

**PROTECTED OR POLICED?: INVOKING
CHILDREN’S FOURTH AMENDMENT RIGHTS AGAINST
UNNECESSARY CPS INTERVENTION**

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“Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience.” — C.S. Lewis¹

ABSTRACT

Critiques of the child welfare system have become increasingly common within the past decade. Legal challenges to CPS investigations and child removal, however, have been primarily centered on parents’ constitutional rights. These challenges, while essential and effective, do not adequately consider the constitutional rights of children that are threatened when CPS comes knocking. This Note centers on the Fourth Amendment rights of children who are subject to investigation and removal from their families in the name of protection.

The Supreme Court has not yet ruled on the applicability of the requirements of probable cause and a particularized warrant to child welfare workers, allowing CPS agencies across the United States to routinely violate the traditional protections of the Fourth Amendment. Using a framework of CPS investigation as “family policing,” this Note argues that caseworkers must be

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1. C.S. LEWIS, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 287, 292 (Walter Hooper ed., 1970).

subject to the warrant and probable cause requirements enshrined in the Fourth Amendment. Furthermore, I argue against the application of the “special needs” and consent doctrines to CPS investigations due to their similarity in form and function to law enforcement action. Finally, I examine non-reformist solutions to persistent Fourth Amendment violations by CPS agencies and advocate for robust protections for children during CPS investigations.

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I. INTRODUCTION

“The Fourth Amendment doesn’t apply to us.” This bold assertion, made confidently by a CPS investigator in Philadelphia during the summer of 2023,² is a sentiment shared by many CPS caseworkers throughout the United States.³ The Fourth Amendment protects individuals against unreasonable searches and seizures by state actors.⁴ Despite the fact that the Fourth Amendment rights of children have been formally recognized by the Supreme Court since 1985,⁵ these rights are consistently ignored by caseworkers, attorneys, and judges in the child welfare system.⁶ Although parents are generally considered the targets

2. Conversation with a DHS Investigator, in Philadelphia, Pa. (July 24, 2023). This statement was made to the author by a Department of Human Services (DHS) investigator in Philadelphia. Here, and throughout this Note, I refer to various child welfare offices under the umbrella term child protective services (CPS) for convenience.

3. See Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One*, PROPUBLICA (Oct. 13, 2022, 8:00 AM), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> (quoting a caseworker who stated, “[r]ights — no, we never did that. I didn’t even know that was a thing” and arguing that “ACS officials . . . [said] that the Fourth Amendment applies only to the criminal justice system.”).

4. See *infra* Part IV.

5. See *New Jersey v. T.L.O.*, 469 U.S. 325, 333–34 (1985).

6. See Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1060 (2023) (“Now the judge continues,

of investigations by Child Protective Services (“CPS”) agencies, children⁷ are the most impacted by investigations into their home lives and the consequences of those investigations.⁸ Despite this, the protections of the Fourth Amendment remain elusive for the children who are searched and seized every day by CPS workers.⁹

The home is the most protected space in Fourth Amendment law, as “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”¹⁰ Family life has also been traditionally protected, at least in theory, from government intrusion both because the family is connected to the home and because the “institution of the family is deeply rooted in this Nation’s history and tradition.”¹¹ As CPS investigations involve both the home and family life, these intrusions occur at what is, in theory, the apex of Fourth Amendment protection. In practice, however, the Fourth Amendment is routinely violated and virtually nonexistent during CPS investigations.¹²

There is a profound lack of research on the Fourth Amendment rights of children during CPS investigations. Much of the scholarship critiquing the family policing system focuses on either the rights of parents at the investigative stage or the rights of children after they have been removed from the home without substantively addressing the constitutional implications of investigations themselves on children’s Fourth Amendment rights.¹³

This Note argues that children whose parents¹⁴ are investigated by the family policing system can invoke their Fourth Amendment rights

telling the father that the Fourth Amendment does not apply in this context and that he does not have a Fourth Amendment right not to cooperate with state caseworkers who demand entry into his home.”).

7. Throughout this Note, I will use the terms “children” and “youth” to encompass all minors.

8. See *infra* Part II.

9. See *infra* Part V.

10. *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, S. Div., 407 U.S. 297, 313 (1972).

11. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

12. See *infra* Part V.

13. See generally Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1164 (2019) (discussing the harm of removal to children and parents); Ryan C. F. Shellady, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 IOWA L. REV. 1613, 1616–17 (2019) (highlighting procedural issues with “safety plans” from the perspective of parents). But see Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 425–26 (2005) (arguing for Fourth Amendment protections in CPS investigations); Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1491 (2023) (same).

14. Throughout this article, I use “parents” to refer broadly to the adults that a child lives with.

against unreasonable searches and seizures and proposes non-reformist reforms that would limit the power of the family policing system and protect families from unnecessary state intrusion into the home.

Parts I through IV of this Note provide a comprehensive analysis of CPS investigations and Fourth Amendment law. Part I provides an overview of CPS investigations, tracing the structure of the investigation from the initial report to the removal of a child. Part II details the traumatic impact of investigations on children, particularly those who are removed from their homes. Part III explains the family policing framework by providing a comparison of police and CPS in both form and function. Part IV analyzes Fourth Amendment law, including the traditional protections of the Amendment, Supreme Court interpretations of those protections, and exceptions to the Fourth Amendment relevant to CPS investigations.

Parts V through VI analyze CPS investigations through the lens of children's Fourth Amendment right against unreasonable searches and seizures, reject the application of the special needs and consent exceptions, and conclude that CPS investigators must secure a warrant to enter a home or remove a child absent exigent circumstances. Part V considers the applicability of three Fourth Amendment exceptions to CPS investigations and ultimately concludes that only the exigent circumstances exception is appropriate in the context of CPS investigations. Part VI applies traditional Fourth Amendment law to CPS investigations and explains that the current investigatory framework violates a child's right against unreasonable searches and seizures. Finally, Part VII proposes non-reformist reforms to remedy the routine violations of children's Fourth Amendment rights during CPS investigations. These solutions include a robust warrant requirement for CPS searches, heightened legal standards for child removal, and court oversight for removals executed through "safety plans."

II. OVERVIEW AND SCOPE OF THE FAMILY POLICING SYSTEM

Many advocates for families use the terms "family policing" or "family regulation" to better describe the function of what is typically called the "child welfare" or "dependency" system.¹⁵ Framing this system as one of policing, rather than benevolence, "more accurately captures the roles

15. *Why We're Using the Term 'Family Policing System,'* RISE MAG. (May 7, 2021), <https://www.risemagazine.org/2021/05/why-were-using-the-term-family-policing-system/>.

this system plays in the lives of families, which include surveillance, regulation, and punishment.”¹⁶

A. *Scope of the Family Policing System*

Across the United States, CPS agencies receive just under four million referrals annually, with allegations related to over seven million children.¹⁷ National data indicates that over one in three children will be subjected to a CPS investigation before the age of eighteen.¹⁸ These rates are elevated for children of color, particularly Black¹⁹ and Indigenous²⁰ children. Approximately half of all Black children, for example, will experience a CPS investigation at some point in their childhood.²¹ Although accounts of severe physical and sexual abuse dominate media coverage of child welfare issues,²² these instances make up a small minority of cases. During the 2021 fiscal year, for example, 76% of cases were classified as neglect, 16% involved physical abuse, and 10% involved sexual abuse.²³

16. *Glossary—Family Policing System*, UPEND MOVEMENT, <https://upendmovement.org/glossary/> (last visited Feb. 25, 2025).

17. Kati Mapa, *Child Maltreatment 2021 Report*, CHILD WELFARE LEAGUE OF AM., <https://www.cwla.org/child-maltreatment-2021-report> (last visited Feb. 25, 2025).

18. Frank Edwards et al., *Contact with Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, PNAS, July 19, 2021, at 1, <https://www.pnas.org/doi/10.1073/pnas.2106272118>.

19. While the median investigation rate was approximately 35% for all children, the risk of investigation for Black children ranged from approximately 33% to 63% nationwide. *Id.*

20. Approximately one in nine Native American children will enter foster care at some point in their childhood, compared with almost one in twenty of all children. See Youngmin Yi et al., *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011–2016*, 110 AM. J. PUB. HEALTH 704, 708 (2020).

21. Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017). The disproportionate investigation of families of color is part of a long history of oppression. Child removal has been used as a tool to oppress people of color for centuries in the United States. See generally LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* 7–8 (2020) (providing a history of child-taking in the United States).

22. See Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 8 (2010); see also Axel Aubrun & Joseph Grady, *How the News Frames Child Maltreatment: Unintended Consequences*, CULTURAL LOGIC LLC (Aug. 22, 2003), <https://www.frameworksinstitute.org/wp-content/uploads/2020/06/HowTheNewsFramesChildAbuse.pdf>.

23. *Children Who Are Confirmed by Child Protective Services as Victims of Maltreatment by Maltreatment Type in United States*, ANNIE E. CASEY FOUND. KIDS COUNT DATA CTR., <https://datacenter.aecf.org/data/bar/9906-children-who-are-confirmed-by-child-protective-services-as-victims-of-maltreatment-by-maltreatment-type?loc=1&loct=1#1/any/false/2048/3885,3886,3887,3888,3889,3890/19241> (April 2024).

These statistics only reflect part of the story. National data is not collected on families who are operating under “safety plans,” a mechanism by which CPS can intervene in family life without a formal dependency petition.²⁴ Researchers estimate the prevalence of safety plans to be parallel to that of the formal foster care system.²⁵ Statistics also fail to capture the looming threat of CPS investigation that communities face every day. Parents around the country experiencing poverty, domestic violence, and other issues avoid seeking assistance due to the fear of contact with mandated reporters.²⁶ Access to social support “requires subjecting oneself to surveillance, monitoring, and the risk of punishment,”²⁷ thus conditioning aid on a parent’s acquiescence to state surveillance, which could easily result in CPS investigation. Although these fears may go unnoticed by white, middle-class families, they are omnipresent for the poor families of color for whom CPS involvement is extremely common.²⁸

B. How the System Functions

The structure of CPS investigations varies across the United States, as each state—and in some states, each county—operates its own child welfare system²⁹ which is subject to both state and federal guidelines.³⁰ Although CPS procedures differ depending on state law, the general structure of a CPS investigation remains fairly consistent from state to state.³¹

1. Reporting

Typically, a CPS investigation begins with a report to a state’s child abuse hotline or to a local law enforcement agency.³² According to

24. See *infra* Part I.B.4.

25. See Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 860 (2020).

26. See generally KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 4 (2023) (analyzing the effect of CPS on mothers’ ability to access resources for their families).

27. *Id.* at 16.

28. *Id.* at 5.

29. See Children’s Bureau, *State vs. County Administration of Child Welfare Services*, CHILD WELFARE INFO. GATEWAY (Mar. 2018), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/services.pdf?VersionId=sCIFPdVWvKGX_HymH2hK53tLMda3d101.

