

Letting the Fox Guard the Hen House: Why the Fourth Amendment Should Not Be Applied to Interviews of Children in Child Abuse Cases

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Introduction

An eight-year-old girl is being sexually abused by her father. She is ashamed and too frightened to tell anyone. A concerned teacher files a report with child protective services with no tangible evidence other than what she vaguely describes as troubling behavior. The parents are unwilling to cooperate and refuse to give parental consent for anyone in social services to speak with their child. Unfortunately, the information from the teacher is insufficient to establish probable cause to procure a warrant and interview the child to gain more information. Trapped in a deadlock, child protective services and the police are powerless to investigate or take any steps to protect this child who is being victimized.¹

A recent Supreme Court case confronted the applicability of the Fourth Amendment search and seizure doctrine to the investigation of child abuse cases. *Camreta v. Greene* presented the constitutionality of interviewing an alleged victim of child abuse without parental consent when one of the parents was the suspect.² By the time the case found its way to the Supreme Court, the child had reached the age of majority and the Court determined the case was moot—avoiding an opportunity to provide guidance to social

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1. This hypothetical is provided as an illustration of the compelling issues in this note and does not reflect actual events or people.

2. *Camreta v. Greene*, 131 S.Ct. 2020 (2011).

welfare agencies and parents.³ This Note will argue that the Fourth Amendment warrant requirement should not be applied to interviews of potential victims of child abuse in the context of an investigation to assess their safety. Child victims are witnesses, not perpetrators, taking them outside the scope of traditional Fourth Amendment jurisprudence. In the alternative, if the Fourth Amendment is applicable, situations where children are potentially victimized by their parents present an extenuating circumstance where procuring a warrant would run counter to the objectives of the Constitution and the State's interest in protecting these children. Additionally, although the Fourth Amendment is intended to protect individuals from encroachment by the government, a warrant requirement would actually obstruct investigations into these crimes and preclude many victims from receiving help.

Section I will provide background on the Supreme Court case, *Camreta v. Greene* and the Fourth Amendment predicament it represents. Section II will argue that the Fourth Amendment warrant requirement is not applicable to interviews with child victims because they are witnesses, not suspects in an investigation. Section III will argue that even if the Fourth Amendment is applicable in these situations, interviews of potential child victims falls under the special needs exception and a warrant should not be required. Section IV urges a reduced standard of proof to initiate interviews, from probable cause to reasonable suspicion. This balances the privacy of the child and potential trauma of forensic interviews with the State's interest in protecting at-risk children. Finally, this Note will conclude with a summary of what is at stake for these children, and how our constitutional protections are limiting the state's responsibility to protect those who cannot protect themselves.

I. Background of Child Abuse in America

Child abuse is an epidemic in the United States. According to the Child Abuse Prevention and Treatment Act, child abuse is defined as "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which presents an imminent risk of serious harm."⁴ If child protective services are hindered from investigating allegations of abuse, more and more

3. *Camreta*, *supra* note 2 at 2033.

4. 42 U.S.C. §5101 (1996).

children will remain trapped in harmful situations. In the United States in 2010, an estimated 1,560 children died from abuse and neglect.⁵ Of those fatalities, more than eighty percent (81.2%) were killed at the hands of one or more parent.⁶ If unaddressed, the cycle of abuse promises to inflate this trend in the years to come—of those children who grow up as victims of this abuse, almost thirty percent of will later abuse their own children.⁷

Although the Supreme Court found *Camreta v. Greene* moot,⁸ the case presents a representative example of the constitutional issues surrounding interview procedures for child victims.⁹ Nearly a decade ago, petitioner Camreta, a state child protective services worker, and petitioner Alford, a county deputy sheriff, interviewed then nine-year-old S.G. at her Oregon elementary school about allegations that her father had sexually abused her.¹⁰ They had neither a warrant nor parental consent to conduct the interview.¹¹ S.G. eventually stated that she had been abused.¹² After reviewing Camreta's petition and affidavit, the Juvenile Court issued a protective custody order authorizing the removal of S.G. and her sister from the Greene's

5. U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2009*. Washington D.C.: U.S. Government Printing Office (2010).

6. *Id.* at 23.

7. U.S. Department of Health and Human Services, *Long-Term Consequences of Child Abuse and Neglect*. Child Welfare Information Gateway. Washington, D.C. (2006). Retrieved from http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm. (last visited Mar. 30, 2012).

8. S.G.'s mother originally filed a §1983 action against Camreta and Alford, which authorizes suits against state officials for violations of constitutional rights. The district court granted summary judgment to Camreta and Alford based on qualified immunity and because no established law had warned them of the illegality of their conduct. *Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009) (hereinafter "Greene"). The Ninth Circuit affirmed but addressed the illegality of the issue to give guidance to others "charged with the task of protecting child welfare within the confines of the Fourth Amendment." *Id.* at 1022. Although the Ninth Circuit ruled in Respondent's favor, it held that their conduct did violate the Fourth Amendment and was impermissible absent a warrant or probable cause. *Id.* Even though the judgment was in their favor, Camreta and Alford petitioned the Supreme Court for certiorari to review the ruling that their conduct violated the Fourth Amendment. 131 S.Ct. 456, 457 (2010). In *Camreta v. Greene*, Supreme Court discussed whether someone who won final judgment in the court below can petition for review by the Supreme Court. 131 S.Ct. at 2027. They ultimately determined the issue moot and vacated the decision below. *Id.*

9. *Camreta supra* note 2 at 2027.

10. *Greene, supra* note 8 at 1016.

11. *Id.* at 1016–17.

