

Family Policing and the Fourth Amendment

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Each year, Child Protective Services (CPS) investigates over one million families. Every CPS investigation includes a thorough, room-by-room search of the family home, designed to uncover evidence of maltreatment. Most seek evidence of poverty-related allegations of neglect; few ever substantiate the allegations. Despite what in many cities amounts to dozens of daily home invasions by government agents, the most remarkable feature of CPS home searches is how uncommon it has been for courts to clarify their legal parameters. More surprising than the relative dearth of case law and scholarship on the subject is the conclusion some courts have reached that these investigations are outside the familiar rules regulating law enforcement searches of homes.

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This Article examines how CPS home searches have escaped meaningful Fourth Amendment scrutiny for the past fifty years, despite their explicitly suspicion-based, investigative design. The few courts examining CPS home searches have distinguished them from traditional police investigations. These courts have situated CPS home searches within the “administrative search doctrine”—a confusing web of Fourth Amendment exceptions that the Supreme Court created in the late 1960s for non-law enforcement searches. But when they were created in the 1970s, CPS agencies assumed policing powers initially held by traditional law enforcement—including the powers to investigate maltreatment and to remove children. The co-emergence of the administrative search doctrine and CPS as a new investigative agency with old policing powers resulted in half a century of unnecessary confusion.

This Article seeks to resolve that confusion. It provides a brief description of the statutorily required CPS home search, an overview of its legal framework, and a critical analysis of the consequences of CPS searches on the families who experience them. The Article then situates the emergence of the CPS home search within the contemporary Fourth Amendment doctrinal edifice. It analyzes how a government agency conducting millions of suspicion-based home searches could slip through the cracks and demonstrates how none of the administrative search exceptions apply. Finally, the Article suggests a path forward through universal application of traditional Fourth Amendment principles. In so doing, the Article highlights CPS’s unique coercive power, related to—but wholly distinct from—the criminal police. It sets the stage for engagement based on support, not coercion.

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INTRODUCTION

Imagine you are a single mother living in East Harlem, New York, and a caseworker of the New York City Administration for Children’s Services (ACS) knocks on your door.¹ You answer, and the caseworker tells you she needs to come in. She got a call from your daughter’s school—it really is not that serious, but she will have to ask you and your daughter some questions.² She also needs to talk to your other child; what is his name again? And she will need to take a look around the house, just to make sure you have everything you need. That’s fine with you, right? Reluctantly, you let her in.

You watch her take notes as she opens the kitchen cabinets and refrigerator door, counting the eggs and the number of beer bottles left in the refrigerator from a get-together you had with friends last week. You hesitate—should you explain that to her? She has moved on, though. She tests the carbon monoxide detector, which beeps twice—is that good or bad?—and dramatically steps over the toys that the kids have thrown around the living room. She scribbles in her

1. For the past eight years, East Harlem has had the most ACS investigations in the borough of Manhattan. N.Y.C. ADMIN. CHILD. SERVS., ABUSE/NEGLECT INVESTIGATIONS BY COMMUNITY DISTRICT 2, 4 (2021), <https://www.nyc.gov/assets/acs/pdf/data-analysis/abuseneglectreport16to21.pdf> [<https://perma.cc/GA7Q-NLFW>]; N.Y.C. ADMIN. CHILD. SERVS., ABUSE/NEGLECT INVESTIGATIONS BY COMMUNITY DISTRICT 1 (2018), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2018/AbuseNeglectInvestByCommDistrictYrs2014To2017.pdf> [<https://perma.cc/8T9Y-BH33>].

2. In New York state, a CPS agency must conduct “an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment.” N.Y. SOC. SERV. L. § 424(6)(a) (Consol. 2023). The majority of investigations are done pursuant to calls from state officials and licensees who are mandated to report concerns of maltreatment. *See* U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2020 9–10 (2022) [hereinafter CHILD MALTREATMENT 2020], <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2020.pdf> [<https://perma.cc/2WPU-GNAQ>]; U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 9 (2021) [hereinafter CHILD MALTREATMENT 2019], <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/B8UF-EYM2>].

pad as she walks by the sink, which is full of dirty dishes that you have not had time to clean since you came home from work. She walks into your bedroom, then your kids' room, and then the bathroom, taking notes the whole time. The caseworker calls your daughter into the bedroom and asks you to instruct her that it's okay to speak alone and that she should follow the caseworker's instructions and answer any questions she might have. Eleven-year-olds may not feel comfortable speaking with strangers, of course. You follow these instructions warily and walk back to the kitchen table.

What choice do you have, really? This caseworker has power that you know all too well—just last year, you watched an ACS caseworker basically take over your cousin's life. They first came and searched her house, just like this, without saying why. Eventually, they made her take all sorts of classes that she did not want to take and that you knew she did not need. They demanded her kids submit to psychological examinations, and they asked her to get a mental health evaluation too. She tried to reason with them—she did not need to take a class on how to change a baby's diapers: her kids were in grade school!—but it did not work. Eventually, they took her children away and put them in foster care, and she had to visit them while someone watched and took notes. It was only after she did everything they asked that she was able to reunite with her kids. It took years more for the ACS worker to stop calling her house every day, years to stop coming.

The caseworker finishes with your daughter and now calls in your eight-year-old son. You want to ask what is going on, if you are free to go, or better still if she would just leave your family alone, but you are scared that what happened to your cousin will happen to you too. When she is finished speaking to you and your kids, the agent leaves and tells you that you will hear from her soon.

Agents like these—Child Protective Services (CPS) agents—are entrusted with enforcing the state's child welfare laws. They are responsible for investigating every colorable claim of child maltreatment that comes into the state's child maltreatment hotline,³ regardless of its provenance.⁴ By state and federal statute, each investigation requires a search of the family's home, like the search described above. While CPS agents conduct more than one million home searches annually, most investigations are closed as “unsubstantiated” without any oversight by a court or judge. Rarely do investigations result in formal

3. See U.S. DEP'T HEALTH & HUM. SERVS., MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT 3 (2021) [hereinafter MAKING AND SCREENING REPORTS], <https://www.childwelfare.gov/pubpdfs/repproc.pdf> [<https://perma.cc/XY5N-SW8C>] (describing that when a call or report meets the statutory definition of child abuse or neglect in a particular state, the report is “screened in and referred to the State CPS agency for response”).

4. See 42 U.S.C. § 5106a(b)(2)(B) (2021) (conditioning funding to states that include “provisions or procedures for an individual to report known and suspected instances of child abuse and neglect” and “procedures for immediate screening, risk and safety assessment, and prompt investigations of such reports”).

charges of neglect or abuse in court. During an investigation, CPS agents have authority to disturb the fundamental rights to family integrity that are enshrined in nearly a century's worth of Supreme Court precedent.⁵ They have statutory power to either remove children on their own authority or petition a judge to order children removed from their families and placed in foster care. This, in turn, can lead to the permanent destruction of the family relationship through the termination of parental rights.

Beyond these legal implications, a home search like the one described above can have deeply traumatic effects on a family. Research has shown that CPS home searches undermine a child's basic attachment to their parents, forever impacting their earliest and most important human relationships by fundamentally altering a child's trust in a parent's ability to protect and provide for them.⁶ This impact is especially potent in Black communities: 53 percent of Black children in the United States will endure a CPS investigation in their lifetime, nearly two times as often as their White counterparts.⁷

While repeatedly affirming the right of parents to the care and custody of their children—and the right of children to be raised by their parents—the Supreme Court has never directly addressed a family's constitutional protections during a CPS home search, notwithstanding its profound impacts. Indeed, despite what in many cities amounts to dozens of daily home invasions by government agents, perhaps the most remarkable feature of this practice is how uncommon it has been for courts to clarify the legal parameters of CPS home searches.⁸ More remarkable than the relative dearth of case law on the subject is the conclusion some courts have reached that these investigations are outside the familiar rules regulating law enforcement searches of homes.⁹

5. See *infra* Part III.B.

6. Substantiated cases usually result in a parent's listing on a state registry of maltreatment, circumscribing their ability to financially support their family and care for other children. At least thirty-seven states permit the disclosure of state registry information for purposes of evaluating fitness as a foster care or placement resource. U.S. DEP'T HEALTH & HUM. SERVS., DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS 2 (2022), <https://www.childwelfare.gov/pubPDFs/confide.pdf> [<https://perma.cc/K6TY-7YVB>]. At least thirty-four states "allow access to central registry records for agencies conducting background checks on individuals applying to be child care or youth care providers," like child-care services providers, employees in schools, or health-care providers. *Id.* at 4; see also *infra* Part III.B.

7. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017). In twenty-nine states, more than half of Black kids experience a CPS investigation before the age of eighteen. In six states, this number jumps to over 70 percent, including Indiana where nearly eight in ten Black children will undergo a CPS investigation in their lifetime. Youngman Yi, Frank Edwards, Natalia Emanuel, Hedwig Lee, John M. Leventhal, Jane Waldfogel & Christopher Wildeman, *State-Level Variation in the Cumulative Prevalence of Child Welfare System Contact, 2015-2019*, 147 CHILD. & YOUTH SERVS. REV. 1, 10 (2023).

8. See *infra* Part III.A.

9. See *infra* Part III.B.

Academic scholarship examining the constitutional limits of CPS investigations has been woefully underdeveloped.¹⁰ Fourth Amendment scholars—primarily keyed in on the criminal legal system—have attempted to follow Supreme Court guidance in their analysis of CPS searches. To that end, search and seizure treatises usually focus on CPS’s role in the context of dual-purpose investigations, where the consequences of criminal policing—arrest, prosecution, or imprisonment—overshadow the family policing consequences—surveillance, family separation, or termination of parental rights. These scholars have usually concluded that where criminal police are involved, the Fourth Amendment’s warrant and probable cause requirements apply to CPS investigations.¹¹ But courts and the legal academy have shied away from scrutinizing head-on the extent of the Fourth Amendment’s applicability to CPS investigations as standalone coercive government interventions.

The few family law scholars who have directly analyzed CPS searches have focused on the “special needs doctrine”—the culmination of the Court’s muddled administrative search analysis, which grants relaxed Fourth Amendment status to searches “beyond the [government’s] normal need for law enforcement.”¹² Like the aforementioned Fourth Amendment scholars, Coleman has argued that because CPS and criminal law enforcement are so fundamentally intertwined, special needs would generally not apply to CPS investigations.¹³ Gupta-Kagan has argued for a fundamental shift in the special needs doctrine to account for the harms of CPS searches.¹⁴

10. Critical legal scholarship on child welfare began with Dorothy Roberts’s important work. *See generally* DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997) (detailing the history of Black women’s reproductive rights in the United States); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (exploring the history and sources of racial disparity in the U.S. child welfare system). Articles specifically focusing on the question of CPS searches are more recent. *See infra* Parts I.A & II.D.

11. WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.3(a) (6th ed. 2021) (observing that CPS searches, categorized as “inspections related to government benefits or services,” would likely only require a reasonable suspicion—and, therefore, only an administrative warrant, which requires less than traditional probable cause—in the absence of police involvement).

12. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

13. Doriane Lambelet Coleman offered a Fourth Amendment evaluation of CPS investigations through the prism of two home searches involving both CPS and criminal police. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 475 WM. & MARY L. REV. 413, 447–59 (2005). Coleman argued that after the Supreme Court’s *Ferguson v. City of Charleston* decision, discussed *infra* Part II.E, Fourth Amendment protections in CPS investigations would turn on the degree of police involvement. *Id.* at 489–90.

14. Josh Gupta-Kagan argued that Coleman overestimated the police’s actual entanglement in CPS investigations. Since most investigations are conducted without police, he worried most families subject to investigation would be vulnerable to warrantless searches under a series of exceptions to the warrant requirement. Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Special Needs Doctrine*, 87 TUL. L. REV. 353, 358 (2011). Gupta-Kagan suggested an adjustment to the special needs doctrine: rather than separating between searches that serve normal law enforcement purposes and those beyond them, the special needs

Rather than relying on CPS's relationship to criminal law enforcement or suggesting that the Supreme Court retool an already-mangled doctrine, this Article breaks new ground by proposing an immediately actionable analytical frame: that entirely familiar Fourth Amendment principles constrain CPS investigators seeking to search a home. Like any other government agent engaged in targeted investigation, a CPS agent may only enter a home with the knowing and voluntary consent of the parent or with an individualized warrant properly issued by a neutral and detached magistrate.

Situating CPS home searches within the traditional Fourth Amendment warrant and probable cause framework addresses three shortcomings in the literature. First, it disambiguates family policing from criminal policing as interrelated, but independent, forms of state power worthy of restraint in the Fourth Amendment analysis. A close read of the history of CPS investigations shows that CPS agencies are relatively modern, independent entities engaging in investigations and seizures that were previously carried out, almost exclusively, by the criminal police before Congress underwrote CPS with the Child Abuse Protection and Treatment Act (CAPTA) in 1974. For its part, the Supreme Court has repeatedly contributed to confusion in the lower courts and the literature about CPS's Fourth Amendment responsibilities. While failing to reckon with the implications of CPS's emergence as a standalone investigative body engaged in traditional searches and seizures, the Court contemporaneously developed the mangled administrative search doctrines, pocked with exceptions to and modifications of the warrant and probable cause requirements.

Second, because the traditional Fourth Amendment home search framework is entirely familiar in other contexts, a roadmap for its application in CPS investigations equips families and practitioners to immediately apply well-known principles in lower courts and in practice, rather than awaiting an unlikely shift in the presiding doctrine.

Third, by focusing squarely on home searches, rather than on CPS investigations or the special needs doctrine more broadly, this Article addresses both the question of the warrant requirement and the question of the degree and type of probable cause necessary to substantiate such a warrant under current Fourth Amendment jurisprudence. Since a home search is the core component of nearly every CPS investigation, focusing on home searches implicates nearly every one of the millions of CPS investigations conducted each year while focusing on the clearest question under the presiding jurisprudence.

This inquiry into the Fourth Amendment limitations of CPS home searches raises a host of questions beyond the scope of this Article. How do we assess the actual voluntariness of consent in home searches, which are fundamentally premised on the threat of family separation? To what extent do CPS agents act

doctrine should distinguish between searches that threaten fundamental rights and searches that do not. *Id.* at 358–59.

as law enforcement beyond the context of the home search? What about the exclusionary rule in CPS cases? And what is it about CPS investigations that has allowed them to escape critical legal scrutiny for so long? This Article sets the stage for these conversations by homing in on the first moment of contact between a family and a CPS agent: the knock at the door.

Part I describes how CPS, through its routine home investigations, functions as an independent government agency with coercive authority. I describe the legal framework undergirding these powers and responsibilities, flowing from CAPTA in 1974 into state statutes and best practice guides promulgated at the federal and state level. I then set out the prevailing CPS investigative model created by this legal framework, focusing on its theoretical underpinnings and its goals. I describe how home searches play out in practice by examining the modes and methods of CPS agents' training regimes and the on-the-ground conduct of CPS agents.

Part II shows how CPS emerged as a new investigative state agency in the early 1970s. I describe the Supreme Court's refusal to reckon with CPS's new investigative and coercive power, and I demonstrate how the Court has contributed to confusion on the role and power of CPS home searches by evading the question through a *dual-purpose slip*—subordinating CPS's role to some other, more familiar government function with which the Court could more easily reckon.

In Part III, I weave these threads into the Article's central argument: CPS home searches are, on their own, traditional policing investigations requiring a particularized warrant supported by probable cause of the allegations giving rise to the search, with limited exceptions in cases of voluntary consent or exigency. I lay out the doctrinal basis for this argument, summarize its implications, and anticipate both legal and practical counterarguments.

Finally, Part IV prescribes the actual obligations of CPS agents under the Fourth Amendment. Using an actual case study, I describe what the Fourth Amendment requires of CPS agents conducting a home search, particularly in the case of a parent who refuses entry into the home. I then articulate the implications of recognizing CPS agents' obligations and describe why recognizing them is necessary.

I.
CPS HOME SEARCHES

A. *CPS Investigations*

State statutes across the country¹⁵—incentivized by federal dollars¹⁶—require CPS agents to investigate every actual allegation of child maltreatment.¹⁷ Generally, states set up a centralized hotline¹⁸ that receives reports from the general public or from mandatory¹⁹ reporters²⁰—professionals who are legally responsible, as part of their jobs, to lodge concerns of child maltreatment.²¹ Mandatory reporters include a wide swath of the public and private work force²²—teachers, doctors, social workers, dentists, criminal police, therapists, and clergy, to name a few examples²³—and account for the majority of calls to state child maltreatment hotlines that lead to investigations.²⁴ Among the general

15. See, e.g., ARK. CODE ANN. § 12-18-601(b)(2)(B)(iii)(b) (West 2019); IOWA CODE ANN. § 232.71B(4)(a)(2), (6) (West 2022); S.C. CODE ANN. § 63-7-920 (2015); Josh Keefe, *De Blasio Announces Reforms Following ‘Unacceptable’ Death of Zymere Perkins*, GOTHAMIST (Oct. 6, 2016), <https://gothamist.com/news/de-blasio-announces-reforms-following-unacceptable-death-of-zymere-perkins> [<https://perma.cc/5VJJ-4GXX>].

16. See 42 U.S.C. § 5106a(a)(1), (b)(2)(B)(i), (iv), (xi), (xix) (2019).

17. Most states do this intake in a two-step process, first filtering out cases that, for example, do not allege child maltreatment under the state’s statute or where the child in question is over the age of eighteen. See, e.g., U.S. DEP’T HEALTH & HUM. SERVS., REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS (2018), <https://www.childwelfare.gov/pubpdfs/registry.pdf> [<https://perma.cc/JK24-DDBB>].