30. See, e.g., Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115; Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101–19.

31. FONG, *supra* note 26, at 9.

32. See *id.*

national estimates, CPS agencies receive over 4.3 million referrals every year, which include over 7.5 million children.³³

a. Mandated Reporters

Most referrals to CPS come from mandated reporters—individuals who are required by state law to report suspected child abuse or neglect—such as healthcare workers, teachers, social workers, childcare providers, and police officers.³⁴ Federal law requires each state to have a mandatory reporting law in order to receive federal funds for child welfare programs.³⁵ Mandated reporters can include a wide array of individuals depending on the state. In seventeen states, *every* person is legally obligated to report suspected child abuse or neglect.³⁶ Although almost all states impose penalties on mandated reporters for a failure to report child abuse or neglect, only twenty-nine states penalize intentional false reporting.³⁷ This encourages mandated reporters to err on the side of reporting any potential child welfare issues to avoid penalties, even when these reporters do not believe that CPS involvement is warranted.³⁸

b. Permissive Reporters

Allegations of child abuse or neglect can be made by any person (dubbed “permissive reporters”), even without any proof to support their allegations.³⁹ In most states, these allegations can be made anonymously or confidentially, which shields people who make false reports from

33. CHILDREN’S BUREAU, U.S. DEPT OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2022, at 7 (2022), <https://www.acf.hhs.gov/cb/data-research/child-maltreatment>.

34. *Id.* at 9 (noting that professionals submit 70% of reports).

35. 42 U.S.C. § 5106a(b)(2)(B)(i).

36. CHILD WELFARE INFO. GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE & NEGLECT 4 (2023), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/manda.pdf?VersionId=Gm9t7CW5XdPolnEMHHR3wCnsw782WZQ1>.

37. CHILD WELFARE INFO. GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 1, 3 (2019), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/report.pdf?VersionId=L5R7xLMqtiiYYGz3jipHmCkeIIr3ve9K>.

38. See Mike Hixenbaugh et al., *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead*, PROPUBLICA (Oct. 12, 2022, 8:00 AM), <https://www.propublica.org/article/mandatory-reporting-strains-systems-punishes-poor-families>.

39. See, e.g., NJ Dep’t of Health, *Child Abuse and Neglect*, NJ.GOV, <https://www.nj.gov/health/ceohs/phfpp/youthcamps/operators/abuse.shtml> (last visited Feb. 25, 2025) (“A concerned caller does not need proof to report an allegation of child abuse . . .”).

detection.⁴⁰ Anonymous reporting thus enables disgruntled family members, judgmental neighbors, and domestic abusers to make false allegations against a parent without repercussions. Accordingly, at least one study has found that anonymous reports are almost ten times less likely to be found credible than non-anonymous reports.⁴¹ No matter how obviously false the allegations are, however, they must be investigated if they could meet the statutory definitions of child abuse or neglect.⁴²

c. Class and Racial Bias

CPS investigations are heavily influenced by class and racial bias even before the investigation opens.⁴³ Families of color and those experiencing poverty are more likely to be reported for abuse or neglect.⁴⁴ Black and Indigenous families are at the highest risk, as they are more likely to be reported and subject to CPS investigations.⁴⁵ Poor families are also much more likely to be reported for neglect than other families, partially because they are more likely to come into contact with mandated reporters.⁴⁶ Vague statutory definitions of “neglect” also contribute to the disproportionate representation of poor families investigated for neglect, as conditions of poverty are often

40. See Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 52 (2014).

41. MADELYN FREUNDLICH, ADOPTIVE & FOSTER FAM. COAL. OF N.Y., CHILD ABUSE OR MALTREATMENT REPORTS TO THE CENTRAL REGISTER MUST INCLUDE THE CALLER'S NAME AND CONTACT INFORMATION 4 (2022), <https://affcny.org/wp-content/uploads/SCR-Anonymous-vs-Confidential-Madelyn-Freundlich-AFFCNY-March-22.pdf>.

42. See Cecka, *supra* note 40; see also Eli Hager, *CPS Workers Search Millions of Homes a Year. A Mom Who Resisted Paid a Price*, NBC NEWS (Oct. 13, 2022, 8:00 AM), <https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716> (quoting a CPS worker who explained, “[s]omeone said Mickey Mouse lives at 123 Disney Lane doing something evil . . . [a]nd I have to go in every time.”).

43. See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 76–77 (2022); see also Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES, <https://www.nytimes.com/2022/11/22/nyregion/nyc-acb-racism-abuse-neglect.html> (June 20, 2023).

44. CHILD WELFARE INFO. GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., SEPARATING POVERTY FROM NEGLECT IN CHILD WELFARE 2–3 (2023), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/bulletins-poverty-neglect.pdf?VersionId=x2GsXdvm8qWqsNr5PRp5csenhOHas4zf>.

45. *Id.* at 2; see also Jessica Lussenhop & Agnel Philip, *Native American Families Are Being Broken Up in Spite of a Law Meant to Keep Children With Their Parents*, PROPUBLICA (June 15, 2023, 6:00 AM), <https://www.propublica.org/article/native-american-parental-rights-termination-icwa-sotus> (“In South Dakota, Native American children experience termination of parental rights at 13 times the rate of white children.”).

46. CHILD WELFARE INFO. GATEWAY, *supra* note 44, at 3.

mischaracterized as neglect in child welfare laws.⁴⁷ For example, “neglect” typically includes a failure to provide sufficient food, clothing, or medical care to a child.⁴⁸ Almost half of all states do not have a statutory exception to neglect for families who cannot afford to provide for their child(ren)’s material needs.⁴⁹ As a result of these broad definitions of neglect, poor families are often accused of neglecting their children simply because they cannot afford what investigators consider to be sufficient food, clothes, or medical care.⁵⁰

2. Screening

Once a report is received, CPS agencies screen the report to determine whether the allegations in the report meet the state’s statutory definition of child abuse or neglect. Federal law requires that this definition include, at minimum, “[a]ny 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.”⁵¹ Reports that meet the applicable definition of child abuse or neglect are “screened in” and investigated, while those that do not are “screened out” and not pursued by CPS workers.⁵² Nationally, only 51.5% of reports are screened in, leaving 48.5% screened out.⁵³ If a report is screened in, CPS workers

47. See David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885, 895, 899–904 (2019) (critiquing the characterization of poor families’ neighborhoods, homes, and lives as inherently unsafe); Diane Redleaf, *The Challenge of Changing America’s Amorphous, Limitless Neglect Laws*, IMPRINT (May 16, 2022, 1:00 AM), <https://imprintnews.org/opinion/challenge-changing-americas-amorphous-limitless-neglect-laws/65055>.

48. Some states, however, have addressed this issue (at least in theory) by specifying that parents must be financially able to provide for the child’s needs to have neglected the child. See, e.g., N.J. STAT. ANN. § 9:6-8.21(c)(4)(a) (West 2024); 23 PA. STAT. AND CONS. STAT. ANN. § 6304(a) (West 2024).

49. Sarah Catherine Williams et al., *In Defining Maltreatment, Nearly Half of States Do Not Specifically Exempt Families’ Financial Inability to Provide*, CHILD TRENDS: POVERTY & ECON. WELL-BEING BLOG (Feb. 23, 2022), <https://www.childtrends.org/blog/in-defining-maltreatment-nearly-half-of-states-do-not-specifically-exempt-families-financial-inability-to-provide>.

50. See HINA NAVEED ET AL., “If I Wasn’t Poor, I Wouldn’t Be Unfit”: *The Family Separation Crisis in the US Child Welfare System* 111–20 (Maragret Wurth et al. eds., 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare>; see also Hixenbaugh et al., *supra* note 38.

51. CHILDREN’S BUREAU, U.S. DEPT OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2021, at 17 (2023) (quoting CAPTA, 42 U.S.C. § 5101 note), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf>.

52. See *id.* at 6, 17–18.

53. *Id.* at 7.

open an investigation within a predetermined time period that varies by state.⁵⁴

3. Investigation

Once a case has been opened, CPS workers begin investigating the allegations in the report. This investigation typically includes: interviews with the alleged victim(s), parents, and others who have contact with the family; home investigations (even if the allegations do not include concerns about the home); physical examinations of the child(ren); and document review.⁵⁵

In almost every case, CPS investigators do not bother to seek a warrant before knocking on a family's front door. In 2023, for example, CPS investigators in New York City sought an entry order in just 0.56% of cases.⁵⁶ Families are rarely informed of their right to refuse entry to CPS investigators, as no *Miranda*-style warnings are nationally required in CPS investigations.⁵⁷ On the contrary, efforts to implement a "family Miranda warning" have been quashed⁵⁸ after pressure from CPS officials.⁵⁹ Just one state—Texas—provides such protections.⁶⁰

54. *Id.* at 10.

55. See, e.g., *A Parent's Guide to a Child Abuse or Maltreatment Investigation*, NYC.GOV, <https://www.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> (last visited Feb. 25, 2025); *Parents' Handbook*, N.J. DEPT OF CHILD. AND FAMILIES 3–4, https://www.nj.gov/dcf/families/dcpp/ParentsHandbook_English.pdf (last visited Feb. 25, 2025).

56. N.Y.C. ADMIN. CHILD. SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2023, at 9, 16 (2023), <https://www.nyc.gov/assets/acs/pdf/data-analysis/2023/CityCouncilReportCY2023.pdf> (reporting that ACS made 222 applications for Entry Orders out of its 39,614 investigations).

57. Sarah Duggan, *Family Caseworkers Are Like Cops, but They Don't Tell Parents Their Rights*, APPEAL (May 16, 2023), <https://theappeal.org/child-welfare-family-policing-miranda-rights/>.

58. See, e.g., Madison Hunt, *New York Lawmakers Reject Parents' Rights Bills*, IMPRINT (June 6, 2022, 5:39 PM), <https://imprintnews.org/child-welfare-2/new-york-lawmakers-reject-parents-rights-bills/65587>.

59. See, e.g., Eli Hager, *NYC Child Welfare Agency Says It Supports "Miranda Warning" Bill for Parents. But It's Quietly Lobbying to Weaken It*, PROPUBLICA (June 5, 2023, 5:00 AM), <https://www.propublica.org/article/new-york-families-child-welfare-miranda-warning>.

60. Eli Hager, *Texas, New York Diverge on Requiring Miranda-Style Warnings in Child Welfare Cases*, PROPUBLICA (July 5, 2023, 3:00 PM), <https://www.propublica.org/article/texas-new-york-diverge-miranda-warning-bill>; see also Annie Sciacca, *Texas Bill to Increase Rights for Parents Under Investigation Passes State House and Senate*, IMPRINT (May 30, 2023, 10:11 AM), <https://imprintnews.org/top-stories/texas-bill-to-increase-rights-for-parents-under-investigation-passes-state-house-and-senate/241759>.