12. *Id.* at 1017.

home.¹³ The Juvenile Court later ordered the children returned to their mother's custody.¹⁴ Her father stood trial for that abuse, but the jury failed to reach a verdict and the charges were subsequently dismissed.¹⁵

After the charges were dismissed, S.G.'s parents sued the child protective worker, Camreta, alleging a violation of their daughter's Fourth Amendment rights.¹⁶ When appealed to the Ninth Circuit, the Court of Appeals ruled that the interview conducted by Camreta and Alford violated S.G.'s rights because they had "seize[d] and interrogate[d] S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent."¹⁷ The Ninth Circuit further held that "government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context."¹⁸ To support its conclusion, the Ninth Circuit relied on the Supreme Court's statement in *Ferguson* that "none of the special needs cases have "upheld the collection of evidence for criminal law enforcement purposes."¹⁹ When interviewing S.G., however, "the presence of law enforcement objectives [was] evident. At the time of the seizure, police were actively investigating allegations of child sexual abuse against S.G.'s father and a police officer was present at S.G.'s interview."²⁰ The Ninth Circuit held that S.G.'s Fourth Amendment rights were violated, and to conduct the interview, probable cause or a warrant was required.²¹

The Supreme Court vacated the decision of the Ninth Circuit leaving it with no binding authority.²² As a result, social services agencies are left with little guidance on the applicability of the Fourth Amendment to these investigations. It is only a matter of time before this unresolved issue is heard by the Supreme Court again.

13. *Id.* at 1019.

14. *Id.* at 1020.

15. *Id.*

16. *Id.*

17. *Id.* at 1030.

18. *Id.* at 2033.

19. *Greene*, *supra* note 8 at 1027 (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.20 (2001)).

20. *Id.*

21. *Id.*

22. *Camreta*, *supra* note 2, at 2036.

Concededly, the facts of the *Camreta* case are not in favor of Camreta and Alford, who conducted the interview, because they did not follow protocol for conducting an interview with a minor suspected of being abused without unduly prejudicing the outcome.²³ However, the facts of this case are not dispositive of the seminal issue, i.e., whether police may interview a minor in similar circumstances, without parental consent.

The Ninth Circuit erred when it determined that nothing short of a warrant based on probable cause would render an interview of a potential child abuse victim at the child's school reasonable, and thus constitutionally permissible. Due to the unique nature of the crime of physical and sexual child abuse, a lower standard than the probable cause standard should be required to interview the alleged minor victims. In most instances, children are the only witnesses to the abuse. Especially when the abuse is sexual in nature, in many cases, there are usually no marks or scars to reveal what the child is enduring. Thus, in many instances, probable cause will be impossible to establish. Moreover, requiring parental consent to conduct an interview when probable cause cannot be established presents an obvious problem for law enforcement personnel and child protective services: the alleged perpetrator is in the position to authorize or deny access to the primary witness.

23. There are two overriding features of a forensic interview. First, forensic interviews are hypothesis-testing rather than hypothesis-confirming. Interviewers prepare by generating a set of alternative hypotheses about the sources and meanings of the allegations. During an interview, interviewers attempt to rule out alternative explanations for the allegations. Second, forensic interviews should be child-centered. Although interviewers direct the flow of conversation through a series of phases, children should determine the vocabulary and specific content of the conversation as much as possible. Forensic interviewers should avoid suggesting events that have not been mentioned by the child or projecting adult interpretations onto situations (e.g., with comments such as, "That must have been frightening"). The location of the interview is also important and should represent a neutral space. For example, a speech-and-language room in a school might be a better choice than the principal's office, because children often believe they are in trouble when they are called to the main office. Several guidelines about interviewer behavior, demeanor and communication should be followed throughout the interview. For example, interviewers should avoid wearing uniforms or having guns visible during the interview. Here, the police officer involved was in uniform and brandishing a weapon. State of Michigan: Governor's Task Force on Children's Justice and Department of Human Services, Forensic Interviewing Protocol (2004), http://www.traversecityfamilylaw.com/Documents/FIA-Pub779_13054_7.pdf.

II. The Fourth Amendment Does Not Apply to Interviews of Potential Child Victims Since They are Witnesses Not Suspects

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause[.]”²⁴ A seizure takes place where one reasonably believes that his or her freedom of movement has been restrained.²⁵ This definition has been applied to cases where individuals experience a seizure of their persons during a brief detention.²⁶

The framers, in an effort to protect themselves against what they considered unwarranted intrusions by the British government, included the Fourth Amendment in the Constitution.²⁷ The history of the Fourth Amendment illustrates a fear of “oppressive general search[es], executed through the use of writs of assistance and general warrants.”²⁸ Some scholars, including Justice Scalia, promote a strict reading of the Fourth Amendment to include only its meaning in the historical context.²⁹ Many others, however, have expanded upon the ideas of the original framers to include an understanding of the Fourth Amendment that evolves with changes in our society and technology.³⁰

Many circuits have held that child abuse investigations constitute Fourth Amendment “searches” and “seizures” and that child protective services personnel and the police participating in such investigations are state actors.³¹ It is also clear that children maintain

24. U.S. Const. amend. IV.

25. *United States v. Mendenhall*, 446 U.S. 544, 552 (1980).

26. *Id.* at 551.

27. The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance From the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 921 (2010).

28. *Id.* at 921.

29. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (“In determining whether a particular governmental action violates [the Fourth Amendment’s unreasonableness] provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed”).

30. Michael, *supra* note 28 at 920.

31. *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 . . . [t]hus, 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). *See also Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 401 (5th Cir. 2002) (“The Fourth Amendment regulates

constitutional protections which limit the exercise of state power.³² Children are certainly afforded protection of the Fourth Amendment when faced with investigations of their alleged criminal conduct. However, to apply the Fourth Amendment where the child is allegedly being abused ignores the fundamental difference between State action here and in other criminal proceedings: The child being interviewed here is a victim, not a suspect.