18. *State Child Abuse and Neglect Reporting Numbers*, U.S. DEP’T HEALTH & HUM. SERVS., https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=Custom&RS_ID=5 [<https://perma.cc/A7W6-HTM6>] (listing forty-four of fifty-four U.S. jurisdictions offering hotline numbers to report child abuse and neglect); see also U.S. DEP’T HEALTH & HUM. SERVS., *How Do I Find Out if My Name Is on the State Child Abuse and Neglect Registry? How Do I Get My Child Abuse Record Expunged?* (2022), <https://www.acf.hhs.gov/cb/faq/can10> [<https://perma.cc/4WZS-DGKU>] (noting “[m]ost states have laws authorizing a statewide central registry”).

19. 42 U.S.C. § 5106a(b)(2)(B)(i); see also U.S. DEP’T HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2019) [hereinafter MANDATORY REPORTERS], <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/S8YN-2FH4>] (describing the distribution of mandatory reporting requirements across professions in all fifty states).

20. See 42 U.S.C. § 5106a(b)(2)(B)(i); see also MANDATORY REPORTERS, *supra* note 19, at 1 (describing the distribution of mandatory reporting requirements across professions in all fifty states).

21. See U.S. DEP’T HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 3 (2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/7ZMR-7M9P>] (asserting that though “[a]ny concerned person can report suspicions of child abuse or neglect . . . [m]ost reports are made by people called ‘mandatory reporters’”).

22. See MANDATORY REPORTERS, *supra* note 19, at 2 (describing professions that are most commonly mandated to report (social workers, teachers, health-care workers, counselors, child-care providers, medical examiners, and law enforcement officers) and additional professionals who are mandated to report (commercial film processors in twelve states, computer technicians in six states, substance abuse counselors in fourteen states, probation officers in seventeen states, and camp counselors in thirteen states)).

23. *Id.*

24. In 2020, 66.7 percent of reports were submitted by professionals, defined as people with “contact with the alleged child maltreatment victim as part of his or her job.” Approximately 17.2 percent

public, anonymous sources make up the plurality²⁵ of calls. All fifty states have codified some form of immunity from prosecution for mandatory reporters.²⁶ In forty states, a mandatory reporter can be charged with a misdemeanor for failing to report suspected child maltreatment.²⁷ In Florida, a failure to report neglect as required by law is a felony punishable by five years in prison.²⁸

Investigations into neglect constitute the vast majority of child welfare investigations in the United States. In 2020, for example, 67 percent of all investigations were into allegations of neglect alone, compared to 14.2 percent into physical abuse.²⁹ Neglect and abuse are defined differently by each state but are tethered to a federal definition in CAPTA, which sets up the funding incentive structure for investigating and prosecuting allegations of neglect and abuse.³⁰ Allegations of abuse that involve serious physical injury to or sexual exploitation of a child frequently result in criminal charges and prosecution; these kinds of allegations therefore frequently involve the police.³¹ Allegations of neglect, on the other hand, result in criminal prosecution far less often and less frequently involve the police.³² Neglect investigations often involve legitimate concerns: concerns regarding a child's frequent tardiness to or absence from school or about a child's presence at home alone, even for a few hours; concerns regarding scratches or bruises on a child's body or a parent's use of drugs, including the use of legal drugs such as marijuana or alcohol; concerns regarding a parent's mental health; and concerns regarding a child's frequent emotional outbursts.

CPS and the Federal Children's Bureau, which sets federal standards for the detection, prevention, and elimination of child maltreatment, set out three main purposes for CPS investigations. CPS agents are required to investigate a family in order to determine (1) whether a family requires "resources" that the

of the reports that led to investigations came from education personnel. Another 20.9 percent came from legal and law enforcement personnel. CHILD MALTREATMENT 2020, *supra* note 2, at xi.

25. *See id.* at 9 (demonstrating at Exhibit 2-E that "anonymous sources" are responsible for more reports than any other identified group of non-mandatory reporters).

26. 42 U.S.C. § 5106a(b)(2)(B)(vii); *see* U.S. DEP'T HEALTH & HUM. SERVS., IMMUNITY FOR REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2018), <https://www.childwelfare.gov/pubPDFs/immunity.pdf> [<https://perma.cc/B559-E5YF>] (noting that immunity in all states is extended to both mandatory and voluntary reporters).

27. U.S. DEP'T HEALTH & HUM. SERVS., PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubpdfs/report.pdf> [<https://perma.cc/EC7H-RS46>].

28. FLA. STAT. § 39.205(1) (2022). Connecticut also treats failure to report as a felony where there is actual knowledge of neglect. CONN. GEN. STAT. § 17a-101a.

29. CHILD MALTREATMENT 2020, *supra* note 2, at 45.

30. The CAPTA Reauthorization Act of 2010 defines child abuse or neglect as "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." Pub. L. No. 111-320, § 142(a)(2), 124 Stat. 3459 (2010).

31. *See* Gupta-Kagan, *supra* note 14, at 367–68.

32. *Id.* at 368 nn.61–63.

reporter would have been otherwise unable to provide,³³ (2) whether there is evidence to substantiate that allegations in the underlying report meet a statutory standard of maltreatment,³⁴ and (3) what degree of intervention is necessary to safeguard the interests of the child (and, some statutes say, the family.)³⁵

Mandatory reporters frequently turn to CPS because they do not have the time, expertise, or resources to accommodate the needs of a family.³⁶ Reporters often believe that CPS, as an institution built to respond to concerns about children and family dynamics, is more likely to have each of those assets.³⁷ Often, reporters do not take into account the harm done or outcomes made possible by virtue of a CPS investigation and are infrequently trained to do so.³⁸

CPS involvement unlocks access to a host of benefits that may not otherwise be available to a family in need.³⁹ Beyond providing the support that a parent or family may request, CPS agents often have their own suggestions about the services that a parent or family requires. To that end, even if CPS agents determine that the underlying allegations are unfounded, CPS may “refer” a parent to services that its agents require or recommend, including “parenting skills” classes, drug testing, or mental health assessment.⁴⁰ Mandatory reporters

33. See DIANE DEPANFILIS, U.S. DEP’T HEALTH & HUM. SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 84 (2018) (“Decision Point: Determining Whether the Family Has Concrete, Emergency Needs”); 42 U.S.C. § 5106a(b)(2)(B)(v) (requiring that states establish “triage procedures”).

34. See DEPANFILIS, *supra* note 33, at 79 (“Decision Point: Substantiating Maltreatment”); 42 U.S.C. § 5106a(a)(4) (making federal funding available to states for “enhancing the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols”).

35. See DEPANFILIS, *supra* note 33, at 84 (“Decision Point: Determining Whether a Child Is Safe”); 42 U.S.C. § 5106a(b)(2)(B)(vi) (requiring that states establish “procedures for immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect”).

36. See, e.g., Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 619 (2020) (quoting a therapist’s rationale for reporting a client’s mother: “[T]he way we look at CPS [is] like, oh, CPS has the resource for parenting, CPS has this, that, and the other thing”).

37. See *id.* at 621 (noting CPS’s reputation among reporting professionals as being “orient[ed] around support . . . [and] well-positioned to rehabilitate families”).

38. See *id.* at 625 (describing reporters’ overreliance on CPS referrals, and recounting that “the agency’s mandated reporter training advises reporters not to do their own investigations”).

39. In New York, for example, parents who are investigated by ACS are entitled to free or subsidized childcare. *Subsidized Child Care*, DAY CARE COUNCIL OF NEW YORK, <https://www.dccnyinc.org/families/what-to-look-for-in-a-program-provider/subsidized-child-care/> [<https://perma.cc/ZU5C-2Q9H>]. A parent whose child was removed for want of “stable housing” jumps to the front of the public housing waiting list. N.Y.C. HOUS. AUTH., PRIORITY CODES FOR PUBLIC HOUSING 1 (2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/nycha-priority-codes-revised-5-9-2022.pdf> [<https://perma.cc/N5QB-8UFJ>].

40. Compare N.Y.C. ADMIN. CHILD.’S SERVS., A PARENT’S GUIDE TO CHILD PROTECTIVE SERVICES IN NEW YORK, https://www1.nyc.gov/assets/acs/pdf/child_welfare/ACS_Parents_Guide_to_the_Child_Protective_Investigation.pdf [<https://perma.cc/MZB4-X7SR>] (explaining there are instances where services may be “recommended” even if a case is unfounded), with *A Parent’s Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. CHILD.’S SERVS. (2022), <https://www.nyc.gov/site/acs/child-welfare/parents-guide->

staff each of these services and have a legal obligation to report any concerns regarding maltreatment to CPS.

By accepting resources, families often also accept additional entanglement with CPS. In practical terms, the provision of resources allows CPS to prolong an investigation that is usually time limited by statute⁴¹ since a condition of accepting the resources is often continued “visitation” from CPS agents to the family’s home.

CPS investigations are also designed to determine if a reporter’s suspicions of child maltreatment are warranted. If CPS determines that there is sufficient evidence to substantiate the report of maltreatment, agents mark the report accordingly. A “central register” of child maltreatment maintains records of “substantiated” or “indicated” reports.⁴² Child-care, educational, and health-care employers can access reports in the state central register when considering a candidate for hire. CPS, foster care, and adoptive agencies consider substantiated reports when deciding whether to certify a person for child-care responsibilities. Substantiated reports can stay in a register for decades.⁴³ Unsubstantiated reports have similar staying power and, under many state statutes, can be dredged up upon the filing of a new initial report.⁴⁴

An initial report—what I am calling a *lead*—to a state hotline for child maltreatment is most often fielded by a CPS agent, whose primary duties are to gather information regarding the alleged maltreatment and then determine whether the allegation should be screened in.⁴⁵ In 2019, U.S. CPS agencies

child-abuse-investigation.page [https://perma.cc/ZR6Z-3XGX] (noting there are instances where ACS may determine that services are “required”).

41. MAKING AND SCREENING REPORTS, *supra* note 3, at 6. For jurisdictions with thirty-day limitations, see, e.g., *Investigation, Disposition and Closure of Emergency Response Referrals*, L.A. CNTY. DEP’T CHILD. & FAM. SERVS. (Aug. 16, 2021), http://m.policy.dfs.lacounty.gov/Src/Content/Disposition_of_Allegatio.htm [https://perma.cc/L6YF-FDZJ]; *Children’s Protective Services Investigation Process*, MICH. DEP’T HEALTH & HUM. SERVS. (2022), <https://www.michigan.gov/mdhhs/adult-child-serv/abuse-neglect/childrens/report-process/investigation-process-and-results/childrens-protective-services-investigation-process> [https://perma.cc/PC8R-QQUP]; *Child Protective Investigations (CPI)*, TEX. DEP’T FAM. AND PROTECTIVE SERVS., <https://www.dfps.state.tx.us/Investigations/> [https://perma.cc/GS66-DXUS]. Ohio offers an intermediate time limitation on investigations at forty-five days. OHIO ADMIN. CODE 5101:2-36-03 (2018). For states allowing investigations to take up to sixty days, see, e.g., FLA. STAT. ANN. § 39.301(16) (West 2021); 325 ILL. COMP. STAT. 5/7.12 (2010); N.Y. SOC. SERV. LAW § 424(7) (McKinney 2017); PA. CHILD WELFARE RES. CTR., THE CASEWORK PROCESS 2, http://www.pacwrc.pitt.edu/Curriculum/411OverviewofChildWelfareandFiscal/Hndts/HO09_TheCswrkPrss.pdf [https://perma.cc/R5GA-V2Y7].

42. U.S. DEP’T HEALTH & HUM. SERVS., ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE AND NEGLECT 2, 3, 10 (2018), <https://www.childwelfare.gov/pubpdfs/centreg.pdf> [https://perma.cc/XT9D-DXNG].

43. See generally REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS, *supra* note 17, (listing statutory timelines for an entry’s minimum placement on the central register).

44. *Id.* at 2.

45. See DEPANFILIS, *supra* note 33, at 55 (“Gathering Information from the Reporter”).

received approximately 4.4 million leads;⁴⁶ agencies screened out 2 million because they did not rise to the level of the state’s definition of maltreatment, because the children involved were over the age of eighteen, or because the tips did not contain enough information to investigate.⁴⁷ The remaining 2.4 million leads⁴⁸ were screened in and assigned to local CPS offices for investigation or assessment.⁴⁹ In all screened-in cases, CPS conducts a home search.⁵⁰

Investigative CPS agents (and, in some states, other members of an investigative team)⁵¹ are tasked with determining if the parent engaged in maltreatment.⁵² An astonishing 83 percent of investigations do not substantiate the allegations in the underlying reports.⁵³ In 2020, 17 percent of all leads investigated by CPS resulted in a determination that the allegations in the lead had some basis in fact.⁵⁴ More than half of that 17 percent substantiated allegations of neglect alone, usually based on a preponderance of the evidence standard. Five percent of all investigated leads substantiated allegations of abuse as distinct from neglect.⁵⁵

Finally, beyond a substantiation decision, CPS investigators are tasked with making decisions regarding any additional state intervention necessary in light of their investigation. If agents do not believe a parent is likely to comply with the services or resources they deem necessary for the well-being of a child, or if they believe that the child is at significant risk of harm, CPS can refer the case to CPS prosecutors to file a petition before a judge in court.⁵⁶

As will become evident in Part I.B below, CPS has a variety of coercive tools at its disposal before seeking the court’s added heft. CPS agents have

46. CHILD MALTREATMENT 2019, *supra* note 2, at 7.

47. *Id.*; *see also id.* at 6 (listing reasons for screening out reports of child abuse or neglect, including that a report “does not contain enough information for a CPS response to occur”).

48. *Id.* at 8. I’ve relied on the 2019 numbers because they are not affected by the coronavirus pandemic, which may have affected reporting in 2020, the year for which the latest numbers are available. *See generally* Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. 1 (2022) (describing the lessons learned from how ACS adjusted its reporting practices in response to pandemic-era limitations). The 2020 numbers nonetheless tell a similar story: 3.9 million calls were made, 1.8 million were screened out, and 2.1 million were screened in and investigated. CHILD MALTREATMENT 2020, *supra* note 2, at x.

49. CHILD MALTREATMENT 2020, *supra* note 2, at 18 (defining “alternative response” as “[t]he provision of a response other than an investigation that determines if a child or family needs services” that “usually include the voluntary acceptance of CPS services and the agreement of family needs”). Despite these nominal differences, for reasons further described in Part I.B below, this Article refers to all assessments of “screened-in” allegations as investigations.

50. *See infra* Part I.B.1 (describing federal and state legal frameworks requiring home searches).

51. MAKING AND SCREENING REPORTS, *supra* note 3, at 4.

52. The evidentiary standard for this determination varies by jurisdiction: thirty-seven require a preponderance of the evidence that maltreatment has been committed before a report can be substantiated; fourteen allow merely “credible” or “reasonable” evidence to substantiate a report. CHILD MALTREATMENT 2020, *supra* note 2, at 139.

53. *Id.* at 20.

54. *Id.*

55. *Id.* at 45.

56. DEPANFILIS, *supra* note 33, at 31 (“Civil Court Intervention”).

unique statutory authority to remove a child prior to seeking a court order if they determine there is sufficiently significant risk;⁵⁷ further, they are empowered—and sometimes required—to seek the involvement of the police,⁵⁸ whose involvement can have its own ramifications on a case. There are no legal restrictions on whether or how CPS agents convey this coercive authority to the subject of an investigation: they are neither required to provide a *Miranda*-style warning to parents under investigation or signal that parents' words or consent may result in these outcomes, nor are they legally restricted from threatening these outcomes to a parent whom they deem to be insufficiently compliant.⁵⁹

B. Authority for Home Searches

1. Legal Framework

A child welfare investigation is fulsome, by dint of statute, regulation, guidelines, and practice. At the federal level, the current version of CAPTA sketches out a skeletal framework for the reporting and investigation⁶⁰ of maltreatment allegations, requiring each state that receives federal funding to have a plan for the following: reporting, including mandatory reporting;⁶¹

57. 42 U.S.C. § 5106a(b)(2)(B)(vi) (2018) (requiring “procedures for immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect and of any other child under the same care who may also be in danger of child abuse or neglect and ensuring their placement in a safe environment” as a condition of federal funding for investigation and prosecution of child abuse and neglect cases under 42 U.S.C. § 5106c (2018)). For a list of state statutes implementing this provision, see, e.g., *State Statute Database Search for Handling of Reports*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/?CWIGFunctionsaction=statestatutes:main.getResults> [https://perma.cc/R3XP-J4U3] (displaying handling of reports list if user (1) selects “Select All States,” then (2) selects “Making and Screening Reports of Child Abuse and Neglect,” then (3) clicks “Go!”); see also *State Statute Database Search for Use Assessments*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/?CWIGFunctionsaction=statestatutes:main.getResults> [https://perma.cc/265G-7D7Q] (displaying use assessments list if user (1) selects “Select All States,” (2) selects “The Use of Safety and Risk Assessment in Child Protection Cases,” then (3) clicks “Go!”).

58. 42 U.S.C. § 5106a(b)(2)(B)(xi) (2018) (requiring “the cooperation of State law enforcement officials . . . in the investigation, assessment, prosecution, and treatment of child abuse and neglect”). See MAKING AND SCREENING REPORTS, *supra* note 3, at 4; see also U.S. DEP’T HEALTH & HUM. SERVS., CROSS-REPORTING AMONG AGENCIES THAT RESPOND TO CHILD ABUSE AND NEGLECT 2 (2021), https://www.childwelfare.gov/pubPDFs/cross_reporting.pdf [https://perma.cc/A5LZ-GQ7T].

