damage is primarily emotional and psychological, but it is also sometimes physical. The state's reason for wanting to inquire into my personal affairs, or to look at my body, makes a big difference to me as I consider whether or not I am comfortable with or potentially traumatized by its examination; there is no reason to believe that it is not or should not be the same for a child.³⁰⁶ Indeed, the fact that a child who is the subject of a maltreatment investigation is singled out for different treatment—treatment that inevitably implies the state believes she has done something wrong or that her parents are bad—adds considerably to the distress she is likely to feel in this process.³⁰⁷ It is patently wrong for states to

306. A direct adult analogy would be the partial strip search of a woman at an airport as part of the random screening of passengers, or a partial strip search of a woman as part of an investigation initiated by the state and not the woman, which is designed to discover whether her partner abuses her. Although neither suggests that the woman herself has done anything wrong, the latter is fraught with emotional complexities that are absent in the former. Importantly, this is true whether or not the woman in the latter case has been abused by her partner.

307. See Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, 3 INST. FOR PSYCH. THERAPIES (1991), available at http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm (noting that after being falsely accused of child abuse, family members reported feelings of powerlessness, self-doubt, depression, and isolation, similar to emotions demonstrated by adults and children who feel shame; authors speculate that CPS and accused families act in a shaming parent-shamed child relationship); cf. ANTHONY J. URQUIZA & CYNTHIA WINN, U.S. DEP'T OF HEALTH & HUMAN SERVS., TREATMENT FOR ABUSED AND NEGLECTED CHILDREN: INFANCY TO AGE 18, at 71-80 (1994), available at <http://nccanch.acf.hhs.gov/pubs/usermanuals/treatmen/treatmen.pdf> (discussing treatment issues for abused and neglected children, including intrapersonal issues such as fear, trauma, anxiety, guilt, and stigmatization).

assume that a child will be equally comfortable with a full or partial strip search conducted during an annual checkup and a full or partial strip search conducted during a child abuse investigation. The same distinction applies where the state is conducting a probing personal interview.

2. The Intrusiveness of the Investigations

Child maltreatment investigations are highly intrusive in two constitutionally relevant respects. First, as described in the Introduction and Part I, states' "take no chances" approach to defining and screening-in cases for investigation results in a disturbingly overbroad scheme that wrongfully captures hundreds of thousands of children within its auspices each year. Many of these children are victims of either intentionally fraudulent or simply erroneous reports.³⁰⁸ Second, the highly discretionary approach to conducting individual investigations often results in searches and seizures that are deeply intrusive in both symbolic and actual terms. Indeed, it is accurate to say that the authorities' very intent is to be highly intrusive, because only searches this thorough are sufficient to assure that all maltreatment can be identified.³⁰⁹

Home visits epitomize deep intrusion in both symbolic and actual respects. During these "visits," state officials do not merely cross the threshold into the realm of what is deemed to be ultimately private as a political and philosophical matter. They also quite literally storm the castle, opening closed bedroom doors to find, talk to, examine, and remove the children; opening and looking through refrigerators and cupboards to see if the children have sufficient food to eat; opening and searching closets and drawers to check if the children have enough clothing and that no inappropriate disciplinary methods are being used in the family.³¹⁰ They do this both during the day and at night.

308. See *supra* notes 8, 68-74 and accompanying text (breaking down these statistics).

309. See *supra* notes 44-65 and accompanying text (describing the requirement of "thorough investigations" and states' reliance on the right of their officials to conduct the investigations unfettered by procedures designed to safeguard the privacy of the family).

310. See *supra* notes 50-56 and accompanying text (examining the scope of the authorities' thorough investigations of the child's home environment).

Similarly high degrees of symbolic and real intrusiveness will often be involved as state officials search and seize children inside or outside of the family home, including for sequestered interviews with the child about private family matters, and for physical examinations of the child's body. John Doe, Jr.'s story is exemplary of the former, as it involved unfamiliar CPS and law enforcement officials physically removing fourth-grade John Jr. from his classroom in the middle of the day without his parents' knowledge, and taking him to an unoccupied room where these officials interviewed him alone about private family matters in connection with an ultimately unfounded allegation of excessive discipline by the school's principal.³¹¹ The stories of Jackie Roe³¹² and Jessie and Lauren Wallis³¹³ are exemplary of the latter, as they involved CPS, medical, and law enforcement officers conducting physical examinations of young children, including physical examinations of their genital and anal areas, in connection with ultimately unfounded suspicions of sexual abuse.

Of course, searches and seizures of the person may vary in the degree of their intrusiveness. In this regard, children are no different than adults. Thus, brief interviews of children conducted outside the home and in circumstances where they are clearly not uncomfortable are likely to be judged less intrusive than the sequestrations, removals, interviews, and physical examinations that I have just described. Nevertheless, the Court has been clear that an investigation's intrusiveness is enhanced significantly when an intent exists to turn over its fruits to a third party, especially to law enforcement.³¹⁴ Thus, although a brief detention and interview

311. See *supra* notes 88-115 and accompanying text (describing the case *Doe v. Heck*, 327 F.3d 492 (2003)).

312. See *supra* notes 1-2 and accompanying text (describing the case *Roe v. Tex. Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002)).

313. See *supra* notes 116-27 and accompanying text (describing the case *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000)).

314. Compare *Ferguson v. City of Charleston*, 532 U.S. 67, 78-79 (2001) (finding that the state hospital urine screens designed to obtain evidence of illegal substance abuse by pregnant women were particularly intrusive in part because the evidence was intended for use both by hospital workers and law enforcement officials), with *Bd. of Educ. v. Earls*, 536 U.S. 822, 833 (2002) (finding that public school urine tests are not intrusive in part because "results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences."), and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (finding that public school urine screens designed

of a child ordinarily may involve limited intrusion, the intrusion appreciates significantly when the police either conduct or assist with the investigation, or when they otherwise are associated with it from the beginning. And certainly, the intrusiveness inherently involved in a residential search, a long detention, or body search of a child, is exacerbated in these circumstances.