It is well established that parents have a protected liberty interest in the custody, care and management of their children.³³ The Supreme Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.³⁴ A parent's interest is not absolute. It is limited by the compelling government interest to protect children—"particularly where the children need to be protected from their own parents."³⁵ Accordingly, familial integrity "does not include a parent's right to remain free from child abuse" investigations.³⁶ Therefore, a parent's right to be free of searches or seizures of their children is limited insofar as the state's protective function is measured and implemented.

A. The Fourth Amendment in Child Welfare Cases

Courts have recognized in some circumstances that the need to further child abuse investigations outweighs the need to obtain a warrant. These courts have put the child's protection at the forefront of the issue and their analysis should guide other courts presented with this issue.

In *State v. Hunt*, the family housekeeper reported that she observed an injured child in the Hunt household.³⁷ The court upheld entry into the home, the search for the child, and the interviews on

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").

32. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) (Upholding a minor's freedom of speech rights.); *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (both recognized a child's right to be free from unreasonable searches while at school).

33. See *Lehr v. Robertson*, 463 U.S. 248 (1983); see also *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123 (3d Cir. 1997).

34. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

35. *Croft*, 103 F.3d at 1125.

36. *Id.*

37. *State v. Hunt*, 406 P.2d 208 (Arizona 1965).

the scene by the responding police officer.³⁸ There, a housekeeper found one of the children “lying on her stomach in the unlighted, dark furnace room, her head underneath the hot water heater, her hands tied behind her back . . . her face bloody, and what appeared to be strap marks on her face.”³⁹ The police officer, in response to the housekeeper’s report, entered the home without a warrant, found the child and after a brief interview removed the child from the home.⁴⁰ Although the police officer lacked sufficient probable cause for a warrant, the court explained that in that context, the police officer was acting as an agent of the juvenile court and the primary objective of the search was to protect the child, not to investigate a crime.⁴¹ The court held that any peace officer “with reasonable cause to believe that a child’s health, morals or welfare were being endangered had not only the lawful *right*, but the lawful *duty*” to conduct an investigation, search or remove the child.⁴²

Furthermore, in *Wyman v. James*, the Supreme Court held that home visits by welfare caseworkers did not invoke the Fourth Amendment because their primary objective was the welfare, not the prosecution, of the recipient.⁴³ The Court looked to the reasonableness of the visits and focused on the fact that noncompliance did not result in criminal prosecution⁴⁴ and the information from the home visit could not be equally obtained elsewhere.⁴⁵ Moreover, the Court stressed that the primary focus of these visits was the dependent child and “only with hesitancy [should] we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.”⁴⁶

Conversely, the Ninth Circuit, in *Calabretta v. Floyd*, required a warrant for police to search a home when the primary purpose was to investigate child abuse allegations.⁴⁷ There, a social worker received a tip from a neighbor who claimed to have been awakened late at night

38. *Id.*

39. *Id.* at 212.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Wyman v. James*, 400 U.S. 309, 323 (1971).

44. *Id.* at 325.

45. *Id.* at 322.

46. *Id.* at 318.

47. *Calabretta v. Floyd*, 189 F.3d 808, 810 (9th Cir. 1999).

by a child screaming “No Daddy, no!”⁴⁸ Suspecting abuse, the social worker and a police officer visited the home, entered without consent, and interviewed and examined the children.⁴⁹ The family later brought suit, alleging violation of their Fourth Amendment rights.⁵⁰ The defendants argued that the search was reasonable because “any check on the welfare of children” triggered the “exigent circumstance[s]” exception to the Fourth Amendment’s warrant requirement.⁵¹ They further argued Fourth Amendment protections do not apply to child abuse investigations, as these investigations are administrative searches requiring neither probable cause nor a warrant.⁵² The Ninth Circuit rejected both arguments holding that the family had a right to be free of warrantless searches and seizures in their home, even within the context of a child abuse investigation.⁵³

Also, in *Doe v. Heck* the Seventh Circuit held that an interview of a child at a private school for suspected abuse violated the child’s Fourth Amendment rights.⁵⁴ The court determined that the Fourth Amendment was applicable and a search and seizure had taken place when the child was interviewed.⁵⁵ The court analyzed both the subjective and objective expectations of privacy that the parents held in the private school to determine the reasonableness of the search and seizure.⁵⁶ Because young children do not often express subjective expectations of privacy, the court substituted the expectations of the parents.⁵⁷ Moreover, because the parents chose to send their child to private school, the court concluded that they had a reasonable expectation of privacy that the child would not be interviewed about their family life without their consent.⁵⁸

48. *Id.*

49. *Id.* at 810–12.

50. *Id.*

51. *Id.* at 811.

52. *Id.* at 812.

53. *See id.* at 817. *See also* Wallis v. Spencer, 202 F.3d 1126, 1130 (9th Cir. 2000); Rogers v. County of San Joaquin, 487 F.3d 1288, 1291 (9th Cir. 2007).

54. *Doe, supra* note 31, 327 F.3d at 512.

55. *Id.*

56. *Id.*

57. *Id.* (citing Darryl H. v. Coler, 801 F.2d 893, 901 (7th Cir 1986) for the proposition that when a child is searched by the government for purposes of a child abuse investigation, “[a]lso at stake . . . are the closely related legitimate expectations of the parents or other caretakers, protected by the fourteenth amendment, that their familial relationship will not be subject to unwarranted state intrusion”).