59. Compare, e.g., *State v. Jackson*, 116 N.E.3d 1240, 1247 (Ohio 2018) (holding that a social worker was not law enforcement and, thus, defendant accused of child sexual abuse was not entitled to *Miranda*-style warnings), with *LAFAVE*, *supra* note 11, § 8.1 n.10 (collecting criminal cases where refusal to comply is not evidence of probable cause). See also NEW YORK OFF. OF CHILD. AND FAM. SERVS., NEW YORK STATE CHILD PROTECTIVE SERVICES MANUAL CH. 6 F-11 (2022), <https://ocfs.ny.gov/programs/cps/manual/2022/2022-CPS-Manual-Ch06-2022Jun.pdf> [https://perma.cc/4Y4D-6U6U] (requiring CPS agents to immediately advise a parent who refuses entry that a warrant would be sought to search the home and that the police could be called).

60. 42 U.S.C. § 5106a(a)(1) (2019).

61. *Id.* § 5106a(b)(2)(B)(i) (2019).

“immediate screening[;] risk and safety assessment[;] and prompt investigation of such reports.”⁶²

From its initial version in 1974, CAPTA has had a basic requirement that CPS promptly investigate reports of maltreatment;⁶³ nonetheless, statutory requirements around investigations in CAPTA have swung back and forth like a pendulum. In 1996, Congress added a provision mandating states to require cooperation with criminal law enforcement officials in the “investigation, assessment, prosecution, and treatment of child abuse and neglect.”⁶⁴ The 2003 amendments to CAPTA took an ostensibly more rights-protective tone. State CPS would be required to advise the subjects of CPS investigation as to the nature of the allegations against them and to train CPS agents regarding their “legal duties . . . in order protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment.”⁶⁵

As mandated by CAPTA, the Children’s Bureau of the Department of Health and Human Services also regularly publishes advisory materials on best practices for child protective caseworkers, including in-depth guidance on assessments and investigations.⁶⁶ The most recent federal manual for caseworkers, published in 2018, directs CPS workers to conduct an “initial assessment/investigation” after a lead is screened in.⁶⁷ According to the guide, the core elements of every CPS investigation are (1) interviews with the child identified in the report, their siblings, and any other children living in the home; (2) interviews of all adults living in the home, nonresident parents, and the alleged maltreating parent;⁶⁸ (3) observation of the “interactions among the child, siblings, and parents”; (4) observation of the “home,” “neighborhood,” and “general climate of the family’s environment”; and (5) compilation of information from other sources “who may have information about the alleged maltreatment, family dynamics, or the risk and safety of the children.”⁶⁹

The federal caseworker guide is fairly specific in the detailed investigative protocols it suggests. It contemplates fact-gathering interviews designed to “understand the circumstances related to the alleged maltreatment” and “gather

62. *Id.* § 5106a(b)(2)(B)(iv) (2019).

63. *Id.* § 5103(b)(2)(C) (1974) (repealed 1996).

64. *Id.* § 5106a(b)(2)(B)(xi) (2019).

65. *Id.* § 5106a(a)(6)(B), (b)(2)(B)(xix) (2003).

66. *See, e.g.*, DEPANFILIS, *supra* note 33.

67. *Id.* at 20 (“Initial Assessment/Investigation”). The guide suggests that the terms “assessment and investigation” are used interchangeably in many state statutes, but that they are not synonymous. “Investigation,” the guide says, “encompasses the efforts of the CPS agency to determine if abuse or neglect has occurred. Assessment *goes beyond* this concept to evaluate a child’s safety and risk and to determine whether and what strategies or interventions are needed to ameliorate or prevent child abuse and neglect.” *Id.* (emphasis added).

68. While this Article uses the term “parent,” many states conduct CPS investigations into non-parent caregivers as well.

69. DEPANFILIS, *supra* note 33, at 65 (“Initial Assessment Process”).

information related to the safety and risk of the child.”⁷⁰ The guide also provides suggested interview protocols for the various interviewees, including for the alleged child victim, their siblings, adults living in the home, nonresident parents, and the “alleged maltreating parent.”⁷¹ As part of an investigation into reported maltreatment, the guide also instructs CPS agents to observe the “physical condition of the child, including any observable effects of maltreatment”;⁷² the “physical condition of the parents, including any observable disabilities or impairments”;⁷³ the “emotional and behavioral status of the parents and other adults during the interviewing process”;⁷⁴ the “physical status of the home, including cleanliness, structure, hazards or dangerous living conditions, signs of excessive alcohol use, and use of illicit drugs or misuse of legal medications”;⁷⁵ and the “climate of the neighborhood, including [the] level of violence or support, and accessibility of transportation, telephones, or other methods of communication.”⁷⁶

In implementing federal requirements and suggested best practices, states set out their own unique statutory investigative schemes for CPS agents that incorporate much of the federal guidance. While each state requires some form of investigation of a screened-in lead, the statutory requirements for a CPS investigation vary substantially in their specificity and in the invasiveness anticipated for each search.

The “home” is mentioned in at least thirty-eight state statutes.⁷⁷ Most state statutes or regulations explicitly require a search of (or the less intrusive-sounding “visit to”) the home as part of an investigation,⁷⁸ some only authorize such a search,⁷⁹ and other states do not mention home searches whatsoever in their state code. Even when state statutes do not specifically require that the home be searched, they invariably require a CPS agent to “interview every child in the home” or to “speak with every adult who lives in the home.”⁸⁰ Thus, everywhere,

70. *Id.* at 66 (“Using Interviewing Protocols”).

71. *Id.* at 67–68 (“Implementing the Interview Protocol”).

72. *Id.* at 76 (“Observing the Child and Family Members”).

73. *Id.*

74. *Id.*

75. *Id.* at 77.

76. *Id.*

77. *See infra* Part I.B.

78. *See, e.g.*, ARK. CODE ANN. § 12-18-601(b)(2)(B)(iii)(b) (West 2019) (“A preliminary investigation shall include . . . [a] visit to the home of the alleged victim if appropriate given the type of child maltreatment alleged”). For the remaining twenty-six jurisdictions, see STATE STATUTE RESEARCH APP’X, compiled by and on file with author.

79. *See, e.g.*, IOWA CODE ANN. § 232.71B(4)(a)(2), (6) (West 2022) (“A . . . family assessment shall include . . . an evaluation of the home environment”; “The assessment may, with the consent of the parent or guardian, include a visit to the home of the child named in the report and an interview or observation of the child”). For the remaining eight jurisdictions, see STATE STATUTE RESEARCH APP’X, *supra* note 78.

80. *See, e.g.*, S.C. CODE ANN. § 63-7-920 (2015) (“The interviews may be conducted . . . at the child’s home . . . and . . . may be conducted outside the presence of the parents.”). In other states, a CPS manual, rather than a statute or regulation, requires a home search. *See, e.g.*, GA. DIV. FAM. & CHILD.

CPS is concerned about what is happening in the place where the child lives. In addition to interviews with everyone named in the report and everyone living at the subject address, some states authorize investigators to undertake physical, psychological, or psychiatric examinations, as appropriate.

2. Training and Practice

Today's CPS agents train for investigation side-by-side with police departments. Usually in response to tragic events,⁸¹ CPS agencies erect more and more police-like investigative tactics, which have sprawling impacts on every family within CPS's purview. In New York, for example, following the tragic death of two young children at the hands of their caregivers in 2017, an internal investigation determined that ACS could have altered the children's fate with more robust policing of the family.⁸² While devastating, these deaths were ultimately outliers.⁸³ Reducing the risk of similar tragedies to zero would require immense tradeoffs for families and communities touched by ACS. Still, ACS immediately ramped up its investigative tactics to look more like its NYPD counterparts. New ACS agents began receiving training at the NYPD Training Academy to improve their investigative skills.⁸⁴ They attended the NYPD's Criminal Investigator's Course, which is "an intensive two-week class that often draws representatives from law enforcement agencies throughout the world."⁸⁵ One year later, ACS set up its own facilities for investigation training to supplement the NYPD training program. Modeled on an NYPD facility colloquially called "the Fun House," ACS created a mock multi-room apartment, complete with hired actors in the role of parents and children under ACS investigation. This setup provided ACS officers training practice on conducting home searches and investigative interviews.⁸⁶

SERVS., CHILD WELFARE POLICY MANUAL § 5.1 (2020) ("The Division of Family and Children Services (DFCS) shall . . . [o]bserve the physical home environment, including every room in the home to determine if it is safe and appropriate to meet the needs of each child"). For the remaining six jurisdictions, see STATE STATUTE RESEARCH APP'X, *supra* note 78.

81. See, e.g., Keefe, *supra* note 15.

82. Press Release, City of New York Department of Investigation, Summary of DOI's Investigation of the Administration for Children's Services Response to Abuse and Neglect Allegations Related to Jaden Jordan 1 (Jan. 26, 2017), <https://www.nyc.gov/assets/doi/reports/pdf/2017/2017-01-26-ACSstmt.pdf> [<https://perma.cc/E2JZ-D6KH>] (noting that while even ACS described these cases as outliers, there was additional monitoring that ACS could have undertaken to prevent the tragic deaths investigated).

83. See CHILD MALTREATMENT 2019, *supra* note 2, at 54 (noting "the relatively low frequency of child fatalities").

84. Thomas Tracy, *Administration of Children's Services Staffers Now Being Sent to NYPD Investigator Course*, N.Y. DAILY NEWS (Sept. 24, 2017), <https://www.nydailynews.com/new-york/acs-staffers-nypd-investigator-article-1.3518025> [<https://perma.cc/TR3B-2RRH>].

85. *Id.*

86. Thomas Tracy, *Children's Services Case Managers to Get Real-life Home Visit Experience in Simulated Settings*, N.Y. DAILY NEWS (Nov. 25, 2018), <https://www.nydailynews.com/new-york/ny-metro-acs-fun-house-training-20181124-story.html> [<https://perma.cc/E7TJ-FRQP>]; Melissa Russo, *An Inside Look at ACS's New Child Abuse Detection Training Program*, NBC N.Y. (Sept. 20, 2021),

In Texas, the Department of Family and Protective Services hires “Special Investigators” to train, consult, and provide feedback to CPS staff on forensic interviewing skills and techniques.⁸⁷ Special Investigators serve a mentoring role for Texas CPS investigations.⁸⁸ They are former and retired law enforcement, brought on for their experience “with primary duties involving the use of forensic investigatory methods”—including “experience interviewing perpetrators, children and witnesses”; “crime scene analysis including photographic and written documentation”; and “experience obtaining credible and reliable victim, witness, and suspect statements and report writing.”⁸⁹

As required by state and federal law,⁹⁰ when a CPS office is contacted with a report of suspected maltreatment, a local CPS agent is dispatched to investigate. While most state statutes provide a mechanism for agents to seek judicial authorization to conduct a home search or other invasive investigative technique, agents rarely seek this authorization.⁹¹ This may be because agents are *not* statutorily required to obtain such authorization before conducting an investigation, or because they *are* statutorily required to deploy the very same investigation techniques that they would be seeking judicial permission to conduct. Either way, CPS agents more often opt to simply approach a parent at their home to investigate the allegation.⁹² In doing so, they count on training and experience that assumes a parent will consent to a search without a judicial order.⁹³

<https://www.nbcnewyork.com/news/an-inside-look-at-acss-new-child-abuse-detection-training-program/3282657/> [<https://perma.cc/66NA-YS3H>].

87. *What Is a Special Investigator?*, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Jobs/CPS/special_investigator.asp [<https://perma.cc/DTW2-T73K>].

88. *Id.*

89. *Id.*

90. *See supra* Part I.B.1.

91. For example, in the second quarter of 2022, the New York City Administration conducted 1,433 full investigations. ACS sought judicial authorization in fifty-two, or around 3 percent, of the investigations. They were granted authorization in fifty. N.Y.C. ADMIN. CHILD.’S SERVS., CHILD WELFARE INDICATORS QUARTERLY REPORT 9–10 (2022), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2022/ChildWelfareIndicatorsQ2.pdf> [<https://perma.cc/Z9ED-2KDA>].

92. *Id.*; *see also* DEPANFILIS, *supra* note 33, § 4 at 35 (“Engaging and Working with Children and Families”).

93. *See* Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One*, PROPUBLICA (Oct. 13, 2022), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> [<https://perma.cc/CK5C-U7NJ>] (finding that the New York City ACS sought warrants in 0.2 percent of home searches in 2021); Kate Snow, *Unprotected: An Inside Look at NYC’s Administration for Children’s Services Searches*, NBC NIGHTLY NEWS (Oct. 13, 2022), <https://www.nbcnews.com/nightly-news/video/unprotected-an-inside-look-at-nyc-s-administration-for-children-s-services-searches-150608453758> [<https://perma.cc/6HBL-9C47>] (quoting a current ACS caseworker: “If you’re engaging with a family member who’s resistant, you kinda have to make it real for them, that there is a problem happening, not just for me as a caseworker but for you as a parent and it will actually go faster for you if you comply with us . . . It’s like the velvet glove over the steel fist so to speak, the implicit threat that you know, should you not cooperate then there’s a list of more coercive things ACS can do”).

Indeed, the Department of Health and Human Services appears to not contemplate the need to seek judicial permission for a home search, instead describing guidelines for “managing ambivalence and resistance” that include “open-ended questions,” “affirmations,” and “reflections.”⁹⁴

But one thing is undeniable: these home searches are borne out on all families policed by CPS agents, regardless of the underlying allegation. When a CPS agent arrives at a home, they sometimes describe the allegations and sometimes not. No state statute requires a CPS agent to inform a parent of their right to refuse entry. Agents’ notes are maintained in a central digital repository, sometimes for years,⁹⁵ regardless of whether allegations are ultimately substantiated. A CPS agent’s notes reflect their observations and reveal the banality of a home search, which often involves making a full inventory of the content and upkeep of the kitchen cabinets and refrigerator; the tidiness and cleanliness of various rooms and shared spaces; the contents and condition of private bedrooms, the number of beds, and the sleeping arrangements of the occupants; the status of the fire alarms and carbon monoxide detectors; whether there are guards on the windows; the working order of the bathroom sinks and toilets; and the presence or absence of clutter—all these details manage to make their way into CPS notes.

II.

NON-CRIMINAL SEARCHES

While scholars have spilled ink over the Fourth Amendment’s fifty-four words since the Constitution’s ratification, the Supreme Court’s early interpretation of the Amendment was more limited. The lion’s share of the Supreme Court’s Fourth Amendment precedent has been handed down over just the past sixty years, following the landmark decision in *Mapp v. Ohio* in 1961.⁹⁶ *Mapp* held that prosecutors were constitutionally forbidden from introducing evidence obtained contrary to the Fourth Amendment in state court criminal prosecutions,⁹⁷ extending the rule applying to federal courts established in *Weeks v. United States*.⁹⁸ The holding in *Mapp* marks what scholars have called the high-water mark in the Supreme Court’s search and seizure jurisprudence.⁹⁹ *Mapp* propagated millions of state criminal court merits rulings on what did and

94. DEPANFILIS, *supra* note 33, at 43–44.

95. See 42 U.S.C. § 5106(a)(5) (2018); see also REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS, *supra* note 17.

96. See generally PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW, A FOURTH AMENDMENT HANDBOOK 13 (2d ed. 2015) (explaining that since 1961, the Court has decided 330 of its 430 decisions on the Fourth Amendment).

97. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

98. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

99. Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 364 (2013).

what did not violate the Fourth Amendment's bar on unreasonable searches and seizures in a criminal investigation under the U.S. Constitution.¹⁰⁰

While the Supreme Court has significantly pared back *Mapp*'s protections, hundreds of thousands of criminal court Fourth Amendment rulings have nonetheless worked their way through state and federal courts by virtue of defendants' invocation of the exclusionary rule.¹⁰¹ The subsequent juridical debate over the availability of suppression as a remedy has clarified the Fourth Amendment restrictions on criminal police. Many criminal court search and seizure cases have found their way to the Supreme Court, resulting in dozens of high court cases defining the outer bounds of when and how criminal police can search under the Fourth Amendment.¹⁰²

Just as courts began to wrestle with the granular constitutional limitations on state police officers investigating and enforcing criminal laws, a new crop of laws was emerging, with a corresponding set of state agents charged with enforcing them.¹⁰³

A. Before Administrative Searches

The early 1960s marked an era of transformation in the American welfare state, motivated by a seemingly benevolent correction. This transformation gave rise to the modern family policing system¹⁰⁴ and the CPS worker as its central law enforcement officer.

Prior to 1961, states and their agents were entrusted with doling out public assistance dollars under the Aid to Dependent Children (ADC) program.¹⁰⁵

100. As of August 7, 2022, Westlaw counts 1,175 citing references of *Mapp v. Ohio* based on the headnote "Improperly obtained evidence; suppression."

101. See George C. Thompson III, *Mapp v. Ohio: Doomed from the Beginning?*, 12 OHIO ST. J. CRIM. L. 289, 289–90 (2014) (reviewing TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* (2013)), and describing the steady decline of *Mapp* protections through Supreme Court jurisprudence).

102. See Lewis R. Katz, *Mapp After Forty Years: Its Impact on Race in America*, 52 CASE W. RES. L. REV. 471, 479–80 (2001) (summarizing a forty-year trajectory of the Supreme Court's *Mapp* decisions).

103. State-sanctioned family policing dates to before the founding. Laura Briggs and others have demonstrated how enslaved mothers were separated from their children as commodities and as punishment for collective action. LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* 45 (2020). See also DOROTHY ROBERTS, *TORN APART* 87–88 (2022) (tracing the history of family separation into the modern era of family policing). Native children were removed from their families and sent to boarding schools where they were stripped of family and cultural ties. BRIGGS at 47. See also Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 540–41 (2021) (describing the isolation and attempted assimilation into Christian culture of Native children sent to boarding schools).

104. See Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 330–31 (2014) (describing the history of social welfare generally and characterizing the Aid to Dependent Children as designed "primarily to enable poor [W]hite widows to remain in their homes and care for their children").