CPS investigators find evidence of abuse or neglect in only one-sixth of screened-in referrals.⁶¹ Therefore, out of the 51.5% of reports that are investigated, just 16% involve *any* evidence of abuse or neglect.⁶² This 16% includes a significant number of cases of children who are found to be victims of neglect due to poverty. In FY 2020, for example, 64% of entries into foster care involved neglect and 9% involved housing issues⁶³—both categories associated with (or entirely created by) poverty. Vague definitions of neglect thus may artificially inflate the percentage of substantiated cases of neglect reported by CPS agencies across the country.

During an investigation, CPS workers have several options: (1) close the case without any further action; (2) devise a safety plan for a family to comply with in order to avoid court involvement; (3) implement in-home services (such as drug treatment or therapy) that would be accompanied by CPS monitoring and court involvement; or (4) take custody of the child and place the child in foster care.⁶⁴

4. Safety Plans & Hidden Foster Care

In the majority of states, “safety plans”⁶⁵ are presented to families as a way to avoid court involvement by cooperating with a list of demands to ostensibly keep the child(ren) in question safe.⁶⁶ Through safety plans, CPS workers “coerce the parents to accept restrictive conditions on their family life by threatening to place their children in foster care. . . . [e]ven in the absence of any evidence to support the accusations.”⁶⁷ As Josh Gupta-Kagan writes:

61. ROBERTS, *supra* note 43, at 35.

62. See CHILDREN’S BUREAU, *supra* note 33, at 20 (reporting that 16.1% of children who are subjects of reports are classified as “victims” whose cases are “substantiated” or “indicated”).

63. CHILDREN’S BUREAU, U.S. DEPT OF HEALTH & HUM. SERVS., THE AFCARS REPORT, FY 2020, at 2 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report28.pdf>.

64. For a chart depicting these options, see FONG, *supra* note 26, at 10.

65. There are many terms for safety plans, such as “informal kin care,” “kinship diversion,” “voluntary placement,” or “prevention services.” See Karin Malm et al., *Variations in the Use of Kinship Diversion Among Child Welfare Agencies: Early Answers to Important Questions*, CHILD TRENDS 1 (Jun. 28, 2019), <https://www.childtrends.org/publications/variations-use-kinship-diversion-among-child-welfare-agencies-early-answers-important-questions>.

66. Elizabeth Brico, *How Child Protective Services Can Skip Due Process*, TALKPOVERTY (Aug. 23, 2018), <https://talkpoverty.org/2018/08/23/child-protective-services-can-skip-due-process/index.html>.

67. ROBERTS, *supra* note 43, at 134–35.

It is as if a police department investigated a crime, concluded an individual was guilty, did not file charges or provide him with an attorney, and told him he had to agree to go to jail for several weeks or months, or else it would bring him to court and things could get even worse.⁶⁸

Safety plans can place a wide variety of requirements on a family, ranging from something as simple as supervising children outside⁶⁹ to something as complex as changing a family's living arrangements. Some plans, for example, require one parent or person in the home to leave, while others serve as a mechanism by which to remove a child by placing the child with family or friends.⁷⁰ These informal removals are not reported by CPS agencies, which means that the frequency of this practice is unknown.⁷¹ However, research indicates that these custody transfers occur hundreds of thousands of times annually—parallel to the scope of formal child welfare involvement.⁷²

Although safety plans can be useful by limiting state control over families and permitting children to remain safely at home,⁷³ these benefits are largely outweighed by the unchecked power that CPS workers have in their ability to coerce parental cooperation. The use of safety plans to transfer physical custody of a child without any oversight enables CPS to remove children from their families without the inconvenience of justifying the removal to the court—or anyone else. This practice is often called “hidden foster care,” as it “effectuates the same day-to-day changes in children's reality” as foster care but without the oversight and procedural requirements of formal foster care.⁷⁴ These unregulated custody transfers save agencies time, money, and resources while artificially lowering states' removal numbers.⁷⁵ However, these superficial benefits come at the cost of children's safety, well-being, and constitutional rights.⁷⁶

68. Gupta-Kagan, *supra* note 25, at 843.

69. David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 239 n.8 (2015).

70. ROBERTS, *supra* note 43, at 135.

71. See *How is the Practice of Hidden Foster Care Inconsistent with Federal Policy and Harmful to Children and Families?*, CASEY FAM. PROGRAMS (Oct. 19, 2023), <https://www.casey.org/hidden-foster-care/>.

72. See *id.* (“[A] Child Trends analysis estimated 100,000 to 300,000 children are diverted from foster care in this fashion per year.”).

73. Gupta-Kagan, *supra* note 25, at 845.

74. *Id.* at 852.

75. See *id.* at 889–90.

76. See *infra* Part V.

5. Formal Removal

When a CPS investigator decides to formally remove a child from their family and take custody of the child, they are often able to do so without much restriction. The legal standard for child removal differs among the states, with some states permitting removal for mere allegations of abuse or neglect and other states requiring proof of imminent danger before a child may be removed.⁷⁷ These standards, however, are often ignored in practice.⁷⁸

Child removal is rarely subject to meaningful pre-removal oversight. Often, judges will grant orders to remove children from their families “relying solely on the word of a CPS investigator.”⁷⁹ This rubber-stamping of removal requests by dependency judges allows for broad discretion and abuse of power by CPS agencies. In 2019, as an extreme example, Kentucky CPS workers had access to blank orders that had been pre-signed by a judge, which allowed CPS workers to remove children without any oversight.⁸⁰ There are few, if any, repercussions for CPS caseworkers who unnecessarily remove children from their homes.⁸¹ The consequences for children and their families, however, are severe.

III. THE IMPACT OF INVESTIGATION AND REMOVAL ON YOUTH

A. Trauma of Investigation

CPS investigations are inherently traumatic.⁸² During an investigation, a caseworker will enter a child’s home and scrutinize every aspect of the space and the people inside. Caseworkers enter rooms, open cabinets, check refrigerators, look in closets, and inspect children’s

77. *How Can We Ensure That Separating Children from Their Families Is an Intervention of Last Resort?*, CASEY FAM. PROGRAMS, <https://www.casey.org/media/20.07-QFF-RFF-Impact-of-removal-on-children-and-families.pdf> (Oct. 2020).

78. ROBERTS, *supra* note 43, at 129.

79. ROBERTS, *supra* note 43, at 127.

80. Jason Riley, *Kentucky Workers Accused of Illegally Removing Children from Homes*, WDRB.COM, https://www.wdrb.com/in-depth/sunday-edition-kentucky-workers-accused-of-illegally-removing-children-from/article_5b42179c-474f-11e9-b44e-5b1688808fe4.html (Mar. 18, 2019).

81. See J. Justin Wilson, *Family Asks Supreme Court to Hold CPS Officer Accountable for Retaliatory Investigation*, INST. FOR JUST. (Nov. 28, 2022), <https://ij.org/press-release/family-asks-supreme-court-to-hold-cps-officer-accountable-for-retaliatory-investigation/>. CPS workers are generally protected by qualified immunity. See *id.*

82. CASEY FAM. PROGRAMS, *HOW DOES INVESTIGATION, REMOVAL, AND PLACEMENT CAUSE TRAUMA FOR CHILDREN?* (2018), https://www.casey.org/media/SC_Investigation-removal-placement-causes-trauma.pdf.

bedrooms.⁸³ CPS investigators also perform “body checks”—strip searches—on children to check for signs of physical or sexual abuse, even without cause to suspect such abuse.⁸⁴ This is a highly invasive process, particularly for children who have already experienced trauma in their lives.⁸⁵

During investigations, children often feel confused, powerless, and afraid.⁸⁶ Home searches by CPS agents threaten a child’s attachment to their parents, making it more difficult for children to trust in their parents’ ability to protect them.⁸⁷ Investigators also often show up unannounced to a child’s school, where the child can be questioned without parental knowledge.⁸⁸ Not only is this invasive for the child, it is also embarrassing for children whose peers bear witness to the intervention.⁸⁹ The fear of CPS can follow children even after an investigation is over. Parents who have experienced investigations report that their children “react with fear to a knock on the door months after investigations have closed.”⁹⁰ As one fourteen-year-old wrote, “I don’t want to jump every time there is a knock at the door. I want to feel safe in my own home without worrying that [CPS] is coming.”⁹¹

B. Trauma of Removal

The removal of a child from their home is traumatic, even if the child is in a neglectful or abusive household.⁹² Studies have demonstrated that removing a child from their parent(s) “may be ‘more damaging to the child than doing nothing at all.’”⁹³ Research shows that even short periods of separation from a parent cause irreversible damage to a child’s

83. Arons, *supra* note 6, at 1072.

84. *See id.* at 1072–73.

85. *See Strip Searches Harm Children*, PARENTAL RTS. FOUND. (Apr. 18, 2018), <https://parentalrightsfoundation.org/brief-doe-v-woodard/>.

86. Arons, *supra* note 6, at 1073.

87. *See* Ismail, *supra* note 13, at 1535.

88. ROBERTS, *supra* note 43, at 165.

89. *See* Eli Hager, *Child Welfare Officials Have Searched Her Home and Her Son Dozens of Times. She’s Suing Them to Stop*, PROPUBLICA (Nov. 16, 2023, 8:00 AM), <https://www.propublica.org/article/nyc-child-welfare-agency-warrantless-searches-lawsuit> (describing repeated CPS investigations on a child at school).

90. Arons, *supra* note 6, at 1074.

91. *Child Welfare in New York City: “I Am Scared of ACS,”* NAT’L COAL. FOR CHILD PROT. REFORM CHILD WELFARE BLOG (Jan. 2, 2017, 6:00 AM), <https://www.nccprblog.org/2017/01/child-welfare-in-new-york-city-i-am.html>.

92. *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527 (2019).

93. *Id.* at 528 (quoting Lynn F. Beller, *When in Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*, 22 DUKE J. GENDER L. & POL’Y 205, 216 (2015)).

brain.⁹⁴ When a child is removed from their families, stress hormones “flood[] the brain and the body,”⁹⁵ causing distress and irreparable damage to the brain with long-term health effects.⁹⁶ While removal may be necessary in limited circumstances, the research on the trauma of removal indicates that it should be avoided whenever possible.⁹⁷

Many children in foster care are further traumatized by separation from their siblings,⁹⁸ despite federal requirements that CPS workers make reasonable efforts to maintain sibling connections.⁹⁹ Separation from siblings has been found to have a strong negative association with mental health.¹⁰⁰ Strong sibling relationships tend to have a protective, stabilizing effect on children, while separation from siblings intensifies a child’s trauma.¹⁰¹ As identified by researcher Adam McCormick, “siblings can play a critical role in repairing and minimizing the psychological damage of instability, separation, and trauma caused by one’s parents.”¹⁰² Despite the importance of these relationships, however,

94. See Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, PBS NOVA (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/>. Eck, quoting a psychiatric epidemiologist, writes:

The scientific evidence against separating children from families is crystal clear No one in the scientific community would dispute it—it’s not like other topics where there is more debate among scientists. We all know it is bad for children to be separated from caregivers. Given the scientific evidence, it is malicious and amounts to child abuse.