Finally, regardless of its beneficent motives, when the state intrudes in the ways that I have just described, it may also cause real emotional and psychological harm. These consequences must also be weighed in the ultimate calculus of reasonableness. Probably because the subjects of unsubstantiated reports are unknown to researchers, there is a dearth of empirical evidence to support this proposition. The few related studies support my assumption that as a result of the investigation, family members, including children, suffer from a range of responses including trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation.³¹⁵ And in the ultimate irony,

to obtain evidence of illegal substance abuse by student athletes were not intrusive in part because the evidence was intended exclusively for use by school officials and would not be turned over to law enforcement), and *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985) (“This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.”).

315. See *supra* note 307 (citing studies to this effect). It should be noncontroversial otherwise that interventions designed from the outset to help children can also cause them harm. See, e.g., Craig Elliott, *Psychological Interventions for Children with Cancer Undergoing Invasive Medical Procedures: A Meta-Analysis of the Research*, in 59 (9-B) DISSERTATION ABSTRACTS INTERNATIONAL: SECTION B: THE SCIENCES & ENGINEERING 5110 (1999) (describing children’s frequent and unabated stress responses to routine cancer therapies, and ways clinicians can mediate such responses); Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, in 57(5) MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT: 1-142 to -161 (1992) (describing the short- and long-term stress reactions of child victims of sexual abuse who are required to testify in court against their alleged abusers); Myron A. Hofer, *On the Nature and Consequences of Early Loss*, 58(6) PSYCHOSOMATIC MED. 570-581 (1996) (describing results of studies on maternal deprivation which show “a number of discrete sensorimotor, thermal, and nutrient-based events that have unexpected long-term regulatory effects on specific components of infant physiology and behavior”); C.M. Kuhn & S.M. Schanberg, *Responses to Maternal Separation: Mechanisms and Mediators*, 16(3-4) INT’L J. OF DEVELOPMENTAL NEUROSCIENCE 261-70 (1998) (“Consequences of disrupting mother-infant interactions range from marked suppression of certain neuroendocrine and physiological systems after short periods of maternal deprivation to retardation of growth and behavioral development after chronic periods.”). The difference between these contexts and that which is at issue in this Article is that the children here do not need these interventions, and so the harms that are

children who are subject to genital examinations appear to experience the investigatory examinations as sexual abuse.³¹⁶ Nevertheless, it is anecdotal evidence and human intuition that today provide the best proof that the state can cause serious harm to the children it seeks to rescue. In addition to the facts and cases described in Part I, what happened to three-year-old Lacey Doe when a well-intentioned CPS official made a “reasonable mistake” in investigating allegations of paternal maltreatment exemplifies this proof:

The agency screener characterized this supposedly neglected child, a few hours after being whisked away, as “friendly and cooperative.... She appeared to enjoy watching cartoons and playing with toys, exhibited curiosity about her surrounding. She displayed no anxiety to be among strangers and ate a sandwich, chips and cookies hungrily.” ... After being bounced around in the agency and foster-parent bureaucracy for over a year, Lacey was quite a different little girl. She was “diagnosed with Post Traumatic Stress Disorder, hearing voices, and suicidal ideation.” She was put on anti-psychotic medication. She had taken to smearing feces and to other abnormal and highly disruptive behavior. Though Lacey had somehow held her personality together through her mother’s death, her father’s lack of financial success, and the move back to California, what the county did to her to “protect” her apparently destroyed her. Something in this experience, perhaps being ripped away from her father for whom she consistently expressed love during the whole miserable period, perhaps having strangers strip her and search her heretofore private parts, perhaps being put with caretakers instead of her father, amounted to a trauma that was too much for her.³¹⁷

incurred as a result are less easily justified.

316. John Money & Margaret Lamacz, *Genital Examinations and Exposure Experienced as Nosocomial Sexual Abuse in Childhood*, 175 J. NERVOUS & MENTAL DISEASE, 713-21 (1987) (peer-reviewed article setting out this finding and noting the implications of sexual abuse by care providers).

317. *Doe v. Lebbos*, 348 F.3d 820, 834 (9th Cir. 2003) (Kleinfeld, J., dissenting) (citations omitted).

C. *The Government's Needs*

The individual interests just described are to be balanced against the government's need to forego compliance with the presumptive requirements of the Warrant Clause.³¹⁸ In this context, the burden is on the government to prove that such compliance would be impracticable and would "frustrate the [legitimate] governmental purpose behind the search."³¹⁹ And while some Justices appear to require more, the government must at least demonstrate that the means it has chosen to effect its purpose are somewhat effective.³²⁰

In the child welfare context, the government's overarching objective is protecting children from harm. The immediate objective of the investigation is to determine whether evidence exists to substantiate an allegation of abuse or neglect. In defense of conducting the investigation outside the Fourth Amendment's requirements, the government can argue that forced compliance with the Warrant Clause would substantially undermine its mission to protect child welfare by making the business of conducting investigations more difficult. In addition to the insufficiency of the consent and exigent circumstances exceptions which have already been addressed, three arguments support this position.³²¹

1. *The Practicability of the Warrant Requirement*

The government can argue that the warrant process itself—taking the time to visit a judge and for the judge to consider the application—is impracticable and frustrates the governmental purpose behind the search. Specifically, state officials claim they need to act quickly to investigate reports of abuse or neglect to ensure that maltreated children are saved from their unfortunate circumstances before it is too late; the implication is that the cumbersome warrant process would impede the states' ability to

318. See *Vernonia*, 515 U.S. at 652-64 (applying a balancing test to determine the reasonableness of a government action infringing on an individual's Fourth Amendment interests).