58. *Id.*

Here, as in *Hunt*, the Fourth Amendment is not implicated because the primary objective of child protective agents is the welfare of the children they are interviewing. Even police officers can act as agents of social services to fulfill the primary objective of protecting the child from a potentially harmful situation. As in *Wyman*, any noncompliance by a child victim would not result in criminal prosecution. Additionally, the opportunity to interview the child victim presents a unique opportunity to gather information that cannot otherwise be obtained. Physical and sexual abuse often occurs in the privacy of the home and the child is often the only witness to the abuse. Without the opportunity to interview the minor, the police would be unable to gather essential information to determine whether or not the child is safe.

The case of a child victim being interviewed at school is factually distinguishable from *Calabretta* because that case involved a search of the home, which has historically been given increased protection. It is possible that the weight given to the protection of homes might, in some cases, outweigh the State's interest in child abuse investigations. This, however, should not preclude any and all interviews of children under similar circumstances. Where the interview is done at a school or does not include a search of personal effects or property, the State's interest outweighs that of the individuals involved.

Additionally, *Heck's* reliance on the heightened expectation of privacy in a private school is misplaced. Such a conclusion would lead to children having varying Fourth Amendment rights as a result of their parent's socioeconomic status or general ability to send them to a private school. Furthermore, the *Heck* Court's reliance on the premise that parents have a property interest in their children such that it is their own expectations of privacy that are material is misguided. Fourth Amendment analysis in this context, as in *Hunt* and *Wyman*, should focus on the child and the safety of the child not as property of their parents but as separate individuals.

Interviews of children can be conducted within reasonable parameters so as to balance the need for investigation of these crimes while still limiting the intrusion of the government into an impermissible area. Where a child is otherwise defenseless against potential abuse, the government's interest in the search or seizure outweighs any slight infringement that might result.⁵⁹ If a parent

59. There is no question that allegations can be unsubstantiated and, in extreme cases, can amount to an infringement both for the child and the parent. However, there

could subjectively manifest an expectation of privacy in their children by sending them to private school, that would have to be an expectation of privacy that was objectively reasonable—that society was prepared to accept.⁶⁰ Even if this is objectively reasonable it should not extend to students in public schools. Indeed, the Fourth Amendment principles as applied to students have otherwise been relaxed on public school campuses.⁶¹

B. The *Terry* Doctrine in Child Welfare Cases

The Supreme Court has held that the reasonableness of a search or seizure should be assessed in the context of the encounter.⁶² In *Terry v. Ohio*, the Supreme Court upheld the brief stop and “pat down” of an individual suspected of being involved in the commission of a crime.⁶³ There, the *Terry* Court acknowledged that the officer involved seized and searched the individual but no warrant was required because the warrant requirement was not implicated.⁶⁴ The Court noted that there were circumstances where an officer had a heightened need to protect themselves or other possible victims in situations where they lack probable cause.⁶⁵ Although these actions would not be tested against the warrant requirement, the Court nonetheless analyzed the officer’s actions in terms of reasonableness.⁶⁶ The *Terry* Court adopted a reasonableness test for searches and seizures: “first . . . focus[ing] upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen [and] balancing the need to search (or seize) against the invasion which the search (or seizure) entails.”⁶⁷

Here, as in *Terry*, the short-term seizure of a child *witness* does not implicate the warrant requirement. Accordingly, the reasonableness of the seizure is assessed by balancing the government interest justifying the intrusion and the constitutionally protected

are safeguards within the social services framework that protect these interests while also allowing for the investigation into potential child abuse.

60. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

61. *See generally* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

62. *Terry v. Ohio*, 392 U.S. 1 (1968).

63. *Id.* at 30.

64. *Id.* at 20.

65. *Id.* at 24.

66. *Id.* at 20.

67. *Id.* at 20–21.

interest of the child. Here, the government interest involves the need to protect vulnerable children from victimization at the hands of their parents. As *parens patriae*, the State has an “urgent interest” in the welfare of all children.⁶⁸ The State is thus charged with protecting children who are not yet able to protect themselves from suffering the trauma of child abuse. According to the Supreme Court, “there is no more worthy object of the public’s concern.”⁶⁹

Although children have a competing interest to be free from government intrusion, that need is not outweighed by the State’s interest in protecting them. Clearly, giving more weight to the child’s constitutional rights over the State’s interest would effectively thwart efforts to ensure their safety. When the government is involved in an investigation of a crime, it is the individual’s liberty interest that is juxtaposed with society’s interest in the safety of its citizens. Here, however, it is the child’s liberty that is at the same time juxtaposed with their own interest in safety and society’s interest in protecting children. The individual and community interests in these two scenarios are markedly different. Therefore, social services, when acting to investigate a child abuse allegation, should implicate the *Terry* Doctrine. Reasonable searches and seizures, commensurate with the government interest in protecting children, should be permissible and fall outside the scope of the warrant requirement.

III. If the Fourth Amendment Applies, Interviews of Alleged Child Abuse Victims Fall Under the Special Needs Exception to the Warrant Requirement

The Supreme Court has frequently held that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable.”⁷⁰ The Court has included an exception to the general rule known as the “special needs doctrine.”⁷¹ This doctrine identifies “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”⁷² Generally, these exceptions include community functions of law

68. *Lassiter v. Dep’t of Soc. Services*, 452 U.S. 18, 27 (1981).

69. *Wyman*, *supra* note 43.

70. *Katz*, *supra* note 60 at 357.

71. *Ferguson*, *supra* note 19, at 78.

72. *T.L.O.*, *supra* note 32 at 351 (Blackmun, J., concurring).

enforcement where the primary objective of the search is beyond that of ordinary law enforcement.