Id.

95. *Id.*

96. Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AM. (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/>; see also William Wan, *What Separation from Parents Does to Children: ‘The Effect is Catastrophic,’* WASH. POST (June 18, 2018, 6:15 PM), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html.

97. See Trivedi, *supra* note 92, at 526.

98. *Id.* at 533.

99. Jeremy Loudonback, *Sibling Connections: States Take Different Approaches to Preserving Family Bonds in Foster Care*, IMPRINT (June 26, 2023, 4:44 PM), <https://imprintnews.org/top-stories/sibling-connections-states-take-different-approaches-to-preserving-family-bonds-in-foster-care/242530>.

100. Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. PUB. CHILD WELFARE 198, 211–12 (2010).

101. R. M. A. Shafi et al., *The Importance of Sibling Relationships for Children in Foster Care*, 51 J. AM. ACAD. PSYCHIATRY & L. 255, 257–58 (2023).

102. Adam McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* 6 (May 2009) (Ph.D. dissertation, University of Texas at Arlington), <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e55a97cd5cb0d1c01cc55e6b242c389d363d9ab6>.

between 53% and 80% of children are separated from a sibling while in foster care.¹⁰³

Upon removal, children are abruptly taken from their homes without much, if any, information about where they are going and what will happen to them.¹⁰⁴ This uncertainty puts children in a state of crisis and overwhelms them with feelings of helplessness, insecurity, anxiety, guilt, and loss.¹⁰⁵ As one child reported, removal “felt like being kidnapped, even though it was just for a few days.”¹⁰⁶

Removal is associated with a long list of negative effects.¹⁰⁷ In studies of children in “marginal” cases (cases where CPS investigators disagreed as to whether removal was necessary), children who were removed suffered worse outcomes than children who remained at home.¹⁰⁸ These outcomes included higher rates of delinquency and teen births; lower earnings as adults; increased rates of learning disabilities, mental health disorders, and developmental delays; and a higher likelihood of entering the adult criminal system.¹⁰⁹ These trends are not solely attributable to maltreatment at home, as studies of children who have experienced maltreatment found that those who were removed had a higher risk of criminal behavior and early death.¹¹⁰

103. *How Are Child Protection Agencies Promoting and Supporting Joint Sibling Placements and Adoptions?*, CASEY FAM. PROGRAMS (Sept. 16, 2020), <https://www.casey.org/joint-sibling-placements/>.

104. Rosalind D. Folman, “I Was Taken”: *How Children Experience Removal from Their Parents Preliminary to Placement in Foster Care*, 2 ADOPTION Q. 7, 17 (1998).

105. *Id.* at 11; see also Carlo Schuengel et al., *Children with Disrupted Attachment Histories: Interventions and Psychophysiological Indices of Effects*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH, Sept. 4, 2009, at 1, 4, <https://doi.org/10.1186/1753-2000-3-26>.

106. Eli Hager, *It Felt Like Being Kidnapped: The Trauma of Short Stays in Foster Care*, GUARDIAN (Feb. 11, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/feb/11/foster-care-short-stays-new-mexico>.

107. See generally Vivek Sankaran et al., *A Cure Worse Than the Disease?: The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1166–67, 1169 (2019).

108. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583–84 (2007).

109. See *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers*, A.B.A. 4–5 (Jan. 2020), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf.

110. *Id.* at 5.

C. Trauma of Foster Care

While removal of any kind causes trauma to a child, removal to “stranger” foster care¹¹¹ is more damaging than removal to kinship caregivers.¹¹² Study after study demonstrates that placement of children in foster homes with strangers or in congregate care facilities further traumatizes children in state custody.¹¹³ The negative effects of foster care are more prominent among youth placed in group settings (congregate placements). Congregate placements are marked by both chaotic environments and excessive rules that lead to violence and risky behaviors by youth.¹¹⁴

1. Instability & Mental Health

Frequent changes in foster placements create a constant sense of instability for children who have no way of knowing how long they will stay in one place. Moving placements can interrupt education and medical care, not to mention the loss of friendship and community that can come with a move.¹¹⁵ Children in foster care, especially those who move placements often, are more likely to develop mental health disorders.¹¹⁶ For example, the likelihood of suicidal ideation among foster children increased by 68% each time a child was placed in foster care.¹¹⁷

These issues are not solely attributable to poverty, as foster youth have higher rates of health problems when compared to other children receiving Medicaid.¹¹⁸ In addition to these negative effects of foster care,

111. “Stranger” foster care refers to placement with individuals that the child does not know. *See generally* Joshua Gupta-Kagan, *Creating a Strong Legal Preference for Kinship Care*, FAM. INTEGRITY & JUST. Q., Fall 2022, at 18, 18. This phrase exists in contrast to “kinship” foster care, which generally refers to placement with family, friends, or other individuals known to the child. *See id.* at 25.

112. ALIA, EVIDENCE BASE FOR AVOIDING FAMILY SEPARATION IN CHILD WELFARE PRACTICE: AN ANALYSIS OF CURRENT RESEARCH 3 (2019), https://www.ncsc.org/_data/assets/pdf_file/0031/18985/alia-research-brief.pdf (concluding that children who are removed have better outcomes when placed with kin versus non-kin).

113. *See* Trivedi, *supra* note 92, at 526.

114. *See* ROBERTS, *supra* note 43, at 252–53. *See generally* CHILDREN’S RTS., ARE YOU LISTENING? YOUTH ACCOUNTS OF CONGREGATE PLACEMENTS IN NEW YORK STATE 7 (2023), https://www.childrensrights.org/wp-content/uploads/2024/07/CR-2023-AreYouListening_report.pdf.

115. *See* ROBERTS, *supra* note 43, at 228–29.

116. Trivedi, *supra* note 92, at 549. *See generally* Eric Adler, *Throwaway Kids: Frequent Moves Don’t Just Harm Foster Kids’ Emotions—They Hurt Their Brains*, KAN. CITY STAR, <https://www.kansascity.com/news/special-reports/article238204784.html> (Feb. 25, 2020, 1:38 PM).

117. ROBERTS, *supra* note 43, at 236.

118. Trivedi, *supra* note 92, at 546–47.

rates of maltreatment in foster care are higher than in the general population.¹¹⁹ In one study, for example, approximately one-third of participants reported maltreatment in foster care.¹²⁰ The trauma of removal and instability in placement is thus often paired with the trauma of maltreatment in foster care.

2. Outcomes

Over 19,000 youth “age out” of foster care every year, meaning that they exit the foster care system without a permanent family home.¹²¹ One-fifth of youth who age out report having experienced homelessness between the ages of seventeen and nineteen; that number rises to over one-fourth for those aged nineteen to twenty-one.¹²² Many of these youth are “legal orphans” without legal ties to any adult. In 2011, over 100,000 children in the family policing system were “legal orphans”—children whose ties to their parents have been legally terminated but who have not been adopted.¹²³ Among these children, only 12% were in pre-adoptive homes.¹²⁴

Even children who *are* adopted from foster care are not exempt from aging out and leaving foster care without legally recognized family ties.¹²⁵ Although the numbers of broken adoptions are not nationally tracked, the problem of children returning to foster care post-adoption is well-known in the field.¹²⁶ The data that does exist indicates that about 10–25% of adoptions fail before the legal finalization of the adoption, while one to 5% of adoptions fail after the adoption has been legally finalized.¹²⁷ It is unclear to what extent this data accounts for the

119. *Id.* at 542.

120. *Id.* at 543.

121. *Child Welfare and Foster Care Statistics*, ANNIE E. CASEY FOUND., <https://www.aecf.org/blog/child-welfare-and-foster-care-statistics> (July 27, 2024).

122. *Id.* This percentage jumps to over 40% for indigenous youth between the ages of nineteen and twenty-one. *Id.*

123. Meredith L. Schalick, *Bio Family 2.0: Can the American Child Welfare System Finally Find Permanency for “Legal Orphans” with a Statute to Reinstate Parental Rights?*, 47 U. MICH. J. L. REFORM 467, 473 (2014).

124. *Id.* at 474.

125. Although it is outside the scope of this Note, adoption is not an adequate solution to the issues of foster care or child maltreatment. The adoption industry has been heavily critiqued by a variety of scholars, including parents and adoptees. *See generally* Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557 (2022).

126. *See* Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 440 (2012); Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 261 (2023).

127. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., ADOPTION DISRUPTION AND DISSOLUTION 2, 6 (2012).

children who are privately “rehomed” by adoptive parents¹²⁸ or sent to institutional settings or “therapeutic” programs away from their adoptive homes.¹²⁹

The harms faced by children in foster care—instability, maltreatment, and negative outcomes—are therefore often similar to or worse than the circumstances the child was removed from.

D. Hidden Foster Care

Hidden foster care carries its own set of problems distinct from formal foster care. Safety plans are not legally binding and do not transfer legal custody from a child’s parents to the new caregiver.¹³⁰ This leaves caregivers with no legal authority to consent to medical or educational decisions, making it difficult for children to receive the services they need.¹³¹ The lack of a formal custody agreement also means that these caregivers are prevented from accessing the welfare benefits that would enable them to provide for the children in their care, such as SNAP or WIC.¹³² Because hidden foster care is treated as a voluntary, private custody transfer between parents and caregivers, these caregivers are typically not entitled to the financial support and resources that formal foster parents would receive.¹³³ This is especially harmful given the vast number of caregivers who are financially insecure.¹³⁴

Moreover, unlike formal foster care cases, which involve court oversight and statutory requirements, hidden foster care escapes court oversight. Children in these arrangements are left without anyone

128. See Jenn Morson, *When Families Un-Adopt a Child*, ATLANTIC (Nov. 16, 2018), <https://www.theatlantic.com/family/archive/2018/11/children-who-have-second-adoptions/575902/>; see also *Waiting Children*, WASATCH INT’L ADOPTION, <https://wiaa.org/2nd-chance-adoption/waiting-children/> (last visited Feb. 25, 2025) (posting photos of children who are “waiting” to be adopted a second time).

129. See Albert & Mulzer, *supra* note 125, at 584–85.

130. Brico, *supra* note 66.

131. Lizzie Presser, *How ‘Shadow’ Foster Care Is Tearing Families Apart*, N.Y. TIMES, <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html> (Dec. 2, 2021).

132. See Morgan Baskin, *Kinship Caregivers in D.C. Say Child Welfare Agency Owes Foster Payments*, IMPRINT (Oct. 4, 2021, 11:59 AM), <https://imprintnews.org/top-stories/kinship-caregivers-in-d-c-say-child-welfare-agency-owes-foster-payments/59410>.