319. *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967).

320. Cf. *Vernonia*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.").

321. See *supra* notes 154-59 and accompanying text (explaining why these traditional exceptions are not the child welfare exception states purport to need in this context).

save at least some of these children.³²² The government also can argue that the requirement of a “particularized” warrant substantially diminishes the flexibility that state officials need during an investigation to leave no stone unturned in their search for evidence of maltreatment. If, for example, the report alleges that a child has been excessively disciplined with a whip, and the court issues a particularized warrant that allows the state to investigate only whether the child has injuries consistent with this or some substantially similar disciplinary method and whether a whip-like apparatus is located in the home, the government’s ability to open the refrigerator and cupboards to determine whether the child is also the victim of nutritional or other neglect will be hamstrung by the restrictive terms of that warrant. Finally, the government may argue that resort to a neutral magistrate to evaluate the need for and scope of a particular investigation is unnecessary because CPS officials in the field are best suited by their specialized training and experience to weigh the relevant individuals’ privacy rights against the states’ special need quickly to find evidence.

The argument that the states need to circumvent the warrant process to assure that children in emergency need of assistance are reached without undue delay is without merit. The exigent circumstances exception precisely covers this situation. The fact that it does not permit warrantless interventions based solely upon a mere suspicion that a child is at risk of serious harm is unhelpful to the states’ position; as Jessie and Lauren Wallis’s story illustrates, there is no reasonable basis in such cases to permit officials to perpetrate the kind of violence on the family that the drama of an emergency necessarily creates.³²³ As the first judge who reviewed their case intimated, an official midnight entry into the family home and the subsequent removal of the two young children to an institutional setting on the basis of a psychotic woman’s rantings about satanic sacrifices ought not to be permitted, pure

322. For example, this argument was accepted by the trial court in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (reporting in part on the decision below). There, the federal district judge wrote, “the more serious problem with the [warrant] procedure is that a delayed examination of a child may simply come too late to protect a child in imminent danger of grave bodily harm or even death. Unfortunately, there is no quicker way of knowing whether a child is at grave risk than by an actual examination of the child.” *Id.* at 899.

323. See *supra* notes 116-27 and accompanying text (describing the facts of *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000)).

and simple.³²⁴ Additionally, the statutes, protocols, and practices of many if not most states contain embedded delays for investigating all but the most obvious emergency reports. In these circumstances, unnecessary emergencies are actually created by the states themselves.³²⁵

Moreover, although the states may prefer to have unfettered discretion to investigate families and their homes in pursuit of their comprehensive approach to evidence gathering, in general this approach is unnecessary to assure that the child is safe from the specific harm alleged in the report. Thus, for example, if the allegation is that a child is inadequately clothed and cleaned, it may be useful for other reasons for the state also to investigate whether the home has smoke detectors, whether the family is also experiencing domestic violence, and generally whether the child's environment is suitable.³²⁶ However, these extra searches are unrelated except perhaps in a most tangential way to the state of the child's wardrobe and hygiene. Nor is there any emergency that compels these searches. Because of this, and because the law—in contrast with other disciplines perhaps—continues to privilege privacy, dignity, and personal security even after a violation is suspected, it does not permit the state to take advantage of the fact that it has gotten into the house to go on a fishing expedition. Such expeditions are anathema to the values at the core of the Fourth Amendment which exists precisely to fetter the discretion of government officials.³²⁷

Finally, there is little merit to the argument that the neutral magistrate is unnecessary in this context, or that state officials are better suited in general to evaluate the reasonableness of a

324. *Wallis*, 202 F.3d at 1131.

325. The facts in *Doe v. Heck*, 327 F.3d 492, 499-508 (10th Cir. 2003), also described in Part I, are particularly illustrative of this last point. See *supra* notes 88-115 and accompanying text. The authorities in that case waited two months to initiate an investigation of a woman's allegations that the private school her child attended had excessively disciplined her and perhaps other children. *Heck*, 327 F.3d at 500. Once the state finally sought to enter the school and interview John Doe, the principal target of the investigation, it attempted to proceed based on the emergency exception to the warrant requirement, without any evidence that the circumstances warranted this designation.

326. See *supra* notes 55-56 and accompanying text (describing these extra searches North Carolina requires its officials to pursue as they investigate specific unrelated maltreatment allegations).

327. See *supra* notes 130-38 and accompanying text (describing this foundation).

particular intrusion on the children's or the family's privacy. Indeed, as two previous commentators have already emphasized, the preservation of the neutral magistrate's role is tremendously important.³²⁸ Too many officials on the ground are undertrained in relevant respects. Moreover, experience shows that children and families cannot count on officials to exercise their discretion in objectively reasonable ways. In particular, CPS and the police often assume guilt at the outset, and thus approach the evidence-gathering process with an eye toward proving that assumption.

The case that introduced this Article is particularly noteworthy in this respect. It involved six-year-old Jackie Roe's apparently precocious awareness of things sexual or suggestive, and a challenge to the discretion exercised by a social worker who entered the family's home without a warrant to investigate her suspicion that the child had been the victim of sexual abuse. In the course of that visit, the social worker rejected the mother's efforts to curb the investigation or to call a lawyer, and she took photographs of the girl's labia in an open and closed position which she later turned over to her supervisor.³²⁹ When asked about the propriety of this aspect of the official's conduct, her supervisor "testified that she would not have taken the pictures but opined that the decision to do so lay within [the official's] discretion."³³⁰ The program director also "described the visual examination and pictures as appropriate because 'caseworkers are trained to find and document all available evidence during their investigations.'"³³¹ It is abundantly clear that no one working for CPS in this case felt confined by any external boundaries of reasonableness. It is also abundantly clear that no

328. Beeman, *supra* note 23, at 1037-39, 1046-47, 1051 (discussing the role of the warrant requirement in restraining official discretion to search and to seize and arguing that "[a]dequately protecting the family's privacy interest requires the imposition of a neutral and detached decision maker" to assure that someone other than the investigation official "decides if the criteria for investigating are met" and that "requiring warrants for investigatory home searches would afford families some protection against unjustified and often officious intrusion"); Hardin, *supra* note 23, at 539-41 (suggesting that a warrant is necessary to "provide a meaningful protection against arbitrary or oppressive state action," to assure that "the standard of evidence has been satisfied in the individual case," and "[to] discipline the child protective agency to carefully consider and document its decisions to make forced entries and searches").

329. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002).

330. *Id.*

331. *Id.*

one within that agency sought to balance their interest in conducting the investigation against either the child or the mother's interest in privacy and bodily security in the family home; or at least that if they did—for example, if the social worker attempted to value the mother's hesitation and concern about the nature and scope of her search—their assessment of the value of the family's privacy interest was dismissive at best. It is unimaginable that a judge objectively balancing the same competing interests would have issued a warrant that allowed an untrained state employee such unbridled discretion literally to pry into this young child's vagina and to photograph its particulars based on a report about a sexy dance in the locker room at day camp. The warrant process is essential to establishing the boundaries of reasonableness.

Finally, the need for a neutral arbiter to be part of this process is not an argument that state officials do not act in good faith. Rather, it is recognition that child maltreatment law formally privileges the exhaustive investigation over privacy. Thus, although officials are cautioned or encouraged to respect family privacy during their investigations,³³² it is irrational to assume that they can in fact reconcile these conflicting messages.³³³ Indeed, my argument is that they are legally bound *not* to give due weight to privacy as they do their work. Injecting a neutral arbiter into the equation enhances the likelihood if not assures that these two competing values will be more properly balanced.

2. The Practicability of the Probable Cause Requirement

The government may also argue that it needs to circumvent the probable cause requirement because the allegations in reports are often insufficient to meet this standard. Indeed, to continue to conduct thorough investigations of all screened-in reports, the government really must presume its ability to act on the lesser standard of mere suspicion. Without this “pass,” it will miss out on the opportunity to safeguard the health and welfare and even the lives of some at-risk children.³³⁴

332. See *supra* note 61 and accompany text (describing this policy objective).

333. See *supra* notes 62-65 and accompanying text (discussing this point).

334. See, e.g., *E.Z. v. Coler*, 603 F. Supp. 1546, 1558 (N.D. Ill. 1985) (suggesting that investigators would have trouble meeting the probable cause requirement and that this

This is all true. The probable cause and reasonable suspicion requirements would preclude pervasive home visits and examinations of children when officials merely suspect that a child is at risk. And the probable cause requirement would bar such investigations when officials cannot prove to a neutral judge or magistrate that a child likely has been injured or at risk. Either way, the authorities will miss some opportunities to help children in need. Therefore, the question is not whether the states need to avoid these evidentiary burdens to pursue the prevailing approach to maltreatment reports, but rather whether this policy itself is necessary. A meaningful response to this question requires careful evaluation and balancing of both its benefits and risks.

These benefits and risks are clear: On the one hand, the policy allows states potentially to save some children from private violence who would not be saved if stronger evidentiary burdens were placed on their officials' ability to investigate allegations that amount to no more than mere suspicion, and if these officials could not otherwise develop the required evidence. The majority of child fatalities that result from parental maltreatment involve children who were previously unknown to the government.³³⁵ However, a few of these children each year are known to the authorities, who are not able to save them because the relevant reports are either not investigated or cannot be substantiated.³³⁶ Thus, the concern in their regard is a real one. On the other hand, the prevailing approach to the child maltreatment problem results in the commission of millions of acts of public violence each year. As illustrated by the stories told throughout this Article, state officials cause real harm in their quest to protect children, including fear, humiliation, shame, and emotional devastation, not to mention the loss of the

requirement would therefore jeopardize the welfare of at-risk children). It is not known how many children at risk of serious harm would be jeopardized by a stricter evidentiary standard. As I have already explained, no definitive statistical evidence exists that breaks down the cases that are investigated but ultimately unsubstantiated. *See supra* note 8 (discussing the lack of such statistical evidence). Thus, although there is good reason to believe the authorities who, because of their experience, say that stricter standards would jeopardize some number of children, my evaluation must proceed on the basis of only this generalization.

335. *See supra* note 87 and accompanying text (noting this point).

336. *See supra* notes 81-83 and accompanying text (describing the facts of *State v. Wilkerson*, 247 S.E.2d 905 (N.C. 1978), in which a father killed his two-year-old son by throwing him against the side of the family's trailer).

children's and sometimes also their families' Fourth Amendment rights and the fundamental interests these implicate. Notably, hundreds of thousands of these acts of official violence are without any compensating benefit to the investigated children, either because the reports that trigger them are intentionally fraudulent, or because they are simply erroneous. The question begged by this juxtaposition is whether the states are justified in committing these many acts of public violence so that they can save some children from acts of private violence that otherwise would go undiscovered.

Recognizing that family privacy is at issue in this context, two other commentators focusing on home visits have suggested that officials should be required to prove to a warrant officer in advance that conducting the contemplated investigation would be reasonable. Specifically, Michael Beeman has argued that officials ought to be permitted to investigate maltreatment reports if they can show that the intrusion is reasonable in the circumstances,³³⁷ and Mark Hardin has argued that the investigation ought to proceed if a reasonable suspicion of maltreatment exists.³³⁸ In their view, intermediate standards like these—which fall between mere or no suspicion and probable cause—best balance families' and particularly parents' interest in privacy against the states' interest in reducing the number of at-risk children who would be the victims of the stricter probable cause standard.³³⁹

As I will elaborate in my “final accounting” below, I disagree with the prevailing approach of proceeding on the basis of mere suspicion, and with Beeman and Hardin's compromise, because neither reflects sufficient care and respect for the interests of the total population of investigated children. Rather, each focuses on

337. Beeman, *supra* note 23, at 1064-65 (urging that, despite its inapplicability on the facts, the *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), standard of reasonableness in the circumstances best balances parents rights and governmental needs.)