105. In 1962, ADC was renamed Aid to Families with Dependent Children (AFDC). In 1996, AFDC was replaced by Temporary Aid to Needy Families (TANF). KASIA O'NEILL MURRAY &

While most of the funding came from the federal government,¹⁰⁶ states were statutorily permitted to devise “suitability rules”—conditions upon which a family could be denied funding. The rules were discriminatory at the state level, particularly in Southern states roiled by a re-emerging Black freedom struggle.¹⁰⁷ States defined “unsuitable behavior” according to White lawmakers’ stereotypes of Black families: “man-in-the-house” rules targeted Black mothers accused of living or sleeping with a man out of wedlock; “substitute father” rules were premised on the notion that such a man should be responsible for the financial support of any children in the home; and “illegitimate child” rules aimed to exclude families with children born outside the confines of marriage.¹⁰⁸ When a state welfare worker deemed a home unsuitable, the consequence was swift: the family was removed from the welfare rolls and left to fend for themselves, regardless of demonstrable need.¹⁰⁹ The discriminatory intent of this project was summarily realized. From 1955–1959, for example, more than half of Southern Black families were denied ADC benefits on the grounds of suitability.¹¹⁰ In 1959 alone, Florida welfare officials expelled 14,000 children, more than 12,500 of whom were Black, because of their families’ “unsuitable” homes. In 1960, Louisiana expelled 23,000 children.¹¹¹

The disparity in enforcement did not go unnoticed. Others joined in support of Black families, calling for federal action.¹¹² In 1960, the federal Department of Health, Education, and Welfare (HEW), led by Secretary Arthur Flemming, jumped into the fray. In order to protect predominantly Black families against summary dismissal from needed support, the “Flemming Rule”—codified into federal statute in 1961—added two requirements for states receiving federal welfare dollars. These requirements were theoretically designed to address the

SARAH GESIRIECH, PEW COMM’N ON CHILD. IN FOSTER CARE, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 2 (2004), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/legislativehistory2004pdf.pdf [https://perma.cc/8GXN-HULR].

106. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 CHILD WELFARE 9, 11 (1997).

107. *Id.* at 11–13; see also ROBERTS, *supra* note 103, at 117 (discussing the unique impact of suitability rules on Black families and describing establishment of suitability rules as punishment for important civil rights gains in the 1950s).

108. See Lawrence-Webb, *supra* note 106, at 13; see also ROBERTS, *supra* note 103, at 116 (describing the nature of the suitability rules, including “man-in-the-house” rules, “to deny benefits to Black mothers suspected of living or having a sexual relationship with a man, who would be deemed a ‘substitute father’ and expected to support the children financially”).

109. Lawrence-Webb, *supra* note 106, at 11 (citing contemporary NAACP and National Urban League statistics reporting the same).

110. *Id.*

111. *Id.* at 12.

112. See Taryn Lindhorst & Leslie Leighninger, “Ending Welfare as We Know It” in 1960: Louisiana’s Suitable Home Law, 77 SOC. SERV. REV. 564, 575–76 (2003) (describing mobilization by national social welfare organizations to advocate for the Department of Health, Education, and Welfare to investigate and condemn discriminatory eligibility rules).

needs of indigent children, regardless of states' concerns over or judgments of their parents' conduct.¹¹³

The Flemming requirements—and the money that came with them—quietly gave rise to the laws that undergird today's family policing regime.¹¹⁴ The first requirement was process. Under the new regime, before a state welfare worker could boot a family from the welfare rolls, HEW now required states to give families an opportunity to object to a determination that their home was unsuitable under a more stringent definition of suitability.¹¹⁵ Second, beyond extending nominal due process to families, the Flemming Rule both imagined and funded a new role for state welfare agents.¹¹⁶ Beyond an administrative eligibility determination, the Flemming Rule folded states' suitability requirements into a tripartite set of tasks for welfare workers¹¹⁷: (1) to determine whether a home was suitable, (2) to provide “service” interventions to families whose homes were deemed unsuitable, and (3) to “refer to law enforcement or a judge” in cases where families would not accept service interventions, or where service intervention would not alleviate workers' concerns.¹¹⁸ While the first task was always part of a caseworker's role, the Flemming Rule added the second and third tasks. In Flemming's view, “it was ‘completely inconsistent . . . to declare a home unsuitable for a child to receive assistance and at the same time permit him to remain in the same home, exposed to the same environment.’”¹¹⁹ As such,

113. Lawrence-Webb, *supra* note 106, at 17 (describing the change from moralizing language to neglect and abuse).

114. ALLIANCE FOR CHILDREN'S RIGHTS, THE PATH TO RACIAL EQUITY IN CHILD WELFARE 3 (2021), https://allianceforchildrensrights.org/wp-content/uploads/REJPS_summit_report.pdf [<https://perma.cc/AG39-9EFM>] (“The laws passed following the Louisiana incident and the institution of the Flemming rule laid the foundation for the punitive child welfare policies that disproportionately harm children and families of color today.”).

115. Lawrence-Webb, *supra* note 106, at 12; *see also D.C. Appropriations, 1963: Hearings on H.R. 12276 Before the Subcomm. of the S. Comm. on Appropriations, 87th Cong. 2237* (1963) (“Whenever there is a question of the suitability of the home for the child's upbringing, steps should be taken to correct the situation or, in the alternative, to arrange for other appropriate care of the child.”).

116. The full text of the Flemming Rule appears in a 1963 Senate subcommittee hearing. *Id.* at 1268 (“It is of great importance that State agencies should be concerned about the effects on children of the environment in which they are living, and that services be provided which will be directed toward affording the children maximum protection and strengthening their family life.”). It was codified in 1961. Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75 (1961) (including the provision of “federal payments for foster home care of dependent children”). Amendments to PL 87-31 in 1962 expanded funding for child welfare to include services for “assisting in the solution of problems which may result in . . . neglect”; “protecting and caring for . . . neglected children”; and “where needed, [providing] adequate care of children away from their homes[.]” Act of July 25, 1962, Pub. L. No. 87-543, 76 Stat. 172 (1962).

117. In general, the terms “worker” and “agent” and their connotations are interchangeable for purposes of this Article. By using the term “agent,” which is typically reserved for government employees engaged in policing, I intend to suggest to the reader that CPS employees have many of the legal authorities and coercive tools that we typically associate with criminal police as explained in Part I. Exclusively using the term “worker” would therefore draw an unnecessary distinction between CPS employees and employees of other policing agencies.

118. ROBERTS, *supra* note 103, at 117.

119. *Id.*

through codification, Congress provided new funding for states to remove children from their families and place them in foster care if a family was deemed beyond rehabilitation.¹²⁰

The upshot of these legislative changes was stark. Forced with choosing between administering welfare in homes the states disapproved of and removing children from those homes, state welfare workers made their choice. In 1961, the same year that *Mapp* was decided—restricting criminal police’s power to search—150,000 children were removed from their families and placed in foster care pursuant to welfare home searches under the revised ADC. By 1963, that number had risen to 200,000—more than half of the children served by public agencies, with more than 81 percent placed in foster care because their parents were unmarried or because they came from broken homes.¹²¹ As Dorothy Roberts writes, caseworkers’ investigative and policing function shifted dramatically: “[t]he central mission of the child welfare system transformed from providing services to intact [W]hite families to taking Black children from theirs.”¹²²

With these developments, courts were sometimes called upon to weigh in on the role of the caseworker. For its part, the Supreme Court would begin tiptoeing around the question of CPS home searches and their impact on fundamental family integrity within the decade. As will become clearer in the next Section, the federal legislature continued to harden and separate out the role of caseworkers as family police, eventually wholly disconnecting their role from the provision of welfare benefits.¹²³ Congress would empower CPS agents with the exclusive task of policing, categorizing, and separating families based on determinations of suitability, this time using child-centric language—maltreatment, neglect, and abuse—rather than administrative eligibility for funds.¹²⁴

Nonetheless, while subsequent Fourth Amendment jurisprudence has given rise to three additional lenses for non-criminal investigations—searches pursuant to a *Camara* warrant, searches pursuant to a diminished expectation of privacy, and searches pursuant to a contract for government largesse—the Supreme Court has refused to reckon with the Fourth Amendment limits on CPS’s distinct power to enter homes to interrupt fundamental family integrity rights. Instead, the Court has slipped—overlooking CPS’s role entirely, and instead focusing its analysis on other more familiar powers (enforcing “government contracts” and criminal policing) in its reasoning. This slip has contributed to CPS agents wielding

120. *Id.*

121. Lawrence-Webb, *supra* note 106, at 23 (citing HELEN R. JETER, U.S. DEP’T HEALTH, EDUC. & WELFARE, CHILDREN, PROBLEMS, AND SERVICES IN CHILD WELFARE PROGRAMS (1963)).

122. ROBERTS, *supra* note 103, at 118.

123. *See infra* Part II.D; *see also* discussion of CPS role *supra* Part II.B.

124. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 32–33 (2017) (describing the moral construction of poverty, and explaining this shift and the way that it deprives parents of privacy before they even imagine that they are entitled to it).

significant power without the responsibility that a straightforward reading of the Fourth Amendment jurisprudence would require of them.

B. *Camara and Dragnets*

The Supreme Court's contemporary Fourth Amendment jurisprudence in non-criminal home searches begins with its 1967 decision in *Camara*.¹²⁵ Prior to *Camara*, the Court held that city employees were not required to obtain a warrant to enter a home for routine health and safety inspections.¹²⁶ With *Camara*, the Court changed course on the need for warrants in administrative home searches.

Arrested for refusing a San Francisco home inspector's entry without a warrant, Roland Camara filed a writ of prohibition that made its way to the Supreme Court.¹²⁷ While the Court had previously refused to approve a second-tier warrant track requiring anything less than individualized probable cause,¹²⁸ the *Camara* Court held that the Constitution required exactly such a track in the narrow context of searches conducted pursuant to a suspicionless regime to secure safety.¹²⁹ Instead of limiting the warrant requirement's application to suspicion-based investigations, the *Camara* Court extended its scope while diluting the definition of probable cause in the context of what it dubbed "administrative searches."¹³⁰

In administrative searches, Justice White explained, officials are not required to

show the same kind of proof to a magistrate to obtain a warrant as one must who would search for fruit or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an interference of 'probable cause' to make an inspection are clearly different from those that would justify such an interference where a criminal investigation has been undertaken.¹³¹

On this score, the Court held that state agents would need to show far less to satisfy probable cause. For example, a legislature might determine that "the passage of a certain period without inspection" could itself amount to probable cause worthy of a magistrate's warrant.¹³²

125. *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967); see generally Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 262 (2011) (describing the development of the administrative search doctrine).

126. *Frank v. Maryland*, 359 U.S. 360, 372-73 (1959).

127. *Camara*, 387 U.S. at 525.

128. Just eight years before *Camara*, the Court held in *Frank* that a warrant required, by definition, an individualized showing of probable cause. Anything less stringent was a constitutionally illegitimate "synthetic search warrant . . . flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue." *Frank*, 359 U.S. at 373.

129. *Camara*, 387 U.S. at 534.

130. *Id.*

131. *Id.* at 538.

132. *Id.*

Two factors were central to the Court's willingness to depart from traditional probable cause in *Camara*. First, the Court reasoned that San Francisco's "area search" regime was necessary to ensure the government's interest in a safe urban environment. Each home, including Roland Camara's, was subject to inspection in order to safeguard the community at large,¹³³ because "even the unintentional development of conditions which are hazardous to public health and safety . . . may not be apparent to the inexpert occupant himself."¹³⁴ Such conditions could result in "fires and epidemics" that "may ravage large urban areas."¹³⁵ Second, the Court was moved by the circumscribed nature of the investigation. While entering someone's home involved an intrusion on their Fourth Amendment interests, "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."¹³⁶

Camara is broadly recognized as introducing the concept of an administrative search to the Fourth Amendment doctrine. Importantly, though, scholars have recognized that the *Camara* Court crafted the relaxed probable cause standard as a check on a unique and particularly blunt administrative tool—the dragnet search, in which government agents inspect every place in a particular area or every person involved in a particular activity.¹³⁷ In *Camara*, the dragnet was a municipal housing inspection regime in a particular catchment of San Francisco "aimed at securing city-wide compliance with minimal physical standards for private property."¹³⁸ Other common dragnets have developed since *Camara*, including sobriety checkpoints where government agents check every car on a particular roadway,¹³⁹ checkpoints in areas near the border where agents inspect every third car,¹⁴⁰ and routine bag inspections when an individual enters the New York City subway.¹⁴¹

Dragnet search regimes are designed to address broad-based public health or safety concerns and are not predicated on individualized suspicion. The *Camara* Court recognized that in implementing such a dragnet, agents would inevitably have to search the homes of people who had done nothing to trigger the government's suspicion, noting that "the only effective way to seek universal

133. *Id.* at 536.

134. *Id.* at 535–37.

135. *Id.* at 535.

136. *Id.* at 537.

137. Primus, *supra* note 125, at 263 (describing dragnet searches); see also CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 211–12 (2007) (contrasting the individualized suspicion requirement with dragnet-style searches of large groups); LAFAVE, *supra* note 11, § 4.1(a) (describing generally the search warrant doctrine).

138. *Camara*, 387 U.S. at 535.

139. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

140. *United States v. Martinez-Fuente*, 428 U.S. 543, 550 (1976).

141. Katherine Lee Martin, "Sacrificing the End to the Means": *The Constitutionality of Suspicionless Subway Searches*, 15 WM. & MARY BILL RTS. J. 1285, 1289 (2007).

compliance with the minimum standards required by municipal codes is through routine periodic inspection of all structures.”¹⁴² By crafting a mechanical probable cause standard, the Court sought to strike a rights-protective balance where individualized suspicion—the Court’s professed preferred basis for search¹⁴³—was not workable.

In imposing an area search warrant, the Court sought to safeguard two private interests. First, the Court was concerned about fraudsters attempting to gain “criminal entry under the guise of official sanction.”¹⁴⁴ By requiring a judicial warrant upon demand, the Court protected occupants unfamiliar with semi-annual municipal inspection requirements and the proper authority of the inspector.¹⁴⁵ Second, the Court was concerned with abuse of government discretion, including potential ancillary criminal consequences—either for noncompliance with health or building codes or for refusal to permit an inspection itself.¹⁴⁶ In this context, the Court thought it important that occupants get individual notice of the statutory requirements for inspection.

Ultimately, *Camara* authorized government agents to dispense with the Fourth Amendment’s individualized probable cause requirement in dragnet searches that are (1) minimally invasive, such that they satisfy a balance of government and private interests¹⁴⁷ and (2) absolutely necessary, in that a regime based on individualized suspicion of wrongdoing would not effectively serve the interests that the government seeks to achieve.¹⁴⁸

Decided before CAPTA, *Camara* left open the impact it would have on suspicions-based home searches undertaken by CPS agents who had not yet entered the field in force. In the almost sixty years since, two major developments have shaped CPS home searches and their regulation. First, a new set of laws emerged, driving the purpose of these home investigations from generalized investigations to ensure proper use of federal dollars, to suspicion-based parental investigations of child maltreatment. They required states to investigate and, at times, separate families under the law’s auspices. Second, with CAPTA in 1974, federal law funded state agents to enforce those laws, with the primary purpose of investigating child maltreatment allegations.

Since then, the Supreme Court has failed to reckon with the specific question of the Fourth Amendment’s role when CPS agents seek to enter a home

142. *Camara*, 387 U.S. at 535–36.

143. LAFAVE, *supra* note 11, § 4.1(a) (collecting cases in which the Supreme Court has expressed its preference for search warrants and scholars criticize the Court for creating broad exceptions in the face of that preference).

144. *Camara*, 387 U.S. at 531.

145. *Id.* at 532.

146. *Id.* at 531.

147. *See Primus, supra* note 125, at 265 n.60 (collecting examples of minimally intrusive dragnet regimes).

148. *See id.* at 265 n.62 (collecting examples of regimes which would not have been served by individualized suspicion).

to investigate a suspicion-based tip that a child is endangered. The Court had its first opportunity to answer this question in *Wyman v. James*.

C. *Wyman and the Pre-CAPTA Slip*

By 1967, states began adopting the spirit, if not the letter, of the Flemming Rule into law.¹⁴⁹ Local legislatures around the country were shifting their formal focus from a home's suitability to receive funds to an inquiry into a parent's fitness to care for their children.¹⁵⁰ This shift would become hardened by federal financial incentive and regulation with the passage of CAPTA in 1974.

In the period between federal codification of the Flemming Rule in 1962 and the codification of CAPTA in 1974, every state adopted some sort of scheme for reporting and investigating parental fitness. The schema diverged on who should conduct these investigations and who should have legal authority to remove children from parents deemed unfit to parent.¹⁵¹ This divergence was largely the product of a staggered adoption of legislative models proposed by contemporary actors seeking to suggest the best solution to newfound child welfare concerns.¹⁵²

The most influential of these models was proposed by the Children's Bureau of HEW—from whence came the Flemming Rule.¹⁵³ The Children's Bureau model, published in 1963, assigned traditional law enforcement officials

149. Prior to 1963, “[l]aws to protect children (criminal laws forbidding assault and statutes dealing with the neglect of children) were not lacking but were not enforced systematically.” Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 308 (1972); see also Donald W. Green II, *Parent and Child – Child Beating – Recent Legislation Requiring Reporting of Physical Abuse*, 45 OR. L. REV. 114, 115 (1966) (describing the same phenomenon). This changed rapidly after *The Battered-Child Syndrome*. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962); Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 838 (2010) (describing the massive influence of the Kempe study, including three hundred scientific articles on child abuse in three years and a push for reporting legislation).

150. In short order, Kempe's study was followed by model abuse and neglect legislation promulgated by a variety of institutions, including the Children's Bureau. U.S. DEP'T HEALTH & HUM. SERVS., *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING THE PHYSICALLY ABUSED CHILD* (1963) [hereinafter *THE ABUSED CHILD*]; see also Leonard G. Brown II & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. 37, 38 (2013) (describing the history of mandatory reporting laws); Hafemeister, *supra* note 149, at 840–41 (highlighting that while the proliferation of reporting laws to all fifty states took five years from the publication of the Kempe study, “it takes an average of 25.6 years for a new legal concept with broad public support to diffuse across the fifty states”).

151. Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 3 (1967).

152. The four main models were from the Children's Bureau and the American Humane Society in 1963, and from the Council of State Governments and the American Medical Society in 1965. For a contemporaneous discussion on the contents of those proposals and their patterns of adoption, see *id.* at 3–6. For a retrospective take on the various models, see Hafemeister, *supra* note 149, at 839–41.

153. Paulsen, *supra* note 151, at 3.

the mandate to handle reports¹⁵⁴ because police were the only universally available investigative body capable of the fact-intensive work envisaged by a parental suitability investigation.¹⁵⁵ The prevailing child abuse and neglect laws at the time were criminal laws; the primary agency responsible for enforcing those laws, including all searches and seizures with them, was the criminal police. At the time, in its model legislation, the Children's Bureau was explicit: the police were to be placeholders. Once public CPS agencies were up and running, the Children's Bureau professed a preference for CPS to run investigations rather than police, unless police were the jurisdiction's only option.¹⁵⁶ But many state governments thought that the resources already in place—private entities as resource providers and police as investigators who executed necessary removals—would suffice. This was the predominant model before CAPTA.¹⁵⁷

In *Wyman*, decided in the pre-CAPTA era of *funding eligibility* investigations, the Court held that both the purpose and consequence of a worker's home investigation were administrative: the worker assessed whether a parent was eligible for state and federal welfare dollars. If they were not, or if they refused investigation, the result of the investigation was clear: the funding spigot for the family would shut. After *Wyman*, Congress passed CAPTA, formalizing the shift from a worker's mechanical focus on a parent's eligibility for funding to a worker's more searching focus on a parent's fitness to parent. Parental fitness investigations¹⁵⁸ gave rise to a wholly different set of questions than the ones *Wyman* would answer—questions about the role, power, and identity of the investigator and the potential consequences of the investigation. Who was best suited to determine if a child was maltreated? On what basis? And,

154. THE ABUSED CHILD, *supra* note 150, 3–4, 9.

155. The Children's Bureau assigned investigative responsibility to law enforcement because they simply did not have other widely available options to take on this investigative task: "At present, law enforcement constitutes the only chain of services which is sure to exist in every community and within reach of any medical personnel given responsibility for this reporting." *Id.*

156. *Id.*

157. Hafemeister, *supra* note 149, at 841 ("When mandatory reporting laws were first adopted, lawmakers believed the occurrences of child abuse numbered in the hundreds and therefore the governmental services in place could adequately deal with the reports being filed.").

158. I use the term "parental fitness investigations" to refer to any post-Flemming Rule investigation targeting concerns about abuse, neglect, or maltreatment that could result in state intervention to include the provision of services or separation of families. Parental fitness investigations became the enforcement mechanism of the family policing system and were racialized from their inception. Racially coded language about mothers' "promiscuity" or the "legitimacy" of their children, which gave the state permission to ignore families, gave way to coded language around "neglect" and "abuse" requiring intervention where a parent was deemed unsuitable. *See, e.g.,* Abigail Williams-Butler, Kate E. Golden, Alicia Mendez & Breana Stevens, *Intersectionality and Child Welfare Policy: Implications for Black Women, Children, and Families*, 98 CHILD WELFARE 75, 75 (2020) (describing the alienating impact on Black families of the shift from moralizing language about parents' conduct to protective language about children's well-being); *see also* BRIDGES, *supra* note 124, at 7 (arguing that the focus on poor mothers' neglect is presumed based on a moral construction of poverty: "the idea that people are poor because they are lazy, irresponsible, averse to work, promiscuous, and so on").

importantly, what could they do about it? Fifty years since CAPTA prompted the shift in the focus of CPS investigations, *Wyman* remains the ill-fitting authority on these questions.

In *Wyman*, the Court examined the case of Barbara James, a New York City mother of a two-year-old boy. Ms. James had applied and been approved for funding under the Aid to Families with Dependent Children (AFDC) program when Maurice was born in May 1967.¹⁵⁹ Two years later, as required by state law, a caseworker from the New York City Department of Social Services (DSS) sought to visit Ms. James's home again as a prerequisite for her continued eligibility for welfare funds.

As discussed in the previous section, the DSS caseworker investigation had two purposes under state and federal law. First, the worker had to assess Ms. James's home "for the purpose of determining if there are any changes in her situation that might affect her eligibility to receive Public Assistance, or that might affect the amount of such assistance."¹⁶⁰ With the Flemming Rule, Congress added a secondary purpose, namely, "to see if there are any social services which the Department of Social Services can provide to the family."¹⁶¹ Under the revised federal law, this secondary purpose actually began a parental fitness investigation: "where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State."¹⁶²

Ms. James refused to allow the DSS agent to enter her home, offering instead to meet the agent at another location to provide the information needed for the assessment.¹⁶³ DSS, pointing to its obligations under state law, refused. The agency ultimately terminated Ms. James's benefits until agents could get into her home. Ms. James sued to have her benefits reinstated on the grounds that the state law violated her rights against unreasonable search and seizure under the Fourth Amendment.¹⁶⁴ The Court's decision was blunt: because the DSS inspector conducted its search as an agreed-upon condition of a private contract between the government and the home's occupant, Ms. James did not benefit at all from the Fourth Amendment protection against unreasonable seizures.¹⁶⁵

159. *Wyman v. James*, 400 U.S. 308, 313 (1971).

160. *Id.* at 314.

161. *Id.*

162. *Id.* at 315–16 (citing 42 U.S.C. § 605) (Supp. V 1964)). At the time, federal law did not actually require home searches as a part of the periodic eligibility assessment scheme, but the New York statute did.

163. *Id.* at 313–15.

164. *Id.* at 314.

165. The Court held that the DSS home search "serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment." *Id.* at 326.

The Court's conclusion—and the binding reasoning of the case that the Fourth Amendment did not apply at all to the DSS search—rested on the posture of the worker's search on the one hand, and on consequences of refusing a search on the other. On the worker's posture, the Court reasoned—in just a couple of words—that the DSS home visit was primarily “rehabilitative” and only secondarily investigative.¹⁶⁶ And on the consequences of refusal, the Court held that the upshot for Ms. James was simply a breach of contract. Upon refusing the search, “[t]he aid then never begins or merely ceases, as the case may be. There is no entry of the home, and there is no search.”¹⁶⁷ On this score, the Court distinguished the facts in *Wyman* from the dragnet search in *Camara*. While *Camara* was a “true search for violations,” the search in *Wyman* was not.¹⁶⁸ “Mrs. James is not being prosecuted for her refusal to permit the home visit, and is not about to be so prosecuted,” the *Wyman* Court held. The Court concluded: “The only consequence of her refusal is that the payments of benefits ceases.”¹⁶⁹

Citing *Terry v. Ohio*, the Court then moved on to list why—if the Fourth Amendment applied—a warrantless DSS search would still meet the Fourth Amendment's reasonableness requirement.¹⁷⁰ In the Court's dicta analysis, the pre-CAPTA posture of the decision becomes more evident. First, the Court highlighted the government's interests in protecting the public fisc. In conducting its search, the Court reasoned, DSS was ensuring proper use of taxpayer funds.¹⁷¹

While the administrative and contractual nature of the search was central to the Court's holding that Fourth Amendment protections were not available, in its reasonableness analysis, the Court highlighted “[t]he dependent child's

166. “It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context.” *Id.* at 317.

167. *Id.* at 318.

168. *Id.* at 325.

169. *Id.* at 319.

170. Some scholars have argued that this reasoning is dicta, given the holding on the Fourth Amendment's applicability to the search. See, e.g., Steven Yarosh, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1115–16 & n.90 (1992). I discuss it nonetheless because the Court is forecasting reasonableness in non-criminal home searches more generally, and in particular as the calculus would apply to caseworkers concerned with the well-being of children. See *Wyman*, 400 U.S. at 318.

171. *Wyman*, 400 U.S. at 386. The reasoning has been roundly criticized by scholars ever since. See BRIDGES, *supra* note 124, at 80; see also Ginny Kim, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165, 180–82 (1995) (enumerating several reasons *Wyman v. James* was wrongly decided); Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of Inviolable Home*, 85 IND. L.J. 355, 385 n.257 (2010) (recounting commentary on the conditioning of a public benefit and concluding “the concrete setting in which consent is obtained in the context of welfare home visits is itself exceptionally coercive—manifest in the fact that the aid applicant must choose between asserting her constitutional right and securing the means to feed, clothe, and shelter her children”).

needs.”¹⁷² The Court held, “only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.”¹⁷³ In highlighting this point in the context of the investigation, the Court focused its inquiry on the identity and mandate of the DSS caseworker and the nature and potential outcomes of the caseworker’s investigation.

On the worker’s mandate, the Court pointed to the difference between the caseworker’s *raison d’être* and that of law enforcement: “The visit is not one by police or uniformed authority. It is made by a caseworker of some training, whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient to whom the worker has profound responsibility.”¹⁷⁴ To that end, the Court was swayed by what it understood to be the caseworker’s mandate under the AFDC: “the program concerns dependent children and the needy families of those children. . . . The caseworker is not a sleuth but rather, we trust, is a friend to one in need.”¹⁷⁵

On the nature and potential outcomes of the investigation, the *Wyman* Court again contrasted the DSS investigation with a search for criminal evidence: “[t]he home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding.”¹⁷⁶

Herein lies the first dual-purpose slippage. While the Court made passing mention of the caseworker’s responsibilities to investigate neglect and abuse, the decision never contended with the consequences of such an investigation. After the *Flemming* Rule, a caseworker in this role had the statutory authority to infringe on a long-held fundamental liberty interest by removing children from their parents’ custody,¹⁷⁷ a role previously assigned exclusively to criminal law enforcement.¹⁷⁸ Instead, the Court rested its holding on the caseworker’s

172. *Wyman*, 400 U.S. at 318.

173. *Id.*

174. *Id.* at 322–23 n.11. (brushing aside an amicus brief filed by the Social Service Employees Union, Local 371 supporting a warrant requirement, and calling attention to the poor training, youth, and inexperience of caseworkers: “Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty”).

175. *Id.* at 323; *see also id.* at 313 (citing approvingly the dissenting opinion of the district court judge who argued that a warrant requirement would “introduce a hostile arm’s length element into the relationship between worker and mother, ‘a relationship which can be effective only when it is based upon mutual confidence and trust’”).

176. The Court goes on, “If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect.” *Id.* at 323.

177. *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (“[T]here is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the decisions regarding their children.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that it is in recognition of family integrity that “decisions have respected the private realm of family life which the state cannot enter”).

178. *Wyman*, 400 U.S. at 322–24.

administrative authority, distinguishing such authority from what limited criminal consequences may come as an incidental byproduct of the search.¹⁷⁹

In pushing back on the majority's characterization of the nature and potential outcome of the investigation, the dissenters made a similar slip in the opposite direction. Justice Marshall wrote, "Of course, caseworkers seek to be friends, but the point is that they are also required to be sleuths." He continued:

[A]ppellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, *both of which are felonies*. . . . The fact that one purpose of the visit is to provide evidence that may lead to an elimination of benefits is sufficient to grant appellee protection since *Camara* stated that the Fourth Amendment applies to inspections which can result in only civil violations. But here the case is stronger, since the home visit, like many housing inspections, may lead to criminal convictions.¹⁸⁰

This slip—comparing CPS investigations to those of criminal law enforcement, instead of focusing the analysis on the fundamental liberty interests of the family—became the Court's dominant tack in *Ferguson* almost forty years later.¹⁸¹

In weighing the private interests at issue, the Court forwent a family policing analysis¹⁸² as well.¹⁸³ Instead, the Court focused on, and then largely dismissed, Ms. James's concerns regarding the invasiveness of DSS's questioning and her concerns about potential criminal consequences.¹⁸⁴ Using *Camara*, the Court concluded that the precautions taken in the New York statutory scheme—provision of notice, visits during the daytime, and the emphasis on the interpersonal privacy of the beneficiary—made such a search per se reasonable.¹⁸⁵ The dissenters, also relying on *Camara*, also forewent a family policing analysis, focusing their attention instead on the dignitary harms associated with a search of a home,¹⁸⁶ the potential civil forfeiture through loss

179. *Id.* at 323.

180. *Id.* at 339–40 (emphasis added) (internal citation omitted).

181. *See infra* Part II.E.

182. In her papers, counsel for Ms. James barely raised this issue either. Counsel briefly mentioned the minimal evidence necessary to bring a neglect petition in family court. Reply Brief for Appellees at 2, *Wyman v. James*, 400 U.S. 308 (1971) (No. 70-69), 1970 WL 122600 ("[N]eglect petitions can be issued on rather slender factual allegations.").

183. It bears noting that the New York Statewide Central Register of Child Abuse and Maltreatment (SCR), a product of New York's Child Protective Services Act of 1973, did not exist at the time the Court decided *Wyman*. None of the model reporting statutes discussed above, *supra* notes 157–163, included a statewide central registry. Paulsen, *supra* note 151, at 4. Neither did CAPTA in 1974, or today. *See generally* Hafemeister, *supra* note 149, at 894–99 (describing concerns about registries, the various models that adapt or reject them, and one state, Colorado, which opted to abolish its registry); *see also supra* notes 43–49.

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

185. *Id.* at 321.

186. *Id.* at 339–40.

of benefits arising from the search,¹⁸⁷ and the search's potential criminal consequences.¹⁸⁸

Ultimately, with *Wyman*, the Court defined the caseworker as an administrator—a friend, not a sleuth—whose role was primarily to provide services and support for a family under a neoliberal inspection regime designed to ensure that state welfare dollars were properly dispensed.¹⁸⁹ By focusing on that role, the Court held that the searches were an agreed-upon condition of a welfare recipient's contract with the government, exempting welfare searches from the applicability of *Camara* and therefore from the Fourth Amendment. To the extent that the Fourth Amendment did apply, both the majority and dissent focused their assessments of constitutional reasonableness on the welfare worker's entwinement with criminal police—not on their authority to investigate or separate families.¹⁹⁰ The majority held that that distance was too removed for Fourth Amendment protections to kick in; the dissent held that it was sufficiently proximate.

The federal framework for home visits under AFDC in 1969, the year that Ms. James refused the welfare worker entry to her home, likely contributed to the Court's confusion in *Wyman*. While the Flemming Rule had tasked caseworkers responsible for distribution of federal public assistance funds with the additional responsibility of investigating child abuse and maltreatment, the workers' dual role left the Court meaningful room to slip between a worker's *funding eligibility* assessment role on one hand, and their role as *parental fitness* investigators on the other.

Within three years of *Wyman*, though, Congress had disambiguated those tasks. With the passage of CAPTA in 1974, Congress gave federal endorsement to—and designated federal funding for—wholly distinct state agents responsible for the investigation, assessment, and prosecution of child maltreatment.¹⁹¹ As a condition on federal funding, states were required to grant those agents authority

187. *Id.* at 340.

188. *Id.*

189. *Id.* at 318–19.

190. *Id.*

191. Pub. L. No. 93-247, 88 Stat. 4 (1974), amended by Pub. L. No. 104-235, 110 Stat. 3063 (codified as amended at 42 U.S.C. §§ 5101–5119c (1996)); *see generally* Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 3 (2021) (describing the evolution of CAPTA and advocating for its repeal); *see also* Jane M. Spinak, *The Road to a Federal Family Court*, 58 CT. REV. 8, 9 (2022) (describing the historic roots of CAPTA as investigating child abuse and serious maltreatment before the sprawling definition of neglect captured it); ANDREW L. YARROW, *FIRST FOCUS, HISTORY OF U.S. CHILDREN'S POLICY, 1900-PRESENT* 9 (2009), <https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf> [<https://perma.cc/J7KD-LM99>].

to remove children from their parent's custody.¹⁹² All fifty states did.¹⁹³ The impact of this shift in reporting and investigation responsibilities was dramatic. In 1967, approximately 10,000 cases of child abuse and neglect were reported. By 1975, that number had increased by 300 percent to 300,000.¹⁹⁴ By federal law, each of these reports was to be investigated by an agent who had the power to remove children from their homes.

D. CAPTA

As Congress clarified CPS's role as the states' main investigator in neglect and abuse cases, the number of investigations conducted nationwide skyrocketed.¹⁹⁵ The number of children separated from their parents and placed in foster care because of those investigations grew in parallel over the same period. The number of children in foster care was 246,500 in 1961.¹⁹⁶ By 1977, the number of children in foster care had jumped to 478,000.¹⁹⁷ With CAPTA firmly in place funding CPS and mandating investigations of every report of neglect and abuse, the newly formed Center on Child Abuse and Neglect promulgated guidelines for the investigations.¹⁹⁸ As is the case today, federal guidelines strongly advised home searches as part of a CPS investigation. Many state statutory schemes would eventually incorporate home searches as a required element of CPS work.¹⁹⁹

While CPS agents began to conduct their mandated home searches, the federal judiciary began to see its first cases challenging the Fourth Amendment sufficiency of the newly prevailing CPS regime. At the time, as discussed in

192. Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome*, in C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 89 (Richard D. Krugman & Jill Korbin eds. 2013) (relaying the process from the publication of Kempe's Battered Child Syndrome study to the passage of CAPTA, including its definitions of abuse and neglect).

193. *Id.*

194. JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE* 60 (1998); see also U.S. DEP'T HEALTH, EDUC. & WELFARE, OFF. HUM. DEV., *SHARING & CARING*, Pub. No. 76-30068 6 (1976) (citing the number of children in foster care in 1975 as around 350,000).