133. See Roxanna Asgarian, *Hidden Foster Care: All of the Responsibility, None of the Resources*, APPEAL (Dec. 21, 2020), <https://theappeal.org/hidden-foster-care/>.

134. ADMIN. FOR CHILD. & FAMS., U.S. DEPT OF HEALTH & HUM. SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, NO. 15: KINSHIP CAREGIVERS IN THE CHILD WELFARE SYSTEM 3 (2007), https://www.acf.hhs.gov/sites/default/files/documents/opre/rb_15_2col.pdf (reporting that “[k]inship caregivers were significantly more likely to be living at or below the federal poverty level (33.2%) than foster caregivers (12.9%)”).

responsible for monitoring their safety or ensuring that their needs are met.¹³⁵ This lack of oversight also has the potential to allow CPS to avoid liability for harm done to children in hidden foster care.¹³⁶ Furthermore, the absence of court involvement allows CPS agencies to shirk their legal obligation to make reasonable efforts to reunify children with their parents. Most seriously, children in hidden foster care are vulnerable to neglect, abuse, and even death while in care. In February of 2023, for example, a one-year-old girl was beaten to death in hidden foster care after her mother was coerced into permitting CPS workers to place her daughter with a woman that she “barely knew.”¹³⁷

IV. CPS AS THE FAMILY POLICE

Many activists use the phrase “family policing” to reflect the similarities in both form and function between CPS and police departments.¹³⁸ As theorist Stafford Beer writes, “[t]he purpose of a system is what it does,” despite the intentions of those who operate the system.¹³⁹ By renaming the “child welfare system” the “family policing system,” activists make explicit the implicit purpose of CPS: to police families.

A. *Similarity in Form & Function*

CPS agencies operate remarkably similarly to police departments around the country.¹⁴⁰ CPS and police presence are concentrated in the same (primarily Black) neighborhoods.¹⁴¹ Families investigated by CPS

135. See Aubrey Edwards-Luce, *How Hidden Foster Care Harms Children and Parents of Color*, IMPRINT (July 7, 2022, 4:00 AM), <https://imprintnews.org/opinion/how-hidden-foster-care-harms-children-and-parents-of-color/66286>; see also Presser, *supra* note 131 (discussing the harms of hidden foster care to children).

136. See Gupta-Kagan, *supra* note 25, at 883 n.240 (discussing the issue of liability in hidden foster care cases).

137. Steve Volk, *Philly DHS Took a 1-Year-Old from Her Mother but the Girl Was Then Kicked to Death*, PHILA. INQUIRER, <https://www.inquirer.com/news/philadelphia/philadelphia-dhs-foster-care-homicide-sulayah-williams-20240214.html> (Feb. 14, 2024, 3:56 PM).

138. *Why We're Using the Term 'Family Policing System,' supra* note 15.

139. David Benjamin & David Komlos, *The Purpose of a System Is What It Does, Not What It Claims To Do*, FORBES (Sept. 13, 2021, 6:00 AM), <https://www.forbes.com/sites/benjaminkomlos/2021/09/13/the-purpose-of-a-system-is-what-it-does-not-what-it-claims-to-do/?sh=20a7add63887>.

140. ROBERTS, *supra* note 43, at 161–62.

141. *Id.* at 193.

compare CPS workers' actions to those of police.¹⁴² Like police, CPS agencies disproportionately surveil marginalized communities, investigate allegations of wrongdoing, and threaten individuals' freedom.¹⁴³

In addition to investigating families in a way analogous to a criminal investigation, CPS agencies typically have close ties to local police departments.¹⁴⁴ They train together, share information, and collaborate in investigations.¹⁴⁵ Some CPS agencies even use the same databases and risk assessment technologies as police departments.¹⁴⁶ Police officers, as mandated reporters, bring CPS into the communities they police by making approximately one-fifth of all calls to CPS hotlines.¹⁴⁷

In many ways, CPS workers have *more* power than police. As scholar Dorothy Roberts argues, “[c]hild welfare authorities can wield greater control over families than cops while providing fewer legal protections to parents and children”¹⁴⁸ by avoiding “the constitutional provisions that place restraints on police officers’ actions.”¹⁴⁹ In some cases, particularly those involving allegations of criminal conduct, police officers will accompany CPS workers to home investigations.¹⁵⁰ Police officers often do not seek a warrant in advance of these investigations.¹⁵¹ Officers who accompany CPS investigators in home searches have expressed their shock at the ability of CPS investigators to conduct warrantless searches. One former police officer, for example, explained that the officers “didn’t necessarily understand the powers and privileges [CPS] had,” and wondered, “[w]hat the hell does [CPS] have that we don’t?”¹⁵²

B. *Similarity in Impact*

The consequences of CPS investigation for families are similar (or even identical) to those of a criminal investigation. At least nine states

142. Hager, *supra* note 3 (describing one woman’s statement that “[t]he [CPS] social workers pounded and pounded like police”).

143. See ROBERTS, *supra* note 43, at 161–62.

144. *Id.* at 191–92 (describing relationships between CPS and police).

145. *Id.*; see also Ismail, *supra* note 13, at 1501–02.

146. ROBERTS, *supra* note 43, at 176–77. These risk assessment technologies are highly flawed, as they are biased against poor and Black families. *Id.* at 177–78.

147. *Id.* at 192–93.

148. *Id.* at 163. Police involvement in CPS investigations can escalate the situation and lead to violence and even death. See *id.* at 195–96 (describing a man killed by a police officer who entered his home with a CPS agent).

149. *Id.* at 192.

150. *Id.* at 191–92. Police involvement tends to make investigations more stressful and even violent. See *id.* at 195.

151. See *id.* at 196.

152. Hager, *supra* note 3.

and Washington, D.C., have cross-reporting requirements, which means that reports of child maltreatment are reported to both CPS and police departments—even when these reports turn out to be unsubstantiated.¹⁵³

CPS investigations can lead to criminal investigations beyond those related to child maltreatment. Whenever CPS investigators enter a home, there is a “possibility that they will find evidence of a crime,” such as illegal drugs.¹⁵⁴ When police officers join CPS agents in their home searches, officers can arrest a member of the household for criminal offenses.¹⁵⁵ The reverse is also true: one study found that “contact with police often leads to a child welfare investigation,” particularly for Black and Indigenous families.¹⁵⁶

It is not only parents who are criminalized as a side effect of CPS investigation. Children removed by CPS are thrust into the foster care system, which is notorious for funneling children into the “foster care-to-prison pipeline.”¹⁵⁷ Approximately one-third of teenagers in foster care are placed in congregate care, such as group homes and residential treatment facilities.¹⁵⁸ These facilities, which are characterized by excessive rules, restrictions, and violence, are frequently compared to prisons.¹⁵⁹ As one former foster child explained, “[i]t was often hard to distinguish whether we were victims in protective care or if we were juveniles being treated like delinquents.”¹⁶⁰

The blurred lines between foster care and juvenile detention are reflected in the data surrounding children who are involved in both systems. Children who are placed in foster care tend to “crossover” to juvenile delinquency.¹⁶¹ It is less common for children to crossover from delinquency to the foster care system.¹⁶² Children placed in foster care are more likely to be incarcerated than children who are similarly situated—and often face more severe consequences for less serious

153. ROBERTS, *supra* note 43, at 193.

154. *Id.*

155. *Id.*

156. *Id.* at 194; see also Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RSF 50, 62–63 (2019).

157. *What is the Foster Care-to-Prison Pipeline?*, JUV. L. CTR. BLOG POST (May 26, 2018), <https://jlc.org/news/what-foster-care-prison-pipeline>.

158. ROBERTS, *supra* note 43, at 252.

159. *Id.* at 252–55 (summarizing critiques of congregate facilities).

160. Stacey Patton, *The Foster Care System and Others Failed Ma’Khia Bryant—and Black Kids Like Her*, GRIO (Apr. 23, 2021), <https://thegrio.com/2021/04/23/makhia-bryant-foster-system-black-children/>.

161. National data is not collected on children involved in both systems. ROBERTS, *supra* note 43, at 259.

162. *Id.*

offenses.¹⁶³ Children who have just one placement in a congregate care facility are two and a half times as likely to be arrested than other children in foster care.¹⁶⁴ Staff at congregate facilities tend to call the police to control foster children's behavior, rather than deescalating situations.¹⁶⁵ Furthermore, foster parents are more likely to call the police on foster children and less likely to advocate on their behalf when a child is arrested.¹⁶⁶ Thousands of children in foster care are also criminalized when they run away from their placements to escape restrictive conditions and maltreatment or to return home to their families.¹⁶⁷ The criminalization of children in foster care only emphasizes the policing function of CPS and the necessity for protections against unnecessary CPS investigations.

V. FOURTH AMENDMENT LAW

The Fourth Amendment is designed to protect individuals against unreasonable government intrusion. It reads:

The 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 persons or things to be seized.¹⁶⁸

This language is generally read to require that government searches and seizures be reasonable and supported by a particularized warrant. More broadly, however, the Fourth Amendment "safeguard[s] the privacy and security of individuals against arbitrary invasions by governmental officials."¹⁶⁹

163. *Id.* at 259–60.

164. IRA LUSTBADER ET AL., FAMILIES OVER FACILITIES: ENDING THE USE OF HARMFUL AND UNNECESSARY INSTITUTIONS AND OTHER GROUP FACILITIES IN CHILD WELFARE SYSTEMS 12 (2021), <https://www.childrensrights.org/wp-content/uploads/imported-files/CR-Families-Over-Facilities-Report.pdf>.

165. Brian Rinker, *Cops, Group Homes and Criminalized Kids*, IMPRINT (Jan. 21, 2015, 12:01 AM), <https://imprintnews.org/news-2/cops-group-homes-and-criminalized-kids/9109> ("The group home staff used the police to intimidate the girls to keep them in check.").

166. ROBERTS, *supra* note 43, at 261.

167. *Id.* at 262–67.

168. U.S. CONST. amend. IV.

169. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (quoting *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 528 (1967)).

For the purposes of the Fourth Amendment, a “search” occurs where an individual exhibits a reasonable expectation of privacy and there is state intrusion on that expectation of privacy.¹⁷⁰ A “seizure” occurs when a state actor intentionally restrains a person’s freedom of movement.¹⁷¹ This includes situations where a reasonable person would not feel free to leave, as well as where a person submits to an officer’s show of authority.¹⁷²

A. Warrants & Probable Cause

Generally, the Fourth Amendment requires that any government search or seizure be supported by both probable cause and a warrant. Probable cause is an amorphous concept, but generally exists where there is a reasonable basis to believe that a crime has been committed or evidence of a crime is present.¹⁷³ It must be more than bare suspicion or conclusory statements, but need not be sufficient to justify conviction.¹⁷⁴ A warrant may only be issued where probable cause exists.¹⁷⁵ The existence of probable cause must be determined by a neutral, detached magistrate and based on credible information.¹⁷⁶ Any warrant issued based on that determination of proximate cause must particularly describe either the place to be searched or the person(s) or thing(s) to be seized.¹⁷⁷

The Fourth Amendment protects individuals against government overreach by creating a judicial “check” on the actions of state agents, such as police officers.¹⁷⁸ Requiring a warrant issued by a neutral magistrate, for example, prevents the police from determining for themselves whether they have sufficient cause to execute a search or seizure.¹⁷⁹ One of the defining characteristics of the Fourth Amendment is its prohibition on general warrants—those that “specif[y] only an offense” and leave “to the discretion of the executing officials the decision

170. See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

171. *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (defining “seizure” as “governmental termination of freedom of movement through means intentionally applied”).