338. Hardin, *supra* note 23, at 530-32 (this “relaxed evidentiary standard” is necessary because of “severe and long-term potential consequences of child maltreatment” and because child abuse can be difficult to detect especially where preschool-aged children are involved.) Whether these two standards, “reasonable suspicion” and “reasonableness in the circumstances,” really are different in practice is questionable. Indeed, the *T.L.O.* standard upon which Beeman premises his distinction is generally considered to represent reasonable suspicion. See DAVIS ET AL., *supra* note 89, at 353 (noting that “[t]he Court in *T.L.O.* adopted a reasonable suspicion standard”). Consequently, I discuss Hardin's and Beeman's proposals together.

339. See *supra* notes 23, 162 (describing Hardin's and Beeman's positions).

the tension between the states' interests and parental privacy. In doing so, each ignores that it is the children who primarily pay the price for the states' investigatory policies. While it may be difficult to think of the equation this way, I believe that it is dishonest to ignore that children like Jessie and Lauren Wallis—who are safe and healthy but nevertheless targeted for investigation—are not interested in sacrificing their welfare or their rights to preserve the states' ability to protect other children who may be at risk even of death. Because we should do all that we can to respect their interests, but also because the states could protect at-risk children in other ways, their officials should be required to show probable cause before they conduct maltreatment investigations.³⁴⁰

3. The Administrative Burden Involved in Fulfilling the Requirements of the Warrant Clause

The government's third and final set of arguments centers on the overall administrative burden that the particularized warrant and probable cause requirements would impose on the states' child welfare systems.³⁴¹ As they exist today in many jurisdictions, the systems fundamentally rely on the ability to circumvent the Warrant Clause's strictures. Consequently, states could argue that imposing particularized warrant and probable cause requirements would be cost prohibitive and emotionally debilitating to the relevant state officials and agencies, many of whom are already overburdened, underpaid, and morally depleted. States also could argue that imposing the requirements of the Warrant Clause on state officials would increase the workload of family court judges around the country, many of whom are also overburdened like their CPS brethren.

340. See *supra* notes 11-16 and accompanying text (describing the combination of alternative strategies that could allow the states to do an even better job protecting maltreated children, and at the same time to minimize the harm investigations cause to children and families; acknowledging that these strategies would not be without cost, but arguing that such costs would be justifiable in ways that forcing the children to suffer the impacts of the prevailing approach is not).

341. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347-51 (2001) (focusing on the administrative burden involved in the state altering the apparently time-honored presumption that law enforcement officers can conduct a warrantless search and seizure if they reasonably believe they are witnesses to the commission of a crime).

Imposing the Warrant Clause's requirements would add pressure to an already taxed system. However, whether the additional pressure would be particularly difficult to absorb in the long run is unclear. Many if not most investigations would continue to proceed with consent or on the basis of exigent circumstances. Nevertheless, the new requirements would likely reduce substantially the total number of investigations conducted. And those investigations that were conducted would be significantly tailored and thus more easily administered. In the short run, of course, imposing these requirements would require the development of new protocols and procedures and additional staff training. And alternative investigatory strategies would have to be developed when access to the home and child initially is denied. But as with the long-term costs, there is a dearth of evidence suggesting that these additional burdens would be overwhelming or insufficiently offset by the related reduction in work that would result from the imposition of the Warrant Clause's traditional strictures.

In any event, notwithstanding the merits of this argument about costs, the system ought to be reformed because it currently is ineffective in important ways. That is, we can assume that substantial resources are being expended today in pursuit of the prevailing approach toward solving the maltreatment problem. It is also apparent that a significant percentage of these resources are wasted in the sense that they are expended on reports about children and families who do not need help or who the system ultimately does not help. Alternative strategies that could result in both a reduction of the existing administrative burden and in an amelioration of the maltreatment problem are not pursued with equal vigor. More precise and comprehensive reporting requirements and more refined conceptions of maltreatment, for example, would go a long way toward the development of a more effective program by reducing the number of cases investigated and the expenditure of resources to conduct alternative investigations. I acknowledged in the Introduction that such reforms would be neither cheap nor easy to implement.³⁴² And yet if there was ever a

342. Michael Wald first tackled the issue of reforming the states' broad definitions of abuse, neglect, and maltreatment, and the associated costs in his seminal article, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*. See Wald, *supra* note 22, at 987. His work resulted in important refinements, both at the statutory level

poster child for such a difficult cause, it is Kessler Wilkerson, the two-year-old baby killed by his father after repeated beatings witnessed by others who did not know abuse when they saw it, and who never bothered to report their observations in any event. The Constitution does not require the states to use the best approach to solving a problem. But I suggest that Kessler and the Wallis children are proof that the current approach outside the Fourth Amendment is not even a good one, and thus an argument that it needs to be preserved intact so as to minimize administrative costs is simply inadequate. No one, from the taxpayer to the child and family implicated by a report, to the responsible state agencies and officials, has a legitimate interest in propping up a failed program.