If the Fourth Amendment is to be applied to child abuse situations at all, the special needs exception should govern. Where the potential for self-incrimination is minimal or unlikely—as it is here and where State officials are interviewing a potential child victim of a crime—a seizure’s “entanglement with law enforcement” is an irrelevant inquiry.⁷³

A. Special Needs Doctrine Overview and Supporting Case Law

In some situations, the Supreme Court has lowered traditional Fourth Amendment protections “when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”⁷⁴ The Supreme Court has upheld searches of individuals subject to government control or supervision, such as searches of prisoners⁷⁵ or parolees.⁷⁶ It has also upheld drug testing for employment as permissible warrantless searches.⁷⁷ Drug testing of students as a condition of participation in school activities

73. See, e.g., *Illinois v. Lidster*, 540 U.S. at 424–25 (“Like certain other forms of police activity, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual”); *New York v. Burger*, 482 U.S. 691, 713–16 (upholding constitutionality of regulatory search scheme notwithstanding the fact that, “in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself”).

74. Although the term “special needs” was first used by Justice Blackmun in his concurring opinion in *T.L.O.*, *supra* note 32, at 351 (Blackmun, J., concurring), the doctrine is rooted in the Supreme Court’s decision in *Camara v. Mun. Court*, 387 U.S. 523 (1967), which addressed the constitutionality of San Francisco’s warrantless building inspection program. Since *Camara*, the Court has applied the doctrine in a number of contexts in which such “special needs” exist. *Greene*, *supra* note 8, at 1037 n. 10.

75. *Hudson v. Palmer*, 468 U.S. 517 (1984).

76. *Griffin v. Wisconsin*, 483 U.S. 868 (1987). (warrantless search appropriate because probationers and parolees have a diminished expectation of privacy). See also *Moore v. Vega*, 371 F.3d 110, 115 (2d Cir. 2004); *U.S. v. Loney*, 331 F.3d 516, 520 (6th Cir. 2003); *U.S. v. Oliver*, 931 F.2d 463, 465 (8th Cir. 1991).

77. See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (upholding regulations requiring railroads to administer drug tests to employees involved in certain train accidents or violating certain safety rules); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug testing of employees seeking transfer or promotions that involved direct contact with drug interdiction or the carrying of firearms.). See also *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149 (1993) (special needs exception justified drug testing of airline mechanics because of the strong public interest in airline passenger safety). *But see, e.g.*, *19 Solid Waste Dep’t Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1074 (10th Cir. 1998) (disallowing drug testing of mechanics because “manner in which the City’s drug testing policy [was] executed indicated that it lacks a real capacity to address drug use in the workplace”).

also falls under the special needs exception and the general exception for public school students.⁷⁸ A third common category for the exception is for DUI checkpoints on highways⁷⁹ and general highway stops for investigatory purposes.⁸⁰ In all of these cases the Court has noted that the objective of the search is not focused on the investigation of a crime, but rather to uphold general principles of safety in the community. The fact that the product of the search might produce evidence of criminal activity, such as drug use, was tangential to the validity of the search or seizure. Here, also, the purpose of such interviews with minors is to further community safety. Likewise, any product of those interviews that would further a criminal investigation is tangential to the overall purpose of making sure these children are protected.

For example, in *Illinois v. Lidster*, the Supreme Court considered the constitutionality of detaining potential witnesses to a crime.⁸¹ At issue was whether the brief, suspicionless detention of motorists at a police checkpoint amounted to an unreasonable seizure.⁸² There, the purpose of the seizure was to determine if anyone had witnessed a recent hit-and-run accident in the area.⁸³ The Supreme Court first recognized that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime," but rather to solicit assistance in gathering information about a crime that someone else committed.⁸⁴ The Court reasoned that when officers seize a potential witness, "by definition, the concept of individualized suspicion has little role to play."⁸⁵ The Supreme Court

78. See *T.L.O.*, *supra* note 32 (upholding the search of a student based on reasonable suspicion and without a warrant.); *Matter of D.D.*, 554 S.E.2d 346 (North Carolina 2001) (upholding a search of minors on a high school campus that were not students); *In re Johnny F.*, 2002 W.L. 397046 (L.A. County Super. Ct. 2002) (upholding a subsequent search reasonably related to the circumstances justifying the initial search where the searches were supported by reasonable suspicion). These cases highlight the trend in keeping certain searches and seizures outside the scope of the Fourth Amendment analysis. Like these searches or seizures, an interview with a potential child victim serves the public interest and promotes safety in the community. Additionally, like many of the drug testing cases, the direct purpose of the search is not the investigation of a crime, although in many cases using drugs is also a crime.

79. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that the interest in eradicating drunk driving outweighed any slight intrusion on drivers).

80. See *Illinois v. Lidster*, *supra* note 73, at 419.

81. *Id.*

82. *Id.*

83. *Id.* at 422.

84. *Id.* at 423 (emphasis in original).