172. *Florida v. Royer*, 460 U.S. 491, 497, 502 (1983).

173. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

174. *Id.* at 174–75.

175. *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

176. *Shadwick v. City of Tampa*, 407 U.S. 345, 354 (1972).

177. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

178. Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 144 (2016).

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

as to which persons should be arrested and which places should be searched.”¹⁸⁰

B. Reasonableness Balancing Test

Reasonableness is the touchstone of the Fourth Amendment.¹⁸¹ The constitutionality of a search or seizure depends on whether the action was objectively reasonable given the totality of the circumstances.¹⁸² This is determined by a balancing test that compares “the nature and quality of the intrusion on the individual’s Fourth Amendment interests”¹⁸³ with the importance of the “governmental interests” alleged to justify the intrusion.¹⁸⁴

The protections of the Fourth Amendment are traditionally at their strongest in the home, as “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”¹⁸⁵ Warrantless searches of the home are presumptively unreasonable, absent a recognized exception.¹⁸⁶

C. Children and the Fourth Amendment

As with other constitutional rights, the protections of the Fourth Amendment extend to children.¹⁸⁷ In the words of the Supreme Court, “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”¹⁸⁸ The extent of a child’s Fourth Amendment rights, however, may be dependent on factors such as parental authority, context, and a child’s capacity to invoke their rights.¹⁸⁹ For example, although the Supreme Court has recognized that warrantless searches of students in public schools implicate the Fourth

180. *Steagald v. United States*, 451 U.S. 204, 220 (1981).

181. *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981).

182. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

183. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

184. *Id.*

185. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

186. *Payton v. New York*, 445 U.S. 573, 586 (1980) (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”); *see also* Arons, *supra* note 6, at 1086–87.

187. *See, e.g., In re Gault*, 387 U.S. 1, 41 (1967) (applying the protections of the Due Process Clause to juvenile delinquency proceedings); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (recognizing the First Amendment rights of children in schools).

188. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

189. Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 62 (2011).

Amendment,¹⁹⁰ the constitutional rights of children in schools are “not automatically coextensive with the rights of adults in other [non-school] settings.”¹⁹¹ The Court has justified this limitation by citing the “special” interest of schools in protecting students and enforcing rules.¹⁹²

Outside of the context of school discipline, however, children are generally protected by the Fourth Amendment in a similar capacity as adults. In traditional on-the-street encounters with police, for instance, children have the same Fourth Amendment rights as adults.¹⁹³ Similarly, children are protected by the Fourth Amendment in their homes.¹⁹⁴ Therefore, while a child’s Fourth Amendment rights are limited in some circumstances (such as in the context of school discipline), children maintain their Fourth Amendment rights against government intrusion into their homes.

D. Exceptions to the Warrant Requirement

Since the Fourth Amendment’s inception, many exceptions have weakened its promise to protect against government intrusion. Most relevant to the context of CPS investigations are the exigency, special needs, and consent doctrines.

1. Exigency

Exigent circumstances are circumstances “that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm . . . or some other consequence improperly frustrating legitimate law enforcement efforts.”¹⁹⁵ Typical examples of exigent circumstances include “hot pursuit” of a suspect,¹⁹⁶ the need to provide medical assistance to an occupant of a home,¹⁹⁷ the imminent destruction of evidence,¹⁹⁸ or the threat of immediate physical

190. See *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment applies to searches of students’ belongings by public school officials but upholding a warrantless search).

191. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (discussing students’ First Amendment rights).

192. See *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

193. See *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (assuming without discussing that fifteen-year-old defendant has same constitutional rights as an adult in a police encounter).

194. Henning, *supra* note 189, at 69.

195. “Exigent Circumstances,” LEGAL INFO. INST. (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc)), https://www.law.cornell.edu/wex/exigent_circumstances (Dec. 2022); see *Missouri v. McNeely*, 569 US 141, 149 (2013).

196. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

197. *Michigan v. Fisher*, 558 U.S. 45, 49 (2009).

198. *Ker v. California*, 374 U.S. 23, 40 (1963).

harm to an individual.¹⁹⁹ The exigency exception exists to allow law enforcement to act quickly in situations where “there is compelling need for official action and no time to secure a warrant.”²⁰⁰ Where there *is* time to secure a warrant, however, the exigency exception is inapplicable.

2. Administrative Searches & the Special Needs Doctrine

Although the concepts of an “administrative search” and the special needs doctrine were developed separately, they have been increasingly conflated during the past two decades.²⁰¹ To the extent that the doctrines can be separated, the administrative search doctrine governs “dragnets,” while the special needs doctrine governs searches based on individualized suspicion that are conducted on certain subpopulations.²⁰²

a. Administrative Searches

Administrative searches were recognized by the Supreme Court in the 1960s as a mechanism to permit dragnet searches for the purposes of public health and safety.²⁰³ Dragnets are characterized as minimally intrusive searches or seizures of people, places, or things that are necessary to serve important health and safety interests.²⁰⁴ Dragnet searches are justified where searches based on individualized suspicion would be ineffective in achieving the governmental interest involved.²⁰⁵ For example, housing inspections²⁰⁶ or immigration checkpoints²⁰⁷ constitute administrative searches. Administrative searches must strike a balance between the importance of a governmental interest and the degree of intrusion that the search or seizure has on an individual. Furthermore, administrative searches are only permitted where the governmental interest could not be served with the traditional individualized suspicion and warrant requirements. Finally, administrative searches must limit the ability of government officials to conduct discretionary searches.²⁰⁸

199. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

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

201. See Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 276 (2011).

202. *Id.* at 260–61.

203. *Id.* at 260.

204. *Id.*

205. *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 535–36, 538 (1967).

206. *Id.* at 534–35.

207. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

208. Primus, *supra* note 201, at 270.

b. The Special Needs Doctrine

The special needs doctrine was established in the context of searches of students in schools by the Supreme Court in *New Jersey v. T.L.O.*²⁰⁹ In that case, the Court reasoned that the need for informal discipline in schools was sufficient to justify a departure from the traditional Fourth Amendment warrant requirement even in cases involving individualized suspicion.²¹⁰ Despite its prior statement that “students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate,”²¹¹ the Court has held that students have a lessened expectation of privacy at school and that school officials have a “special need” for informal disciplinary powers.²¹² However, this lessened expectation of privacy has limits. In 2009, for example, the Court held that the strip search of a thirteen-year-old at school was unreasonable.²¹³

Despite Justice Blackmun noting in his concurrence that this exception should be used “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,”²¹⁴ the special needs doctrine rapidly expanded in scope after its inception in 1985. It has been used to justify searches of various other “special subpopulations”²¹⁵ with reduced expectations of privacy,²¹⁶ such as government employees,²¹⁷ probationers,²¹⁸ and parolees.²¹⁹ The applicability of the special needs doctrine to CPS investigations, however, has not been determined by the Supreme Court.²²⁰

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

210. *Id.* at 340.

211. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

212. *See* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657, 664–65 (1995) (permitting drug testing of student athletes); *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 829–32, 837 (2002) (upholding drug testing of all students involved in extracurricular activities).

213. *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 368 (2009).

214. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

215. *Primus*, *supra* note 201, at 270–71.

216. *See T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

217. *See* *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (searches of government employees' offices); *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 632–33 (1989) (drug testing of public railroad employees); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989) (drug testing of Customs employees).

218. *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987).

219. *Samson v. California*, 547 U.S. 843, 847 (2006) (finding a suspicionless search of a parolee lawful).

220. The Court passed on the opportunity to determine the issue in 2011. *See* *Camreta v. Greene*, 563 U.S. 692, 710–11 (2011); *see also* Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 374–75 (2012).

Today, the special needs doctrine permits the government to circumvent the standard warrant and probable cause requirements where (1) the government has a “special need” beyond normal law enforcement activities that makes the search or seizure necessary, (2) the “special need” would be frustrated by the normal warrant and probable cause requirements, and (3) the government’s “interest in the search or seizure outweighs the individual’s privacy interest.”²²¹

3. The Consent Doctrine

The consent exception to the Fourth Amendment permits state actors to search a person or their home if the individual freely and voluntarily consents to the search.²²² The voluntariness of consent is determined through consideration of the “totality of all the surrounding circumstances” in which consent was given.²²³ If consent is the product of either express or implied duress or coercion, it is insufficient as a waiver of one’s Fourth Amendment rights.²²⁴ The burden of proof is on the government to prove that consent was given voluntarily.²²⁵ However, the individual’s knowledge of their right to refuse is not an essential factor in determining reasonableness.²²⁶ Parental consent is arguably insufficient to override a child’s right to refuse a search.²²⁷

VI. REJECTING FOURTH AMENDMENT EXCEPTIONS IN CPS CASES

A. CPS Investigations Are Not Administrative Searches

CPS investigations do not fall under the administrative search exception because, unlike the dragnet searches envisioned by this exception, CPS investigations are based on individualized suspicion and are incredibly invasive. CPS investigations are triggered when a report is made alleging child abuse or neglect against a specific child.²²⁸ The entire structure of CPS investigations is dependent on identifying specific families to investigate for wrongdoing. Furthermore, one of the

221. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259 (2000); see also Arons, *supra* note 6, at 1086–88 (discussing the special needs doctrine in the context of warrantless home searches).

222. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

223. *Id.* at 225–26.

224. *Id.* at 248–49.

225. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

226. *Schneckloth*, 412 U.S. at 226–27; *United States v. Drayton*, 536 U.S. 194, 206–07 (2002).