D. A Final Accounting

In the final analysis, the state's need to investigate is weighed against the individual's reasonable expectations of privacy and the intrusiveness of the specific search or seizure.³⁴³ Constitutional balancing tests, including this one, have been strongly criticized for their lack of rigor and for their outcomes, on the ground that they tend to reflect normative judgments rather than objective conclusions about the merits of the evidence.³⁴⁴ This is an important

and at the level of the agencies' processing of evidence in support of substantiation. Notwithstanding his unassailable arguments about the need to balance the risk of harm to children from maltreatment against the risk of harm from state intervention, however, state schemes continue to reflect a callous disregard for the damage the state itself can and does do to the children they are trying to protect.

343. See *supra* notes 318-20 and accompanying text (discussing this last aspect or prong of reasonableness analysis).

344. The legal literature is replete with this critique. For some recent examples, see Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 963 (2004) ("Individual rights may not act as 'trumps' over social welfare in all cases but neither are they always subservient to community interests. Balancing, then, becomes inevitable, but at the same time, difficult to do in a way that seems principled and not simply as a reflection of a particular court's subjective preferences."); Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 275 (2000) (lamenting that the outcome of special needs balancing reflects the personal inclinations of individual Justices); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 133-38 (2003) (discussing the extent to which constitutional jurisprudence has been "consumed" by balancing tests, and evaluating the critiques by realists that balancing tests permit judges to effectuate their "subjective preferences").

critique, as the Supreme Court itself often engages in conclusory balancing analysis, relying instead on its values-laden characterization of the relevant competing interests to justify its outcomes. Nevertheless, the balancing critique fails sufficiently to allow for the intuitive point that, as Learned Hand noted in the context of the Fourth Amendment, “when you are dealing with such admonitions as ‘unreasonable searches’ there appears to be ‘no escape in each situation from balancing the conflicting interests at stake.’”³⁴⁵ Nor is it inevitable that balancing analysis will lack rigor or that an outcome will be so imbued with personal orientation that it cannot be said to be legitimate. There may be no such thing as true objectivity, but this does not dictate nihilism in the law: We can be better and worse—it is our choice—at determining “reasonableness” and thus the “right” and “wrong” outcomes. Indeed, I suggest that thoroughness in the analysis begets good outcomes precisely because it forces a careful and thoughtful evaluation of the competing arguments about interests.

The discussion that immediately precedes this final accounting reflects the first real attempt at thoroughness in the face of individuals’ and states’ important competing claims as to the reasonableness of a child welfare exception to the Fourth Amendment’s presumptive requirements. My conclusion based upon that analysis is simply this: When all of the relevant interests are carefully evaluated—notwithstanding the almost religious sense of many child advocates to the contrary—there is a strong child-friendly case to be made for requiring valid consent, a real exigency, or a particularized warrant and probable cause before a state conducts a child maltreatment investigation that involves either a home visit or a sequestration and oral or physical examination of a child. These traditional procedures best balance the various private interests and public needs at issue in the child welfare context, by assuring that the state can conduct a properly circumscribed investigation when it has proved to a neutral evaluator that a child is probably at risk.

This approach uniquely respects the child’s own Fourth Amendment interest in privacy, dignity, personal security, and mobility, by recognizing that, in general, the vitality of these values is

345. LEARNED HAND, *THE SPIRIT OF LIBERTY* 179 (1960).

intimately and even inextricably linked to the child's sense that she is one with her family. At the same time, it allows for the reality that this unity is sometimes broken from within by abusive or neglectful parents, giving rise to the need for the state to intrude into the circle of family privacy when a child likely needs to be rescued. As applied in real-life cases, this standard would have permitted the state to intrude to rescue Kessler Wilkerson from his abusive father before he killed the baby by repeatedly throwing him against the walls of the family's trailer, if only one of the outsiders who later indicated that they had known about Kessler's situation had reported it in time to the authorities. And it probably would have protected two-year-old Jesse and five-year-old Lauren Wallis from the official investigation—triggered by a psychotic woman's report that their father intended to sacrifice Jesse to Satan—which involved midnight interviews conducted by police in their home, followed by a devastating and ultimately months-long separation from their parents, and CPS-ordered genital examinations in the hospital.

On the other hand, a careful look at the competing arguments shows that the case in favor of a child welfare exception to the Fourth Amendment is relatively weak, as it gives the state almost unfettered access to the child and to her home on the barest suspicion of maltreatment. Nothing is balanced about this approach: The state receives an abuse or neglect report (however strong or weak) and this alone permits its officials *constitutionally* unfettered access to the child and to her home. Although a version of this standard—the inherent reasonableness of the administrative scheme—has been approved in other contexts involving suspicionless searches,³⁴⁶ it has only rarely supported suspicion-based investigations.³⁴⁷ Indeed, as I have already suggested, the truly extraordinary deference afforded to caseworkers and the police under the prevailing approach to child maltreatment

346. See, e.g., *Camara v. Mun. Court*, 387 U.S. 523 (1967) (allowing a warrant to issue to a city official to conduct a routine suspicionless search of a rental unit for compliance with the housing code on the basis of the reasonableness of the administrative scheme).

347. See *supra* notes 132-35 and accompanying text (explaining the historical basis for the probable cause requirement and the concomitant rejection of targeted government searches conducted in the absence of a sound evidentiary basis).

investigations is similar in scope to that given colonial authorities under the universally abhorred general warrant.

The compromise “reasonable suspicion” standard suggested by Hardin and Beeman and adopted by some courts does recognize what the most absolute version of the child welfare exception rejects, namely that there are individual interests worthy of some consideration in the balance. However, because the compromise standard defines these interests primarily in terms of parental privacy, and specifically without relevant reference to the children’s multifarious concerns, the standard fails to give them due weight.³⁴⁸ It is simply an insufficient recognition of these concerns to say that the state is entitled to conduct exhaustive and often damaging investigations of the children and their families (amounting in many cases to a significant amount of public violence) so long as it can prove that there is approximately a thirty percent likelihood that the targeted child is at risk of some parental violence.