195. See Murray & Gesiriech, *supra* note 105, at 3 ("Along with the expansion of the foster care program, states' implementation of mandatory reporting laws in response to CAPTA resulted in rapid growth in the number of children who were removed from their homes and placed in foster care."); ALLIANCE FOR CHILDREN'S RIGHTS, *supra* note 114, at 4 ("In the wake of CAPTA's passage, the number of children coming into the child welfare system skyrocketed.")

196. *Examination of Problems Which Profoundly Affect the Development of Children in the Foster Care System, Joint Hearing Before H. Subcomm. on Select Education and S. Subcomm. on Children & Youth*, 94th Cong. 332 (1975).

197. See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 57 (2002) (citing a 1979 Senate report on the Adoption Assistance and Child Welfare Act of 1980).

198. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5104, 5105 (1974); U.S. DEP'T HEALTH & HUM. SERVS., *CHILD PROTECTION: GUIDELINES FOR POLICY & PROGRAM* 35 (1982).

199. See *supra* notes 78-81.

Parts II.A–II.C above, courts had three main frameworks through which to evaluate the constitutionality of home searches where there was not freely given consent²⁰⁰ or exigent circumstances:²⁰¹ (1) traditional Fourth Amendment probable cause, which would require a warrant particularized to the conduct and place in question; (2) *Camara*'s diluted probable cause, which would require an area search warrant; and (3) a *Wyman*-type search, which would require no warrant at all. The emergence of CPS as an investigative body and home searches as their investigations coincided with the Supreme Court's expansion of the administrative search exception to include yet another warrantless framework for evaluating them—searches pursuant to a diminished expectation of privacy.

As the Supreme Court began developing doctrinal carve-outs to the Fourth Amendment's warrant requirement before the 1980s,²⁰² the co-emergence of diminished privacy searches with federal CPS funding confused lower courts' analysis of CPS investigation cases, which were just beginning to bubble up.²⁰³ The carceral state was expanding and shifting to designate specialized tasks to additional agents under new agencies. CPS agents were now responsible for investigating parental fitness, placing parents on maltreatment registries, filing neglect and abuse cases in juvenile and family court, and removing children from their parents' care.²⁰⁴ Courts analyzing this novel state action struggled to decide whether such agents, agencies, and their specialized tasks were subject to newly constructed exceptional Fourth Amendment doctrines or if the traditional constitutional doctrines would apply.²⁰⁵

The Supreme Court did not help. In a series of cases postdating *Wyman*, the Court recognized a distinct Fourth Amendment exception, this time permitting government officials to escape the warrant and probable cause requirements in cases of individuals with a diminished expectation of privacy. Beginning in

200. Per CPS agencies, the majority of home searches are done on the parents' consent. *See, e.g., supra* note 100 (showing that only 3 percent of investigations in New York required a request for judge's entry order). State statutes, regulations, and guidelines are often written with the assumption that a parent will consent to the search and rarely reckon with the family's autonomy—presuming that noncompliance amounts to evidence of parental unsuitability. *See also* ROBERTS, *supra* note 103, at 188 (describing the price of noncompliance with CPS).

201. *See* LAFAVE, *supra* note 11, § 4.1(b) nn.44–50 (discussing the “emergency doctrine” and collecting cases).

202. *Id.* § 4.1(b) n.40 (describing the long history of the Court's departure from its purported preference for warrant-backed searches).

203. The first case I could identify where a federal circuit examined a CPS search under the CAPTA regime is *Darryl H. v. Coler*, 801 F.2d 893, 896–97 (7th Cir. 1986), involving a 1981 investigation where CPS agents required children from eight families to disrobe as part of an investigation. The children sued for violations of the Fourth Amendment.

204. *See supra* Part I.B.1.

205. *Compare, e.g., Good v. Dauphin Cty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1089 (3d Cir. 1989) (holding that a CPS home search requires a traditional warrant, without relying on the majority of the Supreme Court's contemporary administrative search cases including *Griffin, O'Connor*, or *Ortega* or mentioning the special needs doctrine), *with Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372 (4th Cir. 1993) (holding that a CPS home search can be without a warrant or probable cause pursuant to special needs).

1985, the Court approved searches of certain individuals who fit that bill, either based on where the searches took place,²⁰⁶ like schoolchildren²⁰⁷ and government employees,²⁰⁸ or based on the individual's legal status, like probationers²⁰⁹ and parolees.²¹⁰ Unlike dragnets, this new subset of exceptional searches required a degree of individualized suspicion, but the Court authorized officials to search without a warrant and on the basis of reasonable suspicion rather than probable cause.²¹¹ In the case of searches pursuant to legal status, the departure from the warrant and probable cause requirements were predicated on an ongoing carceral relationship with the state after criminal adjudication.²¹² To satisfy the exception, in addition to proving up the group's reduced expectation of privacy, the Court required that the government articulate a need—as in the dragnets approved in *Camara*—or departing from the Fourth Amendment's default warrant and probable cause standard.²¹³

In 1985, the Court decided the first of the diminished privacy cases, *New Jersey v. T.L.O.* In *T.L.O.*, the Court ruled that the Fourth Amendment permitted public school officials to search a student's backpack without a warrant if an administrator reasonably suspected that the student was violating the school's drug policy.²¹⁴ While the Court accepted that the Fourth Amendment applied to searches on school grounds (“We are not yet ready to hold that the schools and the prisons need to be equated for purposes of the Fourth Amendment”),²¹⁵ the Court held that students' privacy interests were attenuated with respect to the general public.²¹⁶ Accordingly, such a search could be conducted as “an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself.”²¹⁷ Tucked into Justice Harry Blackmun's concurrence in *T.L.O.* was additional language characterizing the sort of government interest that would be acceptable in a diminished privacy search: “Only in those exceptional circumstances in which special needs, beyond

206. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (“What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.”).

207. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

208. *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

209. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987).

210. *Samson v. California*, 547 U.S. 843, 847 (2006).

211. See, e.g., *T.L.O.*, 469 U.S. at 341 (holding that reasonable suspicion would suffice for a public school official to search a student's backpack at school); *O'Connor*, 480 U.S. at 725 (same with respect to a public employee's office); *Griffin*, 483 U.S. at 873 (same with respect to search of a probationer's home).

212. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (“[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend on the individual's legal relationship with the State.”).

213. See, e.g., *O'Connor*, 480 U.S. at 725 (finding a special government need and citing language from *T.L.O.*); *Griffin*, 483 U.S. at 873–74 (same).

214. *T.L.O.*, 469 U.S. at 339–41.

215. *Id.*

216. *Id.* at 340.

217. *Id.* at 353 (Blackmun, J., concurring in the judgment).

the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”²¹⁸

This “special needs” language was cited in the Court’s next few diminished privacy search cases as a necessary but not sufficient element of the government’s burden in departing from the traditional warrant and probable cause requirement.²¹⁹ Over time, the special needs rationale ballooned, consuming the popular understanding of diminished privacy searches. Eventually, the special needs doctrine became synonymous with administrative searches more broadly. For its part, the Court directly participated in this confusion, interchangeably citing to and relying on special needs analysis in both diminished privacy and the dragnet search cases for which the area search warrant was uniquely designed.²²⁰

The Court’s conflation of dragnets and diminished privacy searches under the administrative search umbrella stripped core protections in both sets of searches. On one hand, the Court has approved dragnet searches where a more precise regime based on individualized suspicion would satisfy the government’s interests.²²¹ And on the other, the Court has approved diminished privacy searches conducted as if they were dragnets, without an articulation of individualized suspicion.²²²

For purposes of this Article, though, while the Court’s administrative search jurisprudence is muddled, there is a clear analytical path forward for CPS home searches. The Court has only approved administrative home searches within these two subsets: dragnet or diminished privacy. If a special needs search approved by the Court does not involve a population with diminished expectations of privacy, it is necessarily a dragnet search. And if an approved special needs search is not a dragnet search, it necessarily involves a population with diminished expectations of privacy. As discussed below in Part III.B, the administrative search doctrine is inapposite because CPS home searches fall in neither category.

Nonetheless, those arguing to apply the administrative search doctrine to CPS investigations have narrowed in on Justice Blackmun’s special needs language in *T.L.O.*, which is now embedded throughout the Supreme Court’s

218. *Id.* at 351.

219. *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

220. *See, e.g., Skinner v. Ry. Lab. Executives’ Ass’n*, 489 U.S. 602, 607 (1989) (approving a statutory search regime requiring all employees on a railroad to take drug tests after a railroad accident); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding a high school’s dragnet drug testing policy); *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (striking down a state dragnet policy of drug testing political candidates).

221. *Primus*, *supra* note 125, at 309–11.

222. *Id.*

administrative search jurisprudence.²²³ On their account, drawing from the *T.L.O.* test, a CPS investigation amounts to “an exceptional circumstance in which special needs make the warrant and probable cause requirement impracticable.”²²⁴ And as a social services agency, the argument goes, CPS exists precisely in the space *beyond the normal need for law enforcement*.²²⁵

The Court has not weighed in on CPS home searches since *Wyman*, well before the emergence of the special needs doctrine. In its only case analyzing a post-CAPTA investigation involving CPS, *Ferguson v. City of Charleston*, the Court neglected to take the analytical steps necessary to straighten out the confusion.²²⁶ For a second time, the Court slipped past an analysis of whether and how the administrative search doctrine would apply to a CPS investigation.²²⁷

E. *Ferguson and the Post-CAPTA Slip*

Thirty years after *Wyman*, the legal and administrative landscape around CPS investigations had shifted significantly. In 1969, the year of the *Wyman* facts, most of the investigative tasks and responsibilities we now think of as belonging to CPS—the authority to investigate parental suitability and to remove

223. See Adam Pié, Note, *The Monster Under the Bed: The Imaginary Circuit Split and the Nightmares Created in the Special Needs Doctrine’s Application to Child Abuse*, 65 VAND. L. REV. 563, 571 (2012); see also Lauren Kobrick, Note, *I Am Not Law Enforcement! Why the Special Needs Exception to the Fourth Amendment Should Apply to Caseworkers Investigating Allegations of Child Abuse*, 38 CARDOZO L. REV. 1505, 1519–20 (2017); Samantha Weckenman, *Giving the Green Light: Why the Supreme Court Should Allow the Special Needs Doctrine to Apply to Investigations of Child Abuse*, 73 RUTGERS U. L. REV. 999, 1006–07 (2021). But see Gupta-Kagan, *supra* note 14, at 385 (arguing for an adjustment in the special needs doctrine that accounts for fundamental liberty interests rather than criminal police involvement); Teri Dobbins Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 WM. & MARY BILL RTS. J. 125, 143 (2012) (arguing that the *T.L.O.* line of cases “cannot be relied upon as sanctioning searches based on reasonable suspicion instead of probable cause”).

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

225. See, e.g., Kobrick, *supra* note 223, at 1536 (“CPS intervenes after a privacy interest has already been invaded, namely the child’s interest to have her body be free from abuse. A caseworker conducts a warrantless search or seizure only when parents cannot or will not protect, by their acts or omissions, their children’s basic safety needs.”); Weckenman, *supra* note 225, at 1027–28.

226. See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

227. The strategic and appellate posture of *Ferguson* invited the Court to ignore the CPS purpose of the search and instead choose between its medical purposes (a position advocated by the government) and its criminal purposes (a position advocated by the patients). Consider the named defendants (the hospital’s trustees and medical staff, Charleston prosecutors, and the police chief) in *Ferguson v. Charleston*, 186 F.3d 469, 474 n.1 (4th Cir. 2001); the question presented to the Court by petitioners (“Whether the ‘special needs’ exception to the Fourth Amendment’s warrant and probable cause requirements was properly applied to a discretionary drug testing program that targeted hospital patients and was created and implemented primarily for law enforcement purposes by police and prosecutors?”), Brief for Petitioner at i, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 728149; and the question presented by respondents (“Whether the urine drug tests performed by the MUSC Medical Center for medical purposes in the course of treatment of their maternity patients were reasonable searches under the Fourth Amendment?”), Brief of Respondent at i, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 1341474.

children from their parents' care—had been entrusted to criminal police²²⁸ or assigned to welfare workers as a condition of a family receiving public benefits.²²⁹ In most states at that time, CPS did not yet exist as a standalone entity.²³⁰ In 1974, CAPTA changed all of that. Congress had effectively required the reporting of child maltreatment, funded CPS as the authority to investigate these reports, and entrusted CPS with powers historically located with criminal police.

In the interim, CPS agencies around the country grew. Their investigative character was hardening as CPS agents began to train alongside and learn from criminal police.²³¹ The ambit and scope of CPS agencies had expanded too, both in the number of reports investigated²³² and in the parental conduct considered to fall within their mandate.²³³ Finally, the consequences of a CPS investigation for a family were also becoming more stark, especially where those investigations resulted in the removal of children. With the passage of the Adoption and Safe Families Act in 1996, Congress attached a tight timeline on how long a parent's child could stay in foster care before a state would be obligated to terminate their parental rights.²³⁴ Into that space came *Ferguson*.

At issue in *Ferguson* was the Medical University of South Carolina's (MUSC) warrantless drug-testing policy. MUSC—Charleston's only hospital serving predominately Black patients—had introduced a War on Drugs-era program targeting pregnant patients seeking prenatal care.²³⁵ The policy—dubbed Plan M-7—was devised in a collaboration between medical, CPS, and criminal law enforcement officials.²³⁶ Plan M-7 required hospital personnel to

228. See *supra* notes 152–160.

229. See *supra* notes 117–122.

230. See *supra* notes 152–160.

231. See *supra* Part I.B.2; see also, e.g., Leroy D. Baca, Paul Jendrucko & Daniel Scott, “*Silent Screams*”—*One Law Enforcement Agency's Response to Improving the Management of Child Abuse Reporting and Investigations*, 22 J. JUV. L. 29, 46 (2001) (describing a forty-hour course in which the L.A. County Sheriff trained CPS agents on investigation and interview skills, substance abuse recognition, detection of deception, and evidence collection).

232. Spinak, *supra* note 191, at 8 (“While fewer than 10,000 reports were filed in 1967, by 1979 almost a million reports were filed.”); ALLIANCE FOR CHILDREN'S RIGHTS, *supra* note 114, at 4 (noting that “[a]midst [the crack cocaine and HIV epidemics] and an economic downturn, the foster care population grew from 280,000 in 1986 to nearly 500,000 in 1995. And between 1986 and 2002, the proportion of Black children entering foster care jumped from about 25 percent to 42 percent”).

233. See Hafemeister, *supra* note 149, at 841–44 (describing the development of CPS and child welfare laws post-CAPTA); see also Spinak, *supra* note 191, at 9 (describing the outcomes of collapsing abuse and neglect under one strategy and stating that “the myriad and complex components of alleged neglect . . . would soon engulf the child protection system”).

234. ROBERTS, *supra* note 103, at 121 (describing the onset and impact of the Adoption and Safe Families Act).

235. *Ferguson v. City of Charleston*, 532 U.S. 67, 71–73 (2001).

236. Appendix to Pet'n for Cert. at A-57, *Ferguson v. Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter *Ferguson* Cert. App'x.] (text of M-7 policy acknowledging DSS role in its crafting); see also Joint Appendix at 156, *Ferguson v. Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter *Ferguson* J.A.] (testimony of Charleston city official acknowledging DSS role in the crafting of M-7 policy).

share positive toxicology results—initially derived from samples provided for the purpose of medical treatment—with CPS and the police, for purposes of arrest and prosecution on charges of criminal child neglect or abuse.²³⁷ In crafting the policy, its architects claimed their ultimate interest was the serious health concern of drug use during pregnancy.²³⁸ To serve that interest, they sought to use the threat of criminal prosecution as a tool to coax expectant mothers into drug rehabilitation programs.²³⁹ In administrative search parlance, the government claimed a broadly framed special need beyond normal law enforcement, namely, the protection of the mother’s own health and the health of the unborn fetus.

The Court did not agree. The *Ferguson* majority ruled that a warrant backed by individualized probable cause was required in the scheme set out by the Charleston drug-testing policy.²⁴⁰ The Court held that Plan M-7 was part and parcel of the government’s normal need for law enforcement, not beyond it. In coming to this conclusion, the Court looked at what it called the “immediate” or “programmatic” purpose of Plan M-7, as compared to its “ultimate” purpose.²⁴¹ The analysis turned on the plan itself—both the process of its development (specifically the central role of criminal police in its development, including in its drafting) and its text (namely elements of the plan designed to facilitate the criminal legal process, including preserving the chain of custody, a warning letter from the prosecutor’s office, and the physical manifestations of criminal process).

The Court concluded that, in both its development and execution, the hospital plan was simply too intertwined with the police to serve a special need beyond law enforcement.²⁴² While the government claimed that its ultimate goal was safeguarding the health of its citizens through diversion programs, the Court saw it differently: “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment”;²⁴³ “the immediate object of the searches was to generate evidence for law enforcement purposes.”²⁴⁴ In examining law enforcement’s role in its special needs analysis, the Court dismissed the government’s claim to benevolent intent: “As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy.”²⁴⁵

237. *Ferguson*, 532 U.S. at 71–73.

238. *Id.* at 81.

239. *Id.*

240. *Id.* at 86.

241. *Id.* at 83–84.

242. *Id.* at 82.

243. *Id.* at 80.

244. *Id.* at 83.

245. *Id.* at 85.