227. See Henning, *supra* note 189, at 59.

228. See *supra* Part I.

key elements of an administrative search is that the search is “minimally intrusive.”²²⁹ Unlike the housing code inspections of *Camara*, for example, CPS investigations involve some of the most invasive searches possible.²³⁰

The closest that the Supreme Court has come to discussing CPS searches is its decision in *Wyman v. James*.²³¹ In *Wyman*, the Court held that a home search by a caseworker for the purposes of welfare eligibility did not constitute a Fourth Amendment search because its purpose was “administrative” and “[t]he only consequence of [refusing entry] is that the payment of benefits ceases.”²³² This reasoning, however, is insufficient to justify entry by CPS investigators both because of the consequences of these investigations and the similarity between CPS and police.²³³ CPS investigations are also distinct from the search in *Wyman*. In *Wyman*, the Court reasoned that the caseworker was “a friend to one in need,” rather than a police officer.²³⁴ This framing is not appropriate to apply to CPS investigators, given their policing function.²³⁵

Key to the Court’s analysis of the home search in *Wyman* was that the only potential negative consequence of the search was the loss of welfare benefits.²³⁶ In a CPS investigation, however, consequences can include criminal charges (for parents) or removal from the home (for children). In the words of the Pennsylvania Supreme Court, “[t]he government cannot condition a parent’s right to raise her children on periodic home inspection unsupported by probable cause.”²³⁷ Likewise, a child’s right to family integrity cannot be conditioned on acquiescence to warrantless investigations.

B. *The Special Needs Doctrine is Inapplicable*

The special needs doctrine has been erroneously used to enable routine violations of individuals’ rights in CPS cases.²³⁸ Some scholars have argued that the special needs doctrine should not be applied to CPS investigations due to the entanglement of CPS with the criminal system,²³⁹ while others have advocated for substantive changes to the

229. See Primus, *supra* note 201, at 265 & n.60.

230. See Ismail, *supra* note 13, at 1538.

231. 400 U.S. 309 (1971).

232. *Id.* at 325–26.

233. See *infra* Part VI.

234. *Wyman*, 400 U.S. at 323.

235. See *supra* Part III.

236. See *Wyman*, 400 U.S. at 327.

237. *In re Y.W.-B.*, 265 A.3d 602, 620 (Pa. 2021).

238. See Gupta-Kagan, *supra* note 220, at 356.

239. Coleman, *supra* note 13, at 490.

special needs doctrine altogether.²⁴⁰ These approaches, while compelling, do not appropriately frame CPS as a policing entity apart from its entanglement with law enforcement.

The special needs doctrine was developed in the context of school searches, where school officials expressed a purported need to search students' belongings for contraband.²⁴¹ One of the core tenets of the special needs doctrine is that it is meant to provide an exception to the Fourth Amendment requirements in situations that are distinct from the regular needs of law enforcement. In the context of CPS investigations and removals, however, the purpose of family policing is parallel to that of traditional law enforcement. CPS investigators are not teachers searching for contraband in a student's locker—they are government agents investigating families for evidence of illegal activity. Refusing to apply the special needs doctrine in CPS investigations would provide more protection to children at risk of unnecessary removal without sacrificing the wellbeing of children who are in real danger and can be served through the exigency exception.

C. *The Consent Exception is Inapplicable*

The consent exception to the Fourth Amendment should not be invoked in the context of CPS investigations. Although parental consent is often used as a proxy for the consent of their children, parental consent is insufficient to waive a child's rights under the Fourth Amendment because a child has an independent interest against government searches and seizures. Even if parental consent was sufficient as a proxy for a child's consent, the "consent" provided in the context of CPS investigations is largely coerced and thus invalid. CPS investigators regularly coerce parents into providing "consent" to CPS entry by threatening them with police involvement or child removal.²⁴² Under these conditions, parental consent is not voluntarily given and thus cannot be used to ignore the Fourth Amendment rights of children.

Furthermore, removal through "safety plans" cannot escape Fourth Amendment review simply because parents "consented" to the custody transfer of their child. Often, caseworkers claim that they will obtain a court order to remove the child if parents do not agree to the safety plan, even without sufficient evidence to legally justify removal.²⁴³ Some courts have held that police officer threats to remove a suspect's children can

240. Gupta-Kagan, *supra* note 220, at 358.

241. See *New Jersey v. T.L.O.*, 400 U.S. 325 (1985).

242. See Ismail, *supra* note 13, at 1541.

243. See Shellady, *supra* note 13, at 1631.

render consent to search involuntary for the purposes of the Fourth Amendment, while others have held that the threat of removal alone is insufficient to constitute coercion.²⁴⁴ The level of coercion involved in the safety plan process is enough to negate the voluntariness requirement for the consent exception to the Fourth Amendment.

Unlike their parents, children are not given an opportunity to consent on any level to CPS searches and seizures. Children generally do not have a choice about whether to let CPS investigators into their homes or whether to enter foster care. Because children cannot meaningfully consent to these actions, the consent exception cannot be used to waive the independent Fourth Amendment rights of a child.

D. The Exigent Circumstances Exception is Sufficient to Protect Children

Rejecting the special needs and consent exceptions to the Fourth Amendment does not leave CPS without avenues to intervene in cases where children are genuinely at risk of imminent harm. The exigency exception to the Fourth Amendment requirements is a well-established rule that permits officials to act quickly in emergency situations.²⁴⁵ This exception naturally extends to CPS caseworkers, providing a practical alternative to the warrant requirement in circumstances involving imminent danger of abuse.²⁴⁶

Unfortunately, the exigent circumstances exception has the potential for abuse by CPS investigators, who are likely to characterize any removal as one spurred by exigent circumstances.²⁴⁷ But not every CPS removal is an emergency.²⁴⁸ Take, for instance, the case of child welfare

244. *United States v. Ivy*, 165 F.3d 397, 403–04 (6th Cir. 1998) (holding that an officer's threat to remove a child is hostile police action that "significantly undermines the voluntariness" of parental consent); *United States v. Tibbs*, 49 F. Supp. 2d 47, 53 (D. Mass. 1999) (holding that an officer's threat to call CPS to remove a child rendered parental consent involuntary). *But see* *United States v. Miller*, 450 F.3d 270, 272 (7th Cir. 2006) (holding officer's threat to put suspect's child in foster care if he did not confess did not render his statements to the police involuntary); *United States v. Henderson*, 437 F. App'x 96, 99 (3d Cir. 2011) (finding officer's statement that the suspect's child would be placed in custody if she did not cooperate did not taint the voluntariness of her consent to search her home). *See generally* Gupta-Kagan, *supra* note 25, at 870 (describing the development of the issue in the circuit courts).

245. *See supra* Part IV.D.

246. *See generally* Coleman, *supra* note 13, at 507 (discussing the practicability of the exigency exception in the context of CPS investigations).

247. *See id.* at 465.

248. *See* Vivek Sankaran, *Is Every Foster Care Removal Really an Emergency?*, IMPRINT (July 6, 2020, 11:45 PM), <https://imprintnews.org/opinion/is-every-foster-care-removal-really-an-emergency/44916>.

in New York City during the COVID-19 lockdown from March to June 2020. As scholar Anna Arons has demonstrated, during this period, the scope of the family policing system in New York City was limited—and children remained equally as safe as they were while the family policing system operated at full force.²⁴⁹ CPS investigators were encouraged to avoid entering families' homes,²⁵⁰ the number of reports received by CPS dropped by over 40%,²⁵¹ and judges became more reluctant to remove children from their families.²⁵² During this period, only about half as many children were removed from their families.²⁵³ Despite public concern that lockdowns would lead to increased rates of abuse of children “trapped” at home,²⁵⁴ these fears were contradicted by CPS data showing, at worst, unchanged rates of abuse and neglect.²⁵⁵ Even after the lockdown was lifted, there was no “rebound effect” indicating that abuse and neglect were going unnoticed during lockdown.²⁵⁶ The example of New York City's lockdown demonstrates that the majority of CPS investigations are not necessary to prevent imminent harm to children. Therefore, the use of the exigency exception to the warrant requirement for CPS investigations must be subject to review by the courts to ensure that the exception does not swallow the rule.

VII. APPLYING THE FOURTH AMENDMENT TO CPS INVESTIGATIONS

Almost all federal circuit courts have held that the Fourth Amendment applies to CPS caseworkers.²⁵⁷ Many of these courts have

249. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 3 (2022).

250. *Id.* at 9.

251. *Id.* at 13.

252. *Id.* at 17.

253. *Id.* at 18.

254. See, e.g., Nina Agrawal, *The Coronavirus Could Cause a Child Abuse Epidemic*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/opinion/coronavirus-child-abuse.html>; Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried*, N.Y. TIMES, <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html> (Aug. 7, 2020).

255. Arons, *supra* note 249, at 13.

256. *Id.* at 20.

257. Arons, *supra* note 6, at 1088; see, e.g., *Tenenbaum v. Williams*, 193 F.3d 581, 602 n.14 (2d Cir. 1999) (recognizing that “[t]he Fourth Amendment’s search and seizure provisions are applicable” to CPS); *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989) (declining to recognize a child abuse exception to the Fourth Amendment); *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404, 429 (5th Cir. 2008) (“[T]he government may not seize a child . . . absent a court order, parental consent, or exigent circumstances.”); *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (explaining that the Fourth Amendment protects children from removal from their homes without exigent circumstances). But see *Wildauer v. Frederick County*,

acknowledged that the warrant requirement applies to CPS investigations, meaning that caseworkers are only permitted to conduct searches if there is either a warrant or a recognized warrant exception.²⁵⁸ Some state courts have reached the same conclusion through an analysis of both federal and state constitutional law.²⁵⁹ Despite this legal recognition, however, the promise of Fourth Amendment protection in CPS investigations falls flat in practice.²⁶⁰ As attorney Vivek Sankaran writes, “attorneys are often chastised [by judges] when they demand that well-established processes be followed [in child welfare cases].”²⁶¹

The reasonableness of a search or seizure by CPS investigators, then, must be analyzed in the same fashion as searches and seizures by police officers. To determine whether a search or seizure was reasonable, one must balance the nature and quality of the intrusion against the importance of the government’s interests.²⁶² Children have a fundamental liberty interest in family integrity that is threatened by government seizures of children from their homes.²⁶³ The Supreme Court has held that children have an interest in maintaining the “emotional attachments that derive from the intimacy of daily association” with their families.²⁶⁴ The search of a child’s home and the removal of a child from their family must be justified by a compelling government interest in order to satisfy the requirements of the Fourth Amendment. For the majority of CPS investigations and child removals, however, the government interest in protecting children is *undermined* by CPS intervention.

993 F.2d 369, 372 (4th Cir. 1993) (applying the special needs exception to a CPS home search).

258. Arons, *supra* note 6, at 1060; *see, e.g.*, Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1250 n. 23 (10th Cir. 2003); Andrews v. Hickman County, 700 F.3d 845, 863–64 (6th Cir. 2012).

259. *See, e.g.*, *In re Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021) (holding that a CPS home search violated both the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution); *State v. Boggess*, 340 N.W.2d 516, 520, 521, 525 (Wis. 1983) (imposing warrant requirement to CPS home searches under federal and Wisconsin constitutions but finding warrantless search at issue was justified under emergency rule exception).

260. *See* Arons, *supra* note 6, at 1065.