Proponents of the child welfare exception have succeeded in influencing policy and practice largely by masking the existence of the sympathetic argument on the other side, and the deep flaws inherent in the authorities’ claims of necessity. It is undoubtedly true that being able to circumvent the particularized warrant and probable cause requirements—in other words, the Fourth Amendment—would make the states’ child welfare job easier in many respects. Among other things, it would—and does today de facto—assure that investigations take less time, that the system as a whole uses less resources, that officials have more discretion to invade individuals’ privacy, and that many more investigations can be conducted. What is unconvincing, however, is the argument that states’ *need* these extraordinary allowances here any more than they *need* them in other instances involving heinous crimes or serious civil transgressions where the requirements of the Warrant Clause obviously apply.³⁴⁹ As the Tenth Circuit explained in *Dubbs*

348. See *supra* notes 23, 337-38 and accompanying text (discussing Hardin’s and Beeman’s privacy analyses) and notes 169, 173 and accompanying text (discussing the tendency of some lower courts to equate the Fourth and Fourteenth Amendments’ reasonableness standards, and to consider those standards as applying to incursions on parental autonomy and privacy).

349. *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989). This court’s view has since been echoed by others, including the Ninth and Tenth Circuits, that have continued to analogize child maltreatment to other deeply violent offenses, such as murder and rape, which specifically trigger the particularized warrant and

v. Head Start, Inc., a case involving challenges to incredibly invasive well-child examinations conducted without parental consent by the civil officials of a local Head Start program, the fact that the state “was acting in the interests of children, as it understood them” does not absolve it from having to comply with these requirements because among other things, they “serve[] important practical as well as dignitary concerns.”³⁵⁰

At bottom, what this argument fails adequately to reflect is that the Fourth Amendment’s presumptive requirements already recognize and allow the states to investigate crime and other social problems. The presumptive requirements just place some reasonable limits on official exercises of discretion both as to the number and scope of intrusions on privacy. If the claim is that the government’s need is different and more expansive here, so that it requires *systematically* unfettered discretion to invade individual rights, the case has not been made. It is obviously appealing simply to respond (as the Head Start officials did in *Dubbs*) that children are special and thus, because state authorities are acting in their interests, they “should not be hamstrung by legalistic requirements like warrants or consent.”³⁵¹ What I hope to have made clear is that this response is unsound in many if not most cases, both because the states in fact can do their child maltreatment work without

probable cause requirements. For example, in *Wallis v. Spencer*, the Ninth Circuit found that in the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the Constitution. The fact that the suspected crime may be heinous—whether it involves children or adults—does not provide cause for the state to ignore the rights of the accused or any other parties. Otherwise, serious injustices may result.

202 F.3d 1126, 1130 (9th Cir. 2000). And in *White by White v. Pierce County*, the Tenth Circuit stated that

[c]hild abuse is a heinous crime. So are murder and rape. Just as the repulsiveness of the latter two crimes does not affect the constitutional restrictions placed on police officers, neither should our repugnance to the former crime cause us to condone police procedures that infringe constitutional protections.

797 F.2d 812, 817 (9th Cir. 1986); *see also* *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1207 (10th Cir. 2003).

350. *Dubbs*, 336 F.3d at 1207. The searches in this case included genital examinations and blood tests conducted on preschool children who were placed together on tables in a classroom.

351. *Id.*

ignoring the Warrant Clause—it is not nearly so impracticable as they might suggest—and because the clause itself is a barrier to the converse problem that is the perpetration of public violence against children and families.

Perhaps most importantly though, proponents of a child welfare exception have succeeded in influencing policy and practice by telling a false story. This story posits family privacy as a bad thing—at least in this context—that only protects fringe and abusive parents from the scrutiny they properly deserve; here, mainstream and innocent parents have no stake in family privacy. The story further assumes that the interests of children who are subjects of screened-in maltreatment reports are aligned with those of the government rather than with their parents for the duration of the investigation, because they are either in fact being maltreated, or because they have a group-based stake in the existence of the prevailing approach to the child abuse problem. As in, “you never know, someday it could be me.”

Neither piece of this story could be further from our collective philosophical truth. As against the government, privacy, including family privacy, is valued in general for reasons that have absolutely nothing to do with rejecting a mainstream lifestyle or hiding personal flaws and dirty laundry. For example, I do not abuse or neglect my children, and they are quite secure in their relationships with me and their family. Nevertheless, I know that I would feel violated if state officials, either subtly or overtly, threatened their way into my home and searched through my cupboards and closets; and it is inevitable that my vulnerability would be felt by my children. I also know that my children would feel frightened, humiliated, and betrayed if a caseworker or police officer interviewed or examined them at school or took them to a doctor’s office to be examined. That the state would mean well, that its actions would be “for their own good” is something neither of them could even begin to believe for years to come, if ever. In this context, which is the context of this Article, privacy is essential to securing parental authority and the unity of the family group, and to the sense of dignity and personal security of its individual members especially the children. The law cannot realign the children’s interests away from their parents on the basis of a mere subjective suspicion of maltreatment and also be true to the children’s

developmental needs or their Fourth Amendment rights. The fact is, most parents are their children's first, best caretakers, and thus the time-honored presumption that parents act in their best interests is both deserved and necessary to the children's wellbeing.

Ultimately, the case in favor of a child welfare exception to the Fourth Amendment is flawed for the same reason that an unbounded and absolute notion of family privacy should be rejected: Both are extreme positions that fail to acknowledge the important individual and governmental interests at stake. As I have written elsewhere, the sovereignty of the family cannot be so impenetrable that it prevents the state from saving children who are at real risk of maltreatment.³⁵² At the same time, it cannot be so porous as to allow the state to storm the castle to "save" children who do not need saving. From the children's perspective, only a compromise conception that reflects appropriate respect for family privacy is just and healthy. The Fourth Amendment's traditional requirements precisely enshrine this conception.