Ultimately, the Court's decision to require a traditional warrant backed by individualized probable cause rested on the criminal police's involvement in the M-7 Plan. Owing to the police's role in the plan's design and implementation, the Court found that the drug tests at MUSC were components of—and therefore not beyond—the normal need for law enforcement. The special needs doctrine was inapplicable. Justice Stevens concluded his pithy sixteen-page opinion by tying the drug tests to imminent risk of arrest and criminal prosecution, foregoing further discussion.²⁴⁶

The role of the South Carolina Department of Social Services (DSS), South Carolina's CPS—whose investigative and carceral tools were as central to the M-7 Plan as the criminal police—is entirely absent from the Court's analysis.²⁴⁷ DSS's role served the same ultimate interest as the police. For example, the Court was concerned about the systemic manner of the criminal police's coercive role in the plan's implementation, including through letters from the solicitor's office threatening the arrest of individuals testing positive. The same letter threatened removal of the birthmother's child by DSS and the mother's arrest upon failure to cooperate with the removal.²⁴⁸ The M-7 Plan gave DSS plenary discretion to remove a child from their birthparent if the parent's unconsented-to drug test came back positive during childbirth.²⁴⁹ By the solicitor's own account, the trinity of carceral tools—arrest, prosecution, and family separation—could be brought to bear on a family who refused to comply with the plan's ultimate goal. However, in concluding that the M-7 Plan ran afoul of the Fourth Amendment because of the police's involvement, the Court skipped DSS's role in the nonconsensual search and DSS's threat of seizure.²⁵⁰

Herein lies the second dual-purpose slip: rather than reckoning with whether the post-CAPTA CPS regime can, against a parent's will and without notice as to why, test her for drugs to determine if an agent has legal authority to seize her children, the Court slipped. Instead, the Court jumped to a discussion and analysis of criminal police involvement and the possibility of prosecution under the criminal code. Neither the majority, the concurrence, nor the dissent mention DSS's role in the development of the plan or in the execution of the ultimate goal that the Court rejected as a basis for an exception to the warrant requirement.²⁵¹ With this slip, DSS's carceral power, if not DSS in its entirety, evaporated from the Court's analysis.

246. *Id.* at 85–86 (“The stark and unique fact that characterizes this case is that Policy M–7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.”).

247. *See Ferguson J.A.*, *supra* note 236, at 104 (describing DSS' central role in the creation of Plan M-7); *id.* at 109 (same).

248. *Id.* at 1263.

249. *See id.* at 148–50 (describing the role of DSS after the implementation of the M-7 plan).

250. *Ferguson*, 532 U.S. at 82–86.

251. *Id.*

Ferguson, of course, does not address the unique question of a home search. And while the *Ferguson* Court protected the rights of families when CPS investigations were intertwined with criminal law enforcement, the Court's 2001 ruling left families and lower courts holding the analytical bag in most contexts where they first encounter CPS: knocking on their front door without the criminal police.

With the two administrative search doctrines firmly in place—and now intertwined under the banner of special needs—each of the Court's dual-purpose slips rendered askew the Fourth Amendment rubric in the context of family policing and especially in the context of CPS home searches. The slip-warped rubric seems to operate in the shadow of the criminal police, without much to say about government agents with other types of carceral tools. It commands an ahistorical appeal to a logic that is at once unmoored from fundamental Fourth Amendment principles and uninformed by the state's power to interrupt fundamental rights, even when carried out by government agents of recent vintage acting beyond the four corners of the criminal code.²⁵²

Under the slip-warped Fourth Amendment rubric, the argument about warrant and probable cause turns on the CPS home search's proximity to a criminal investigation. For those seeking to empower CPS agents with more discretion, the post-*Ferguson* slip-warped rubric suggests an argument that relies heavily on the government interest in child welfare on the one hand, and highlights the distance between a CPS investigation and a criminal one on the other.²⁵³ For those seeking to hold CPS agents to a more stringent standard, the slip-warped rubric suggests an argument that relies instead on highlighting the close link between CPS and the criminal police—the covalent or overlapping nature of some abuse or maltreatment charges under both criminal and family law, their joint efforts in the design of an investigative program, or the sometimes-close collaboration between CPS and the criminal police over the course of an investigation.²⁵⁴ An argument linking CPS and criminal police is muddied by the Supreme Court's confusion between dragnet and diminished privacy searches. As a result, even if successful, such an argument is often an appeal to administrative search warrants with truncated probable cause.

Particularly in the context of CPS home searches, both arguments described above eschew meaningful consideration of how, when, and whether CPS agents function within the historical scope of the Fourth Amendment's search doctrine—as government agents invading a home for the task of gathering evidence, possibly resulting in the curtailment of an individual's (or a family's)

252. See generally Gupta-Kagan, *supra* note 14.

253. See Kobrick, *supra* note 223, at 1537–38 (arguing for the application of special needs to CPS and emphasizing the distinction between CPS and criminal investigations as determined “by[] a close review of the scheme, whether the purpose can be distinguishable from the general interest in crime control, and how involved law enforcement officials are at every stage of the proceedings”).

254. See Coleman, *supra* note 13, at 490.

fundamental rights to family integrity. These arguments ignore CPS's training within carceral institutions, their mandates to conduct thorough adversarial investigations, their historic roots in criminal policing, and their statutorily bestowed authority to surveil or separate families.²⁵⁵ Perhaps most importantly, though, these arguments are doctrinally out of step with the reasoning behind the development of *Wyman* searches, the *Camara* dragnet search, and the diminished privacy doctrine that I have described above. I address each of these in the Sections below.

III.

CPS HOME SEARCHES AND THE FOURTH AMENDMENT

As described in Part II, the administrative search is covered by the Fourth Amendment but with less robust protection than typically contemplated. The administrative search doctrine was born with the Court's 1966 decision in *Camara*.²⁵⁶ *Camara* introduced the dragnet search and set the stage for two other kinds of searches—searches incident to a reduced expectation of privacy and quid pro quo searches to which the Fourth Amendment does not apply at all. In Part III.A below, I demonstrate how lower courts have attempted to apply the administrative search doctrine to CPS home searches. Then, in Part III.B, I describe how the searches developed under *Camara* are fundamentally ill-suited to the CPS home searches described in the first Part of the Article.

A. Home Searches Under Prevailing Doctrine

Federal circuits have struggled to situate modern CPS home searches within the High Court's Fourth Amendment doctrinal edifice. In Part II, I described the legal context for this interpretative struggle: CPS—a newly created state agency, bestowed with significant investigative authority to assess families and carceral power to separate them—emerged in the early 1970s alongside increasingly complicated Supreme Court Fourth Amendment jurisprudence, pocked with carve-outs from,²⁵⁷ exceptions to,²⁵⁸ and alternative definitions²⁵⁹ of the traditional warrant and probable cause requirements. In the more than fifty years since the federal government funded CPS as a stand-alone investigative state agency with CAPTA, the Supreme Court has taken on very few cases that would occasion review of CPS's investigative power generally or CPS's home search power specifically.²⁶⁰ To the extent that the opportunity for analytical clarity was

255. See *supra* Part I.

256. See *supra* Part II.B.

257. See *supra* Part II.C.

258. See *supra* Part II.D.

259. See *supra* Part II.B.

260. In addition to *Wyman* and *Ferguson*, in 2011, the Court decided a case about CPS agents' in-school interview of a child about sexual abuse by her father. The daughter sued. The Ninth Circuit ruled there was a constitutional violation on Fourth Amendment grounds but granted qualified

directly or tangentially presented—before CAPTA in *Wyman*²⁶¹ or after CAPTA in *Ferguson*²⁶²—the Supreme Court has slipped, demurring on a pair of seemingly straightforward questions: when a CPS agent responds to a report of alleged child maltreatment by knocking on a family’s front door, what does the Fourth Amendment say about CPS’s legal constitutional responsibilities and the family’s constitutional rights? And if a warrant is required, what standards do CPS agents have to satisfy before a judge can issue one?

Because there is no exclusionary rule in child welfare cases, there is little appellate jurisprudence bearing on the admissibility (and therefore the Fourth Amendment constitutionality) of CPS agent searches, so the occasions for review have been limited.²⁶³ The few cases appearing before federal circuits on the question of CPS home searches are the product of private suits against state actors for constitutional violations under 42 U.S.C. § 1983.²⁶⁴ Federal appellate courts have universally extended the privilege of qualified immunity to CPS agents.²⁶⁵ By virtue of this legal and procedural posture, most federal circuits looking at CPS search power do so through the lens of an application for dismissal or summary judgment on qualified immunity grounds.²⁶⁶ In practice, this means that federal circuits that have reached the question of warrantless CPS home searches analyze the warrant requirement itself and not the type of probable cause that would be required to substantiate a warrant.²⁶⁷

Even still, not all circuits agree. Two circuits—relying on their own precedents from the early 1990s—continue to hold that CPS agents can conduct child welfare investigations, including home searches, without a warrant.²⁶⁸

immunity. The CPS agents appealed, challenging the Fourth Amendment ruling. The Court did not analyze the merits and dismissed the case as moot. *Camreta v. Greene*, 563 U.S. 692 (2011).

261. See *supra* Part II.C.

262. See *supra* Part II.E.

263. See *supra* Part II.A.

264. See *infra* Part III.A.

265. See Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 802 (2009) (citing *Gates v. Tex. Dep’t of Child Protective & Regulatory Servs.*, 537 F.3d 404, 426 (5th Cir. 2008)); see also *Hatfield v. Berube*, 714 F. App’x 99, 104 (3d Cir. 2017); *Ross v. Klesius*, 715 F. App’x 224, 226 (4th Cir. 2017); *Wernecke v. Garcia*, 452 F. App’x 479, 483 (5th Cir. 2011); *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 411 (5th Cir. 2002); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003).

266. See, e.g., *Southerland v. City of New York*, 680 F.3d 127, 143 (2d Cir. 2012); *Good v. Dauphin*, 891 F.2d 1087, 1094 (3d Cir. 1989); *Thomas v. Texas Dep’t of Family & Protective Servs.*, 427 F. App’x 309, 314 (5th Cir. 2011); *Calabretta v. Floyd*, 189 F.3d 808, 813–14 (9th Cir. 1999). *Ross*, *Wernecke*, and *Roe* were decided on motions for summary judgment; *Hatfield* was decided on both a motion to dismiss and motion for summary judgment; and *Roska* was decided on a motion to dismiss.

267. See *supra* note 265. *But see* Int. of Y.W.-B., 265 A.3d 602, 628 (Pa. Super. Ct. 2021); *Phillips v. Cty. of Orange*, 894 F. Supp. 2d 345, 369–72 (S.D.N.Y. 2012).

268. In 1993, citing *Wyman* and *T.L.O.*, the Fourth Circuit ruled that the special needs exception likely applies to CPS home searches: “investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context.” *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372 (4th Cir. 1993) (citing *Wyman* at 318 for the assertion that “social worker’s visit to home does not ‘fall within the Fourth Amendment’s proscription . . . because it does not descend to the level of unreasonableness . . . which is the Fourth Amendment’s standard’”). One note has suggested that

Reasoning that child welfare is a per se government special need, these circuits begin their analysis within the special needs exception—balancing state and private interests to determine the reasonableness of a search—rather than by asking whether the ostensibly limited exception to the Fourth Amendment’s warrant and probable cause requirement applies based on diminished expectation of privacy.²⁶⁹ Relying improperly on the pre-CAPTA *Wyman* decision, they conclude that because of the government’s important role in protecting the safety of children, a warrant is impracticable and unnecessary in a CPS investigation.

These circuits, however, are in the minority. The majority of circuits affirmatively ruling on the question—five—have in fact held that CPS agents must obtain a warrant to enter a home during a CPS investigation in the absence of exigency or consent.²⁷⁰ Some have even held that such a requirement is a clearly established constitutional standard.²⁷¹ Those circuits arrived at this conclusion before *Ferguson* and grounded their reasoning in traditional Fourth Amendment principles around the sanctity of the home and the harm of government intrusion against which the Fourth Amendment was designed to protect.²⁷² The circuits coming to this conclusion more recently have grounded the constitutional principle on the *Ferguson* slip: CPS investigations require a warrant because of the interdependency of CPS with the criminal police.²⁷³ While holding that the Fourth Amendment applies, none of these circuits have ruled on whether an administrative warrant is available to CPS in the absence of

Wildauer can be cabined because it involved the search of a foster home and not a birth family’s home. See Pié, *supra* note 223. However, the Fourth Circuit in 2019 affirmed its holding as applying broadly to “investigative home visits by social workers.” *Susan Virginia Parker v. Henry & William Evans Home for Child, Inc.*, 762 F. App’x 147, 154 n.1 (4th Cir. 2019). The Eleventh Circuit has sidestepped the constitutional questions around CPS home searches. See *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2011) (“[S]tate officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of ‘clearly established law.’” (quoting *Foy v. Holston*, 94 F.3d 1528, 1537 (11th Cir. 1996))).

269. *Wildauer*, 993 F.2d at 372; *Foy*, 94 F.3d at 1537.

270. *Southerland*, 680 F.3d at 143; *Good*, 891 F.2d at 1094; *Thomas*, 427 F. App’x at 314; *Calabretta*, 189 F.3d at 813–14; *Roska*, 328 F.3d at 1247.

271. In a particularly prescient passage, the Third Circuit denied qualified immunity to a police officer and CPS agent who conducted a warrantless search of a home during a CPS investigation:

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

Good v. Dauphin, 891 F.2d 1087, 1094 (3d Cir. 1989); see also *Thomas*, 427 F. App’x at 314 (holding that the warrant requirement for CPS searches was clearly established by *Gates v. Texas Dep’t of Protective & Reg. Servs.*, 537 F.3d 404 (5th Cir. 2008)); *Calabretta*, 189 F.3d at 814 (“The Fourth Amendment preserves the ‘right of the people to be secure in their persons, houses . . .’ without limiting that right to one kind of government official.”); *Roska*, 328 F.3d at 1250.

272. *Good*, 891 F.2d at 1094; *Calabretta*, 189 F.3d at 813–14; *Roska*, 328 F.3d at 1250.

273. *Gates*, 537 F.3d at 435. Cf. *Andrews v. Hickman Cnty.*, 700 F.3d 845, 863 (6th Cir. 2012) (holding that the social workers were immune because of their reliance on police assessments).

criminal police, although some have implied that it might be. This question has been debated, if in a limited fashion, in the lower courts.

B. *Not Administrative Searches*

There are legitimate arguments as to whether CPS searches conducted outside the home—at school, in a hospital, or in another public setting—would fit under one of the administrative search doctrines developed since *Camara*. I believe that, based on CPS’s broad statutory authority to investigate and the carceral consequences flowing from their searches, courts should apply the same Fourth Amendment restrictions to CPS investigations that would otherwise apply to law enforcement engaged in similar investigative conduct. Other scholars have begun to make such arguments—including by setting forth a re-imagining of the special needs test which complicates the baseline.²⁷⁴ I look forward to addressing this broader question in later work, including by examining closely how CPS functions as a law enforcement agency outside of the home search context. With respect to CPS’s home searches, though, which are the focus of the analysis below, none of the administrative search doctrines apply. Courts examining the conduct of CPS agents seeking to gain entry to a home must apply traditional Fourth Amendment principles.

1. *Not Dragnets*

It is a “basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.”²⁷⁵ The *Camara* administrative home search warrant is a notable departure from the Constitution’s traditional requirement that such a warrant be predicated on individualized suspicion of wrongdoing. In cases approving such a departure— involving health and safety²⁷⁶ and fire code²⁷⁷ inspections—the Court has authorized mechanical warrants only when dispensing with the individualized suspicion requirement was necessary to further the governmental interest in question, like in the case of an area inspection of every home in a particular geographic area. Aside from this *Camara* exception, the Court has only authorized a home search warrant on particularized probable cause and has rejected the suggestion of a hierarchy of governmental interests that would allow state agents to invade a private home on a warrant based on a lesser standard.²⁷⁸

274. See Gupta-Kagan, *supra* note 14.

275. Groh v. Ramirez, 540 U.S. 551, 559 (2004) (quoting Payton v. New York, 445 U.S. 573, 586 (1980)).

276. *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 537 (1967).

277. See *v. City of Seattle*, 387 U.S. 541, 546 (1967).

278. See *Caniglia v. Strom*, 141 U.S. 1596, 1599 (2021) (declining to extend the community caretaking exception to a home search). *But see* Ric Simons, Lange, *Caniglia and the Myth of Home Exceptionalism*, 54 ARIZ. ST. L.J. 145, 174 (2022) (arguing that *Caniglia* was less a protection of the exceptionalism of the home under the Fourth Amendment and more an expansion of the “emergency aid” exception); *see also* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (highlighting the unworkability

Instead, to address the government's interests in protecting against "any emergency threatening life and limb," the Court has suggested the universal availability of exigency as an exception to the warrant requirement altogether.²⁷⁹

As such, while the government has an undoubted interest in protecting children and in investigating credible allegations of any unlawful conduct—be they allegations of neglect, abuse, or crime—articulation of such an interest has never alone permitted a departure from the probable cause requirement in the search of a home, absent exigency.²⁸⁰ The Court has always required something more—either a structural need for such a departure in the context of an area search or a showing that the search is being conducted subject to a diminished expectation of privacy.

By definition, CPS home searches are not the sorts of searches with a structural basis for departure from the individualized suspicion requirement. Put another way, even if a recent study of investigations by New York City's ACS in poor and of-color neighborhoods might suggest otherwise,²⁸¹ CPS searches are not dragnets. CPS does not visit each home in a given city to search for evidence of neglect. Quite to the contrary. CPS home searches are "personal in nature" and "aimed at the discovery of evidence" of wrongdoing by occupants of the home being searched.²⁸² They are initiated based on leads from a mandated named or anonymous reporter called into a state's child abuse hotline; screened in or out based on the facial sufficiency of the facts alleged;²⁸³ and launched based on the particularized allegations—usually of neglect—occurring behind the door where the CPS worker is sent to knock.

As such, even if minimally invasive, CPS investigations are not in any sense "routine periodic inspections,"²⁸⁴ and they thus fail the threshold requirement for the revised probable cause standard introduced in *Camara*. A *Camara* warrant based on pro forma legislative standards is designed for an area search where there is a logical presumption that many, if not most, of the homes

of such a sliding scale since "no consideration relevant to the Fourth Amendment suggests any point of rational limitation").