261. Vivek Sankaran, *A Court Reminds Us of the Obvious: Probable Cause Counts in Child Welfare Cases, Too*, IMPRINT (Jan. 10, 2022, 3:45 AM), <https://imprintnews.org/opinion/court-says-probable-cause-counts-in-child-welfare-cases-too/61832>.

262. *See supra* Part IV.

263. *See* Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 286 (2021) (“[T]he right to family integrity is an individual right that belongs to all members of the family.”).

264. *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 844 (1977).

A. CPS Investigations As Searches

Children are routinely subjected to searches of their homes, bedrooms, belongings, and bodies during CPS investigations. Each of these searches is subject to the protections of the Fourth Amendment.

1. (Un)Reasonableness of Home Searches

Children have a privacy interest in their homes, despite not owning the property.²⁶⁵ It has been firmly established that “[t]he reasonableness of an individual’s expectation of privacy in his living space is not diminished by a lack of property interest or even by severe restrictions imposed on the use of the space by an owner or others who control the property.”²⁶⁶ Although the issue of children’s expectation of privacy within the home separate from their parents’ rights has seldom been litigated, state appellate courts that have ruled on the issue have held that children have a legitimate expectation of privacy in their homes.²⁶⁷

Warrantless searches of the home are presumptively unreasonable absent exigent circumstances.²⁶⁸ CPS searches that occur in the absence of a warrant or exigent circumstances, therefore, must be presumed unreasonable. Balancing the interests of the child and the government in warrantless CPS investigations also compels the conclusion that such searches are unreasonable absent exigent circumstances. Children have a strong privacy interest in their homes that must be balanced against the governmental interest in child safety. Although the governmental interest here is important, this interest would not be frustrated by compliance with the warrant requirement because the exigency exception permits warrantless searches when necessary to prevent the imminent risk of harm. In the absence of exigent circumstances justifying the privacy intrusion of a home search, then, warrantless CPS searches are unreasonable.

265. See Henning, *supra* note 189, at 71. *But see* *Georgia v. Randolph*, 547 U.S. 103, 114 (2006) (dictum) (suggesting that the Court would not apply its rule regarding the consent of one occupant to the relationship between parents and minor children).

266. Henning, *supra* note 189, at 71; *see also* *Minnesota v. Olson*, 495 U.S. 91, 99–100 (1990) (recognizing that overnight guests have legitimate expectation of privacy). *But see* *Rakas v. Illinois*, 439 U.S. 128, 142–43 (1978) (finding passengers lacked standing to challenge a police search where they could not assert any property or possessory interest in the vehicle or items seized).

267. Henning, *supra* note 189, at 72–73.

268. *Payton v. New York*, 445 U.S. 573, 586 (1980).

2. (Un)Reasonableness of Body Searches

As Justice Stevens aptly wrote in *Safford Unified School District v. Redding*, “[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.”²⁶⁹ The same reasoning applies to CPS searches of children’s bodies in their own homes. While the government clearly has an important interest in protecting children, this interest is not served by violating the bodily integrity of children through invasive searches without probable cause to justify the search. In fact, these searches traumatize children instead of protecting them.²⁷⁰ In light of the negative impact of these searches on children, these searches are presumptively unreasonable under Fourth Amendment standards.

B. Child Removals As Seizures

Child removal constitutes a seizure under the Fourth Amendment, as these removals restrict a child’s freedom of movement.²⁷¹ Unreasonable seizures, such as the warrantless and unnecessary removal of a child from their home, are unconstitutional pursuant to the Fourth Amendment. Currently, the majority of child removals are unnecessary to protect children. The experience of children who are removed from their families and then quickly returned is a prime example of how unnecessary many removals are.²⁷²

Every year, CPS removes approximately 25,000 children to foster care just to return them after less than thirty days.²⁷³ Most of these children spend less than two weeks in foster care and are placed with strangers, group homes, or shelters.²⁷⁴ While some of these removals may have been justified, the prevalence of these short stays indicates that CPS agencies are too quick to remove children from their homes.²⁷⁵

269. *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 380 (2009) (Stevens, J., concurring in part and dissenting in part) (alteration in original) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 382, n.25 (Stevens, J., concurring in part and dissenting in part)).

270. See *supra* Part II.

271. See *supra* note 171 and accompanying text.

272. Data on short stays in foster care can also be interpreted as evidence that the family policing system quickly achieves permanency in these cases. See Christopher Church et al., *Timely Permanency or Unnecessary Removal?: Tips for Advocates for Children Who Spend Less Than 30 Days in Foster Care*, 36 CHILD L. PRAC. 71, 71–72, (2017).

273. *Id.* at 71.

274. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J. L. & SOC. CHANGE 207, 209 (2016).

275. *Id.* at 210 n.24.

Although the government has a compelling interest in protecting children by removing them from dangerous situations, if a dangerous situation does not exist, the government no longer has a legitimate interest in removal. Given the well-documented harms of removal on children, any warrantless removal should be presumed unreasonable, absent evidence demonstrating otherwise.

Fourth Amendment protections are even more necessary in the context of unregulated custody transfers, as children removed in this manner have little recourse to challenge the removal due to the lack of judicial oversight. Children have a significant interest in remaining with their families, and in the context of informal removals, the government's interest in avoiding court involvement is insufficient to outweigh the child's interest. Pressuring parents to transfer custody of their children implicates a child's right against unreasonable seizures. Although the CPS caseworker may not be filing a petition to remove the child from their home in this situation, the resulting custody transfer and traumatic impact of removal are the same. Because these informal removals do not protect children from harm,²⁷⁶ they are also not justified by the government interest in protecting children. Informal removals via safety plans should, therefore, be considered presumptively unreasonable under a Fourth Amendment analysis.

VIII. REFORMING THE SYSTEM

While the movement to abolish the family policing system and replace it with an infrastructure of support is steadily growing, this change will not happen overnight. In order to limit the ability of the family police to surveil families and remove children from their homes, activists advocate for the implementation of non-reformist reforms.²⁷⁷ "Reformist reforms" seek to modify a system but "engage[] with power, politics, and the state as it is constituted" rather than challenging the nature of the system itself.²⁷⁸ "Non-reformist reforms," on the other hand, "aim[] to undermine the political, economic, and social system" in an effort to build a new world.²⁷⁹ In other words, reformist reforms alter the way in which a system wields its power, while non-reformist reforms

276. See *supra* Part II.

277. See Maya Pendleton et al., *Framework for Evaluating Reformist Reforms vs. Abolitionist Steps to End the Family Policing System*, UPEND, <https://upendmovement.org/framework/> (Mar. 2023) (providing a framework for distinguishing between reform and abolitionist tools).

278. Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2520 (2023).

279. *Id.* at 2527.

limit the system's power. Although the reforms proposed by this Note would not solve the fundamental flaws of the family policing system, applying robust Fourth Amendment protections to CPS investigations would reduce the power of the family policing system to violate the rights of the children it claims to protect.

A. *Requiring Warrants*

Probable cause and warrant requirements should be the rule, not the exception, in CPS investigations. Before a CPS investigator is permitted to conduct a search of a child's home or body, a warrant must be issued absent exigent circumstances. Removal of a child must also be subjected to the traditional requirement of probable cause and a warrant. Rather than routinely rubber-stamping *ex parte* requests by CPS to take children from their families, judges must (at minimum) ask questions about why immediate removal is necessary and identify facts that support a finding that the child is at substantial risk of harm at home. CPS investigators must additionally be required to answer questions about the efforts that have been made to avoid removal and why the removal must occur.²⁸⁰ Requiring these safeguards would lead to fewer unnecessary removals of children from their homes and allow caseworkers to focus their time and energy on serving children in need of intervention.

B. *Regulating "Safety Plans"*

Measures must be taken to bring hidden foster care out of the shadows and into the courtroom. While safety plans have some benefits, like reducing state surveillance over families and preventing court involvement, the ability of CPS to coerce families and remove children from their homes without any accountability must be curtailed. Courts should reject the argument that safety plans are voluntary due to the inherent coercion in the "take it or leave it" approach of CPS in the context of safety plans. State and/or federal law should require, at minimum, data collection to measure the prevalence of safety plan use and comprehensive protections for the individuals operating under safety plans. Most importantly, coerced and unregulated custody transfers of children through safety plans should be recognized as violations of the Fourth Amendment rights of children.

280. For more examples of the kinds of information investigators should be required to provide at this stage, see Sankaran, *supra* note 248.

C. Creating Accountability for CPS Agencies

To ensure that the Fourth Amendment rights of children are protected during CPS investigations, agencies and caseworkers must be held accountable for their violations of these rights through legislative and judicial action. This could include independent reviews of child removals, accessible grievance procedures, clear statutory requirements for removal, and the implementation of *Miranda*-style warnings for families facing CPS investigation. Perhaps most importantly, families must be able to share their experiences with the family policing system in order to encourage agency accountability and raise public awareness regarding the harms of the family policing system.²⁸¹

IX. CONCLUSION

In February 2024, a class action lawsuit was filed on behalf of families in New York City, alleging Fourth Amendment violations by CPS investigators.²⁸² The stories told in the plaintiffs' complaint mirror the issues raised in this Note.²⁸³ This landmark case has the potential to change the landscape of the family policing system, but it remains to be seen whether this effort by family defenders will invoke children's Fourth Amendment rights.²⁸⁴

Regardless of the outcome of this most recent attempt at impact litigation on behalf of families, it is essential that child welfare professionals implement robust reforms to protect the rights of children in CPS investigations. Applying the familiar protections of the Fourth Amendment to CPS investigations is a workable and essential reform that would protect children from unreasonable searches and seizures by CPS while promoting family integrity. Perhaps in the future, when CPS

281. See Fraidin, *supra* note 22, at 57–58.

282. Jonah E. Bromwich & Andy Newman, *Child Abuse Investigators Traumatize Families, Lawsuit Charges*, N.Y. TIMES (Feb. 20, 2024), <https://www.nytimes.com/2024/02/20/nyregion/acs-nyc-family-trauma-lawsuit.html>; *see also* Complaint at 4, Gould v. City of New York, 24-cv-01263 (E.D.N.Y. Feb. 20, 2024), <https://static01.nyt.com/newsgraphics/documenttools/ff5d17939ae591ea/3f36f32c-full.pdf>.

283. For instance, one mother claims that investigators threatened to take away her children if they were not let inside to search her home. Complaint, *supra* note 282, at 2–3. Another mother reports that her children carry lasting trauma from a coerced home search. *Id.* at 33. Yet another home search allegedly involved investigators strip searching three children despite no court order authorizing such a search nor any evidence of physical abuse. *Id.* at 31.

284. Throughout the complaint, plaintiffs reference violations of parents' Fourth Amendment rights but do not mention the Fourth Amendment rights of the children involved. *See, e.g., id.* at 27, 45 (discussing “parents’ Fourth Amendment rights”).

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knocks at a child's door, they will be confronted with the familiar refrain:
"come back with a warrant."