85. *Id.* at 424.

then concluded that the seizure of the individual to determine whether he was a witness to a crime was both reasonable at its inception and in its scope because the stop was tailored to the need, was minimally intrusive given the government interest, and they were uniformly administered.⁸⁶

The Supreme Court also took notice of searches on school campuses as being included in this special needs exception.⁸⁷ In *New Jersey v. T.L.O.* the Supreme Court balanced the constitutional rights of the children on campus with the compelling interests of the school officials and determined reasonable suspicion was all that was required to justify the search of a student.⁸⁸ The Court likened school search cases to others where “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,”⁸⁹ and held that a warrant was not required.⁹⁰ T.L.O. was found in a bathroom at school holding lit cigarettes.⁹¹ Suspecting T.L.O. to be smoking on campus, the vice principal searched her bag and its contents.⁹² After finding a package of cigarettes, the principle also noticed rolling papers that he perceived to be associated with the use of marijuana.⁹³ A further search of the bag revealed marijuana, drug paraphernalia and documentation of T.L.O.’s sale of marijuana to other students.⁹⁴ The Court determined the search was permissible because the vice principal had reasonable suspicion that T.L.O. was engaged in a prohibited activity on school grounds.⁹⁵ Because of the school’s interest in maintaining a safe environment for learning, the Court supported the application of the special needs doctrine.⁹⁶

Like *Lidster*, the interview of a child victim has the primary purpose of gathering information about a crime someone else committed. Even more so, the interview is meant to assess the relative safety of the child to determine if steps need to be taken to protect him or her. It is true that the detentions in *Lidster*, unlike in

86. *Id.* at 426–28.

87. *See T.L.O.*, *supra* note 32, at 325.

88. *Id.* at 338.

89. *Camara*, *supra* note 74, at 532–33.

90. *T.L.O.*, *supra* note 32, at 340.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

child interviews, were brief and uniformly administered. However, the comparison needs to be viewed in the context of the information sought. Interviewing a child must be done with care and patience.⁹⁷ It is not a process that can be effective in a short amount of time.⁹⁸ Especially when children have been abused, they might not be willing to talk about their experiences with others out of fear or shame.⁹⁹ Additionally, the potential trauma to children during these interviews distinguishes these from situations like *Lidster* where uniformity in the seizure was material. However, as witnesses to their own abuse, children are in the best position to inform others of the crime. Alliance to their parents, or even fear might preclude voluntary disclosure. Accordingly, the interviewing of a child witnesses should fall outside the Fourth Amendment analysis to encourage information gathering of criminal activity and protect vulnerable children from further harm.

The uniformity and brevity of the interview in *Lidster* minimized discretion and uncertainty surrounding the reasonableness of a seizure. Due to the nature of child interviews, the discretion would be far greater. With great discretion does come the possibility of great abuse. However, limiting the interview to curtail possible abuse would thwart the investigative purpose and, indeed, could lead to more trauma to the child.¹⁰⁰ Creating a bright-line rule would be counter-productive. Courts, police officers, and social workers often have to operate in a world of reasonableness based on factual specifics—this is no different.

Unlike in *T.L.O.*, child victims are not thought to be engaged in criminal activity on school grounds, but rather are being abused in the privacy of their homes and often by family members. Moreover, the need to protect minors from physical and sexual abuse is arguably more compelling than the urgency at stake in ridding a school of illegal drug use. At the very least, the school's interest recognized in

97. See State of Michigan: Task Force on Children's Justice and Department of Human Services, Forensic Interviewing Protocol, *supra* note 23.

98. *Id.*

99. See Roland C. Summit, *Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 178 (1983). "Rather than being calculating or practiced, the child is most often fearful, tentative and confused about the nature of the continuing sexual experience and the outcome of disclosure."

100. Portland State University, School of Social Work, Center for Improvement of Child and Family Services, *Reducing the Trauma of Investigation, Removal and Out-of-Home Placement in Child Abuse Cases* (2009).

T.L.O. supports the application of the special needs doctrine in potential child abuse cases.

In the Ninth Circuit decision of *Camreta*, the court noted that *T.L.O.* was tangential because S.G. was seized and interrogated by a social worker and a police officer, not a school official.¹⁰¹ The court went on to quote *Tenenbaum v. Williams*:

As the Second Circuit explained, “[p]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including [Child Protective Services], and the children with whom they deal. Constitutional claims based on searches or seizures by public school officials relating to public school students therefore call for an analysis . . . that is different from that [for searches or seizures by caseworkers].¹⁰²

Indeed, the court emphasized *T.L.O.* was premised on a “special need” of government not present in this case: “the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”¹⁰³

Here, the interview of S.G. was premised on a different, yet equally valuable need: the investigation into her potential abuse. Information provided through interviews with child protective services is used to ensure the children are kept safe and the primary objective of these investigations is the child’s safety.¹⁰⁴ Like other special needs cases, evidence of criminal behavior is tangential to the overriding community function. Additionally, these investigations will not necessarily result in criminal charges being filed against an alleged perpetrator because of the higher burden of proof required for criminal proceedings.¹⁰⁵ Conversely, a civil proceeding to remove

101. *Greene*, *supra* note 8, at 1024.

102. *Tenenbaum v. Williams*, 193 F.3d 581, 607 (2d Cir. 1999).

103. *Greene*, *supra* note 8, at 1024 (quoting *T.L.O.*, 469 U.S. at 339).

104. *See e.g.*, Texas Dep’t of Family & Protective Servs: “The children’s safety is our top priority.” http://www.dfps.state.tx.us/about/news/2008/2008-04-18_news.asp (2008). (last visited Mar. 30, 2012).

105. “[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

children from an unsafe home allows a lower standard of proof.¹⁰⁶ Child protective services gain valuable information to protect the safety of a child without that information ever being used in a criminal proceeding. Therefore, the investigative nature of searches and seizures in the context of child abuse investigations supports the conclusion that the special needs doctrine should apply.

IV. Lowering the Requisite Standard of Proof to Conduct These Investigations Balances the Rights of Children with the State's Interest in Protecting Them

Social services employees and police officers investigating child abuse and neglect allegations should not be required to have probable cause to investigate these allegations, absent parental consent. The reasonable suspicion standard protects the children from unnecessary interference or trauma by an investigating officer while still allowing the state to assess potentially abusive situations.