One final note: As Justice O'Connor has written "[t]here is nothing new in the realization' that Fourth Amendment protections come with a price."³⁵³ If I am correct in this final accounting, and particularly in my view that the states can address most of their concerns in alternative ways that do not exact so much damage to our values and our children, the price of the Fourth Amendment in this context lies primarily in the inability of the states to investigate circumstances where parents choose to isolate themselves and their children from the scrutiny of others. In such cases, a child can be abused with almost complete impunity. I suspect that this concern largely drives much of the prevailing approach to child maltreatment investigations. In my view, however, it is wrong to

352. COLEMAN, *supra* note 4 (arguing that the doctrine of parental autonomy is too strong if it recognizes a parent's right to ignore her child's emotional and developmental well-being); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1093-100 (1996) [hereinafter Coleman, *Individualizing Justice*] (arguing that multiculturalism as a value is too strong if it forces courts to recognize traditional parenting practices that cause physical harm and even death to the children); *cf.* Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 717-24 (1998) (arguing that the states ought not intrude when immigrant parents seek symbolic compromises to traditional practices so that their children are not harmed).

353. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 680 (1995) (O'Connor, J., dissenting) (quoting *Arizona v. Hicks*, 480 U.S. 321, 329 (1987)).

force millions of apparently healthy children each year to undergo often deeply intrusive invasions—sometimes resulting in unjustified removals and even death in alternative homes—just to preserve the states' prerogative to intervene into the lives of these relatively few isolated families. Indeed, these situations point directly to the irony inherent in the child welfare exception: It causes more children more harm than good. Because of this it cannot be the solution to the problem of assuring the welfare of isolated children. Their unique circumstances represent an essential conundrum of American constitutional law that should not be solved at the expense of children generally.³⁵⁴

CONCLUSION

The battle to define the rights of individuals and the boundaries of official authority in child welfare cases has traditionally been seen as pitting the states' interest in saving children from maltreatment against their parents' interest in family or parental privacy. This account allows states to rationalize enormous intrusions on the family as they seek to determine which children actually need saving, because “the life of even one child is too great a price to pay for the possible increased degree of parental privacy” that would

354. As I and others have argued elsewhere, the First and Fourteenth Amendment doctrines which allow parents to raise their children as they see fit including outside the mainstream and completely isolated from others in the society are the genesis of the idea that “children are the Achilles heel of liberalism.” See *supra* note 17 and accompanying text (quoting this language and citing its sources); see also COLEMAN, *supra* note 4, at 99-107 (exploring the problems that strong religious and parental liberties create for the children who would be isolated as a result); Coleman, *Individualizing Justice*, *supra* note 352, at 1166-67 (developing the argument that immigrant children are denied equal protection when their parents' violent traditional practices are respected in the name of multiculturalism); James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1323 (1996) (exploring “the law's denial of equal protection to some children simply because of their parents' religious beliefs”). Using the historical precedent of mandatory schooling and labor laws, these First and Fourteenth Amendment doctrines could be made child-friendly so that parents would not be entitled to create the isolated conditions that allow those who abuse their children to do so with impunity. Constitutional evolution along these lines would certainly be an intrusion on parental autonomy, but in my view it would not intrude on family privacy and the children's individual privacy interests in the developmentally destructive ways that unwarranted Fourth Amendment searches and seizures do.

result from a less intrusive scheme.³⁵⁵ Thus, exploiting the absence of definitive law in the area, state officials largely ignore the Fourth Amendment's prohibition on unreasonable searches and seizures as they conduct exhaustive and unfettered investigations of the family home and the children who reside there.

The states' view of the children's own interests is consistent with their public policy objectives. That is, they assume the children would want state officials to take no chances, and to leave no stone unturned, in their effort to substantiate a maltreatment report. These generic children are willing to pay the price of the investigations—in separations from their parents, in probing personal interviews, and in pervasive medical, including genital, examinations—to realize the fruits of the states' approach. Acceptance of this view requires suspending the standard legal presumption that the children's interests are aligned with those of their parents until the state proves otherwise; and it requires accepting the opposite presumption that the children's interests are realigned with those of the state for the duration of the investigation. The heroes in this scene are the benevolent social workers and police officers who would rescue vulnerable or injured children from their bad parents before it is too late.

The trouble with this story is that it is only partly true; and as a result, it simply cannot support the temporary but nevertheless significant realignment of interests that justifies the child welfare exception to the Fourth Amendment. It is true that some parents abuse and neglect their children, and therefore, there are children who need to be saved. It is also true that social workers and police officers are mostly benevolent. The rest is categorically untrue: Children who do not need saving—most investigated children fall into this category—have no interest in a legal scheme that allows even benevolent state officials to assume that their good parents are no longer their best caretakers. And no child, whether she needs saving or not, is interested in a legal scheme that permits these officials absolute and unfettered discretion to launch invasive and often harmful investigations based upon such assumptions.

355. *Darryl H. v. Coler*, 801 F.2d 893, 899 (7th Cir. 1986) (quoting *E.Z. v. Coler*, 603 F. Supp. 1546, 1559 (N.D. Ill. 1985)).

The violence that these official investigations do to the children can be just as destructive as the private violence they seek to avert. And where no private violence exists—for example in the hundreds of thousands of cases each year involving intentionally fraudulent or simply erroneous reports—the state ends up being the (only) one, to cause the children harm. Recognizing this fact is essential to understanding why the presumptive protections of the Fourth Amendment, a particularized warrant and probable cause, are necessary to assure the integrity of the child welfare system. For it is only according to the balance these requirements strike that the children's interests, as well as those of their parents and the states, are given due respect.