Child protective services agents often have little information at the outset of an investigation, making probable cause a sometimes insurmountable hurdle with dire consequences. Evidence of physical abuse is too easily masked and sexual trauma often leaves only invisible scars. Despite being recognized by social services¹⁰⁷ as at-risk, 11.9 percent of fatalities were of children whose parents had received family preservation services¹⁰⁸ in the past five years.¹⁰⁹ Those

106. *In re Cheryl H.*, 153 Cal. App. 3d 1098, 1111–13 (1984). “[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home.” In the jurisdictional phase the burden of proof is preponderance of the evidence.

107. Social Services is a branch of the state government that oversees child abuse and neglect allegations, investigates these cases, provides services to children and family members who have experienced trauma, places children in foster care while looking for permanent placement options or reunification with the parents. See www.childsworld.ca.gov. (last visited Mar. 30, 2012).

108. Family preservation services are short-term, family-focused, and community-based services designed to help families cope with significant stresses or problems that interfere with their ability to nurture their children. Family preservation services are most often provided to families that have come to the attention of the child welfare, mental health, or juvenile justice systems because of child abuse or neglect, child behavioral health challenges, delinquency, or serious parent-child conflict. These services are applicable to families that are at risk of disruption/out-of-home placement across systems. The goal of family preservation services is to maintain children with their families, or to reunify them, whenever it can be done safely. Family preservation services grew out of the recognition that children need a safe and stable family and that separating children from their families is traumatic for them, often leaving lasting negative effects. These services build upon the conviction that many children can be safely protected and treated

parents were already viewed as dangerous in one way or another and a threat to their children. Such tragic outcomes might have been avoided without such restrictions on the ability of social services to investigate. Those closest to the victims are often the perpetrators and thus less likely to be revealed by these vulnerable children.¹¹⁰ In fact, more than ninety percent of juvenile sexual abuse victims know their perpetrator in some way.¹¹¹

Because of the unique nature of child abuse, many instances go unreported until it is too late.¹¹² Especially in the instance of sexual abuse, the signs of trauma are not outwardly visible.¹¹³ Physical and sexual abuse often happens in the privacy of the home where the victim is the only witness to the crime.¹¹⁴ With no outward evidence available, the state must rely to a large extent on the victim reaching out in one way or another. This is unlikely to happen. For example, in 2008, alleged victims made only 0.5 percent of abuse reports.¹¹⁵ Even when children do come forward or suspicions arise, efforts to investigate are currently thwarted by the requirement to obtain parental consent in the absence of probable cause.

In these instances, the opportunity to develop proof independent of the victim is remote, and investigative interviews of suspected child-abuse victims almost always occur before government officials

within their own homes when parents are provided with services and support and empowered to change their lives.

109. U.S. Dep't of Health & Human Servs, Administration on Children, Youth, and Families, *Child Maltreatment 2008* at 28. Washington, D.C.: U.S. Government Printing Office (2009) (available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>).

110. Snyder, Howard, N. *Sexual assault of young children as reported to law enforcement: victim, incident, and offender characteristics (200)*. Retrieved from <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>. See also U.S. Dep't of Health & Human Servs, *Child Maltreatment 2008*, *supra* note 109. "Nearly 39 percent (38.3%) of victims were maltreated by their mother acting alone. Approximately 18 percent (18.1%) of victims were maltreated by their father acting alone. Nearly 18 percent (17.9%) were maltreated by both parents.

111. *Id.*

112. U.S. Dep't of Health & Human Servs, Administration on Children, Youth, and Families, *Child Maltreatment 2010* at 58, 60 Washington, D.C.: U.S. Government Printing Office (2011), available at: <http://www.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>. (last visited Mar. 30, 2012).

113. Children's Advocacy Center, *Frequently Asked Questions About Child Abuse*, <http://www.childrensadvocacy.org/abusefaq.php>. (last visited Mar. 30, 2012).

114. Snyder, *supra* note 110 at 5-6.

115. U.S. Dep't of Health & Human Servs, Administration on Children, Youth, and Families, *Child Maltreatment 2008* at 7, <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>.

have “probable cause” to believe the abuse has occurred.¹¹⁶ All of the alternatives to officials being able to conduct an in-school interview are often fraught with potential peril for the minor or are impractical. Seeking parental consent is simply not a safe or viable option when the suspected perpetrator is a parent.

If a parent is a suspect, he or she is unlikely to consent to an interview of the child. Nor is it clear that the non-perpetrating parent can always be trusted to give consent—especially when he or she might face abuse or financial consequences.¹¹⁷ Parents who are trapped in abusive relationships often fear retaliation for cooperating with authorities and often face increased hostility at any attempt to leave the situation.¹¹⁸ In addition to safety concerns, victims often face economic obstacles that compound their ability to leave the situation.¹¹⁹ When balancing these factors, it is unreasonable to expect that many non-perpetrating parents will cooperate with investigations.

Even more concerning for the non-perpetrating parent is the reality that he or she often risk losing custody of the children for “failure to protect.”¹²⁰ This ignorance by the courts has a chilling effect on non-perpetrating parents from coming forward and cooperating with investigations from the fear of losing their children.¹²¹ Recent decisions have gone so far as to punish victims of domestic violence who have exposed their children to the violence,¹²²

116. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”).

117. See generally Rosie Gonzalez & Janice Corbin, *The Cycle of Violence: Domestic Violence and Its Effects on Children*, 13 SCHOLAR 405 (2010).

118. *Id.* at 410–11. (“Separation assault is common in violent relationships as “the batterer’s quest for control often becomes most acutely violent and potentially lethal” when the woman threatens to leave the relationship”).

119. *Id.* at 408–09.

120. “Failure to protect” statutes assign blame to a victimized parent or non-perpetrating parent who fails to protect his or her child from abuse or exposure to abusive situations. See e.g., Okla. Stat. Ann. Tit. 21 §852.1 (2011); Kan. Stat. Ann. §21.3608 (1999); Me. Rev. Stat. Ann. Tit. 17-A, §554 (West 1999); Mont. Code Ann. §45-5-622 (1999).

121. See, e.g., *In re J.K.* 174 Cal. App. 4th 1426, 1439 (2009) (holding that a mother’s failure to protect the child from abuse by the father demonstrated current and future risk of abuse). See also *In Interest of D.B. v. L.B.A.*, 916 S.W.2d 430, 433–34 (1996) (Terminating mother’s parental rights for failure to leave boyfriend after knowledge that he was abusing her children.)

122. See *In re Lonell J.*, 673 N.Y.S.2d 116, 118 (App. Div. 1998) (finding a mother guilty of child neglect for staying in an abusive relationship). See also *In re Athena M.*, 678

which further decreases the likelihood that non-perpetrating parents will cooperate with abuse investigations. When one is trapped in the cycle of violence, the financial and emotional cost of escape might not seem worth the risk. This is relevant to this analysis because the State cannot always trust a non-perpetrating parent to allow the interview of the child when there are allegations of abuse. Thus, without access to the alleged child victim, social services and law enforcement officers will be precluded from further investigation. Where there is no parent to come forward and consent to an interview, the child is left helpless and made to endure more abuse until it escalates to produce sufficient evidence to substantiate probable cause, or until a tragic death results.

Child protective services agents should not be allowed to interview children absent any suspicion—such a rule would ignore the potential trauma children can experience when participating in these types of conversations. There must be some middle ground which acknowledges the interests of the child in most respects. To determine the reasonableness of a search or seizure in the absence of a warrant, “it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether,” in the particular context, requiring a warrant or some level of individualized suspicion is “impractical.”¹²³

Certainly children also have Fourth Amendment rights. Lowering the requisite proof needed to conduct these types of interviews does not strip these children of their constitutional rights. Rather, it balances their need for protection against minor intrusions into their experiences as a means of obtaining evidence against potential perpetrators. Instead of requiring probable cause to conduct these interviews and investigations, police should only need a reasonable suspicion that the child is being harmed. Reasonable suspicion involves something more than a vague suspicion, but rather some articulable, objective facts.¹²⁴

N.Y.S.2d 11, 12 (App. Div. 1998) (case held violence in presence of children showed that the children were in imminent danger of harm.).

123. *Treasury Employees v. Von Raab*, 489 U.S. 656, 655-6 (1989); *see id.* at 668 (“[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions”); *see also Skinner v. Ry. Labor Execs.*, 489 U.S. at 616–18 (holding a drug urinalysis to be a search); *Camara, supra* note 74, at 536–37 (there is “no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails”).

124. *See Brown v. Texas*, 443 U.S. 47 (1979).

Lowering the standard of proof required to conduct these interviews acknowledges that social workers are operating in a paradox. In abusive situations time is of the essence. Moreover, the probable cause requirement for a warrant is often dependent on the interviews which require the warrant, thus trapping victimized children in the very provisions meant to protect them. Unfortunately, however, in these circumstances the children's need to be protected from unwarranted intrusion by the State never outweighs the State's interest in safeguarding them.

Police and social workers have a responsibility to approach these matters with sensitivity and must follow the necessary procedures for constitutionally permissible juvenile forensic interviewing. The potential for abuse is not justification for ignoring the State's responsibility to protect children from dangerous situations. Social services agents, as state actors, should be allowed to interview children suspected of being abused by a parent, without the parent's consent. To hold otherwise would force social services agents into a procedural straightjacket and limit their ability to protect the innocent and vulnerable.

Such a restrictive requirement of probable cause thwarts important police work and maintains children in potentially dangerous situations. No one questions that an interview or, even worse, being removed from one's home is traumatic for a child. It is.¹²⁵ Placement with relatives is often not possible and children are taken to live in various foster homes where their trauma is met with instability.

This Note does not endorse placement of children outside the home unless serious neglect is being perpetrated on them. Rather, the police should not be precluded from accessing what is usually the most probative evidence to determine the actual harm to the child.

Conclusion

Requiring law enforcement or child protective services to procure a warrant to investigate potential child abuse where one of the suspects is a parent is ineffective and hinders the State's responsibility to protect children. Without a warrant, social services must rely on parental consent, an unlikely outcome when a parent is the alleged suspect. Even the non-perpetrating parent is not likely to

125. Portland State University, School of Social Work, Center for Improvement of Child and Family Services, *Reducing the Trauma of Investigation, Removal and Out-of-Home Placement in Child Abuse Cases*, *supra* note 100, at 10.

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give consent to protect his or her spouse or preserve a situation of financial dependence.

Because child victims are witnesses in an investigation, not the target of an investigation, Fourth Amendment protections are misplaced. Indeed, the requirements of the Fourth Amendment effectively hinder child services from protecting these vulnerable children. Even if the Fourth Amendment is relevant to the analysis, interviews of child victims to extract information relevant to the State's ability to intervene and provide assistance in these situations falls under the special needs exception. These interviews represent the community service function of social services and the police, and their primary purpose is to effectuate the State's interest in protecting children. Like other special needs examples, procuring evidence of criminal activity is not the primary objective. Finally, these situations implore a lesser standard of proof to balance the competing interests of preserving a child's right to be free from intrusion from the government and the State's interest in protecting the welfare of children.

* * *