279. *Mincey v. Arizona*, 437 U.S. at 392–93 (1978); *see also id.* at 392 n.7 (collecting cases); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (collecting cases).

280. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81 (describing the insufficiency of the state's invocation of a "beneficent" interest).

281. A 2019 study found that—all things equal—neighborhoods with a higher concentration of Black and Latine residents had significantly more investigations than neighborhoods with a lower concentration. Those neighborhoods with higher poverty rates had significantly more investigations than their wealthier counterparts. ANGELA BUTEL, THE NEW SCHOOL, CENTER FOR NEW YORK CITY AFFAIRS, DATA BRIEF: CHILD WELFARE INVESTIGATIONS AND NEW YORK CITY NEIGHBORHOODS 3–4 (2019), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5d12746c3cdaa000017dfc2a/1561490541660/DataBrief.pdf> [<https://perma.cc/MMB7-EYTK>].

282. *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 537 (1967).

283. *See supra* Part I.A.

284. *Camara*, 387 U.S. at 535–36.

searched will reveal no evidence of wrongdoing.²⁸⁵ Imagine a homeowner who refuses to allow a municipal building inspector to confirm that his basement meets the fire code. To obtain a *Camara* warrant, the inspector does not need to show a magistrate probable cause that the basement is out of compliance; he only needs probable cause that the basement is due for its biannual inspection. Even with this mechanical warrant, the homeowner—and all of his neighbors—are reassured that both the inspector and the inspection are legitimate.

Such a mechanism, however, will not protect the interests of a family subject to a CPS home search given the stigma that even an accusation of child neglect or abuse brings, especially when the majority of maltreatment allegations are unfounded.²⁸⁶

2. *Not Diminished Privacy*

The Supreme Court has clichéd the axiom that Fourth Amendment protections are at their strongest when government agents seek entry into a private home.²⁸⁷ By default, a home search is presumed unreasonable if conducted without a probable cause warrant. As described in Part II.D above, there are exceptions to the paradigm even beyond the familiar exigencies. In cases where the state claims some form of carceral control over the subject of a search, the Court has relaxed the axiom, holding that such individuals have a diminished expectation of privacy even in their own homes. In 1987 with *Griffin v. Wisconsin*, in 2001 in *United States v. Knights*, and in 2006 with *Samson v. California*, the Court held that government agents could invade the homes of previously incarcerated men released on condition of probation or parole without a warrant, owing to their legal status.²⁸⁸ *Griffin* held that such an invasion required a modicum of suspicion combined with the special need to monitor a probationer's compliance with restrictions; *Knights* held that reasonable suspicion was sufficient without the special need; *Samson* required no suspicion at all. The language of the decisions approving the post-release warrantless home searches highlight the effective extension of the prison into the home as a condition of punishment²⁸⁹ and the scarlet letter of criminalization that follows.²⁹⁰ The Court's language in these cases is unsurprising, and the rulings

285. See *supra* notes 140–146 and accompanying text.

286. See *supra* notes 52–55 and accompanying text.

287. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”); see also *Caniglia v. Strom*, 592 U.S. 1596, 1599 (2021); *Payton v. New York*, 445 U.S. 573, 585 (1980); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

288. *Samson v. California*, 547 U.S. 843, 848–49 (2006) (“[B]y virtue of their status alone, probationers do not enjoy the absolute liberty to which every citizen is entitled.”); accord *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *United States v. Knights*, 534 U.S. 112, 119 (2001).

289. *Griffin*, 483 U.S. at 874 (describing probation as “one point . . . on a continuum” of detention regimes); *Knights*, 534 U.S. at 119 (same); *Samson*, 547 U.S. at 849 (same).

290. *Knights*, 534 U.S. at 120 (describing the government's concern that probationers are “more likely than the ordinary citizen to violate the law”); accord *Griffin*, 483 U.S. at 875; *Samson*, 547 U.S. at 849.

confirm the justices' uncritical belief in the endemic danger of the criminally convicted and their sense of the righteous scope of carceral punishment.

Even taking the Court's perspectives as accurate, the decisions that the Court's views substantiate have no bearing on a parent in their home, under CPS investigation, with no pre-existing carceral relationship with the state. The parent under CPS investigation has not been adjudicated guilty, let alone sanctioned by a court for wrongdoing. Like any person under criminal investigation, the parent under CPS investigation stands accused by a government agency of an offense, and like the police, the agency seeks entry into the home to gather evidence to substantiate the allegations.²⁹¹ On this score, the Court has never held that an individual targeted for investigation based on allegations against them—of any sort—would have diminished expectations of privacy by virtue of the allegations alone. Absent exigency, the Constitution requires a warrant backed by probable cause.

To illustrate this point, consider the following scenario. An anonymous phone call has come into the statewide central register (SCR). Per the caller, a mother had allowed her five- and eight-year-old children to play on their front stoop alone, and the children had wandered onto the sidewalk. The anonymous caller happened to be driving by when he saw the children on the sidewalk, a few feet from the street. While he saw the mother follow her kids out the door a few moments later, he was concerned about her recklessness and called the SCR. He provided as many details as he could about the incident and as much identifying information as he could about the family—descriptions of the mother and her children, and the address of their home. The mother is now under investigation, and a government agent knocks on her door that evening. Assume the mother refuses to let the agent in.

If the agent is an NYPD officer investigating child endangerment under the New York Penal Code, the Fourth Amendment precedent is clear. Absent exigent circumstances, the police would need to come back with a warrant in order to enter the home. To obtain that warrant, the police would need to show a magistrate probable cause that the mother had acted in a matter that is likely to harm the physical, mental, or moral welfare of a child under the age of seventeen. As I will demonstrate below, the anonymous call to the SCR would simply not suffice under controlling Supreme Court precedent.²⁹²

The point here is that the same standard holds true if the government agent is from the New York City ACS, investigating the mother for neglect under Article 10 of the Family Court Act. The mother in this case does not have a lower expectation of privacy simply because the agent coming to the door carries a different badge. And with no diminished expectation of privacy, there is no

291. *See supra* Part I.

292. *See infra* Part IV.A.

Supreme Court precedent for a search of her home pursuant to the special needs doctrine.

This was an actual case.²⁹³ The anonymous caller—a White man—had been driving through the family’s South Brooklyn neighborhood. The mother—a woman of color—had asked her kids to wait for her on the sidewalk so they could walk over to the park. As she put on her shoes, the mother kept an eye on them through the screen door. She walked outside as the man pulled up in his Jeep. He yelled at her in front of her kids for minutes before hopping in his car and leaving. That night was the eight-year old’s birthday, and CPS showed up at the door as the family was cutting the cake. The mother did not refuse entry—the ACS agents said they were from the “emergency division.” They examined the kids’ bodies and went through the cabinets and the refrigerator. The next day, other CPS agents came to the home and checked out the remaining rooms, including all of the bedrooms. The agent asked the kids to remove their shirts and pants to inspect for any marks. Every two weeks for the next three months, the CPS agent came back and did some version of the same home search.

In addition to imposing upon a person’s Fourth Amendment rights, a CPS home search directly implicates a parent’s fundamental liberty interest in the care and custody of their children and the child’s parallel right to be raised by their parent.²⁹⁴ These liberty interests are usually bundled together under the umbrella of family integrity—“perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.”²⁹⁵ Leading critical legal scholar Khiara Bridges identified three bases for the Court’s elevation of family integrity: instrumental, pragmatic, and non-instrumental justifications. Instrumentally, “in a nation that purports to pride itself on its diversity,” the Court views family integrity as promoting the conditions for a pluralistic citizenry with diverse thoughts and principles, which in turn serves as a bulwark to totalitarianism.²⁹⁶

293. Some details have been altered to protect confidentiality. Case records on file with author.

294. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[U]ntil the state proves parental unfitness, the child and his parents *share* a vital interest in preventing erroneous termination of their natural relationship.” (emphasis added)); *see also* *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the ‘companionship, care, custody and management of his or her children,’ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and of the children in not being disclosed from the ‘emotional attachments that derive from the intimacy of daily association’ with the parent, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977).”); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (“[A] child’s right to family integrity is concomitant to that of a parent.” (footnote omitted)).

295. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (holding that the Due Process Clause protects the right of parents to “establish a home and bring up children” and to “control the education of their own”); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quillion v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997).

296. BRIDGES, *supra* note 124, at 103.

On this account, family integrity is good for the nation. Pragmatically, the Court promotes family integrity because parents, in the usual course, are better positioned to raise and care for their children than the state would be, given “natural bonds of affection” and “a parent’s unrivaled knowledge of her child.”²⁹⁷ And non-instrumentally, by centering family integrity, the Court elevates the inherent value of a parent passing down values to their child. Bridges describes the Court’s thinking: “while anti-standardization is good for the nation, anti-standardization is also good for the individual insofar as it allows individuals to impart the values that are most dear to them.”²⁹⁸

Beyond establishing family integrity rights, the Court has articulated a family’s corresponding interest in exercising their privacy rights without undue state interference.²⁹⁹ In that vein, the Court has expressed concern for CPS intervention, pointing to the “uncertainty and dislocation” that children suffer in even short-term CPS seizure—including separating the children from their parents for interviews during home searches or separating them from their parents for placement into foster care.³⁰⁰ At the most extreme form of CPS intervention, the Court has recognized the devastation that permanent severance of parental rights brings to both parent and child.³⁰¹ Legal, psychological, and social work researchers have similarly elaborated on the enduring harms of CPS’s broad spectrum of interventions into the family³⁰² and their racialized valences.³⁰³ A body of research has shown that a CPS home search can cause both immediate and lasting psychological harm to a child by undermining the child’s attachment to their parent, forever affecting one of a human being’s most fundamental relationships.³⁰⁴ The danger of separation from

297. *Id.* at 105.

298. *Id.* at 106; see Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1361 (1994) (describing the importance of familial bonds).

299. *Troxel*, 530 U.S. at 58 (“[T]here is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children.”); *Prince*, 321 U.S. at 166 (holding that it is in recognition of family integrity that “decisions have respected the private realm of family life which the state cannot enter”).

300. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

301. See *Santosky v. Kramer*, 455 U.S. 745, 766 (describing the consequences of termination); see also ROBERTS, *supra* note 103, at 55 (describing termination of parental rights as “the death penalty of the family-policing system”).

302. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–34 (2019) (describing the trauma of CPS removal).

303. *Id.* at 534–41 (describing the unique harm for children of color).

304. Coleman, *supra* note 13, at 517 n.307 (collecting studies finding that family members falsely accused of maltreatment feel powerlessness, self-doubt, and depression—similar to emotions of children and adults who feel shame), 520 n.315 (describing studies that family members subject to investigation experience trauma, anxiety, fear, shame, and self-doubt); see also Fong, *supra* note 36, at 614 (describing parents’ fear that CPS could separate them from their children, powerlessness to intervene, and ongoing anxiety about CPS’s surveillant capacity); Kristen A Campbell, Lawrence J. Cook, Bonnie J. LaFleur & Heather T. Keenan, *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943, 944 (2010) (describing a medical study finding that mothers under investigation experienced increased depression); CHILDREN’S RIGHTS, FIGHTING INSTITUTIONAL

a parent—even if unspoken—seeds within the child an uncertainty of the parent’s basic capacity to protect them or provide for their needs.³⁰⁵ Parents endure parallel trauma during an investigation.³⁰⁶ The traumatic impact of CPS investigations also reverberates throughout the communities where they take place.³⁰⁷

Bridges argues that despite the Court’s articulation of a robust liberty interest in family integrity, the poor families typically investigated by CPS are ill-equipped to exercise this interest. Bridges’ argument is as follows: poor parents have a diminished privacy interest in enforcing their family integrity as a matter of law and no privacy interest in enforcing it as a matter of fact. *Wyman* will always require a parent who needs public assistance to allow a government agent into their home, including to search for evidence of maltreatment thanks to the Flemming Rule.³⁰⁸ Even if a parent refuses a *Wyman* search, they would lose their benefits and potentially lack the resources they need to provide for their children, exposing the family to a different investigation for endangering the welfare of a child, or neglect. To that end, under the current legal regime, a family cannot afford to be both poor and private vis-à-vis the government. As such, poor families have no meaningful privacy rights.³⁰⁹

While I agree with the upshot of Bridges’ forceful systemic critique, it remains important to clarify the material distinctions between *Wyman* home

RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS 15 (2021), <https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf> [<https://perma.cc/G8FK-22QM>] (“Research suggests that children are likely to experience trauma as a response to government surveillance and investigations because they are frightening intrusions in their everyday lives.”).

305. See Gupta-Kagan, *supra* note 14, at 416 n.307 (describing a medical study finding that children react with anxiety to temporary infringements of parental autonomy); see also PORT. ST. UNIV., SCH. SOC. WORK, CTR. FOR IMPROVEMENT OF CHILD & FAM. SERVS., REDUCING THE TRAUMA OF INVESTIGATION, REMOVAL, & INITIAL OUT-OF-HOME PLACEMENT IN CHILD ABUSE CASES 12–13 (2009) (describing “the potential trauma to children during investigation and removal” as “shock,” “confusion,” “loss of control,” “[a] sense of being kidnapped,” “helplessness,” “betrayal,” “loss of trust,” “a sense that the world is unsafe,” and a “sense of guilt”).

306. Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse than the Disease?: The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1169–70 (2019) (describing the “role ambiguity” experienced by mothers as a result of their “inability to assert their rights, responsibilities, and identity as a mother” during a CPS intervention, a situation which causes “confusion, grief, and trauma for mothers when they no longer believe they have a parental role to serve”); *If I Wasn’t Poor, I Wouldn’t Be Unfit: The Family Separation Crisis in the US Child Welfare System*, HUMAN RIGHTS WATCH (Nov. 17, 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare> [<https://perma.cc/XRB6-2C67>] (“When describing investigations, parents used words like ‘nerve-wracking,’ ‘invasive,’ ‘humiliating,’ ‘causing anxiety,’ ‘full of judgment,’ and reported feeling ‘a pit in their stomach’ and ‘dread’ every time a caseworker showed up unannounced.”).

307. HUMAN RIGHTS WATCH, *supra* note 306 (describing the impact of an investigation as “rupturing the village of the child’s ecological system, which has ripple effects and brings not just stigma, but also fear and distrust, as it tears the fabric of a child’s life and community.”).

308. BRIDGES, *supra* note 124, at 46–47.

309. *Id.*

searches, where warrantless entry into the home can be premised on the receipt of necessary resources, and CPS searches, where it cannot. Doctrinally, as described in Part II, *Wyman* searches are based not on a categorical diminished expectation of privacy owing to poverty status, but on a contractual agreement between the individual and the state. During a CPS investigation—even one in which CPS alleges that the family is not adequately providing for the child—the government has no such contractual agreement to call upon, because a family is targeted for search based on the allegations alone. As a theoretical matter, the distinction between *Wyman* and CPS home searches seems technical: poor people need resources, have no choice but to contract with the state to receive them, and will therefore inevitably be subject to some sort of search. But taking advantage of the technical, doctrinal distinction between *Wyman* and CPS home searches is functionally important for at least two reasons.

First, enforcing the distinction can be a bulwark against the most common basis for the CPS investigation—poverty-based allegations of neglect. While many states have explicitly carved out poverty from their statutory definition of neglect, affected communities, activists, and scholars have convincingly demonstrated both the toothlessness of these carve-outs and the continued overlaps between poverty and neglect in both maltreatment doctrine and CPS investigatory practice. While CPS cannot technically hold a parent accountable for their structural material disadvantage, CPS routinely targets parents for poverty-based neglect, even if unintentionally, including in those states where they are forbidden from doing so. Scholars and practitioners have struggled to identify how to push back against this practice and how to enforce the statutory carve-outs. Refusing CPS entry where the primary allegations against a family are poverty-based could be one such way to push back. By doing so, parents and their representatives have a unique opportunity to hold CPS to its statutory requirements, even (and perhaps especially) after a parent has already refused a *Wyman* search.

Second, by conceding to the collapse of CPS searches into *Wyman* searches, a parent under investigation is conceding more than is required by prevailing Fourth Amendment doctrine, thereby potentially setting the stage for the diversion of more policing responsibility to CPS without basic Fourth Amendment protections. Some circuits have made this very mistake, applying *Wyman* to modern-day CPS searches.³¹⁰ But such an application is anachronistic on two fronts. First, applying the *Wyman* reasoning to today's CPS home searches fails to acknowledge how CPS has developed into a separate, fully funded investigative body conducting home searches based not on a contractual concession of a subset of the population, but rather on allegations of wrongdoing that it has been designed to receive. Beyond failing to recognize the rise of CPS's role, applying *Wyman* to modern CPS home searches misapprehends the purpose

310. See *supra* notes 273–274.

and potential outcomes of a CPS investigation. Unlike in *Wyman*, the ostensible purpose of a CPS investigation is no longer to ensure the proper use of public funds; it is to investigate allegations of a parent's misdeeds with respect to their own child, in their own home. The potential outcome is no longer simply the cancellation of public benefits; it is the stigmatic and material harm of placement on a child maltreatment registry, the initiation of judicial proceedings on these bases, and the separation—temporary or permanent—of a child from their parent's care. To that end, while the Court's Fourth Amendment doctrine still requires a warrant backed by probable cause, it remains important to hold CPS home searches to otherwise familiar Fourth Amendment standards.

3. *Not Minimally Invasive*

So far in this Section, I have described how *Camara*, *Wyman*, and the diminished privacy search doctrines are inapposite as to CPS home searches based on the intended purposes of each search. Beyond the purpose of the search, each deviation from traditional probable cause and warrant requirements is also premised on its limited intrusiveness into the legitimate privacy expectations of the individual being searched.³¹¹ But as detailed in Part I.B above, in meeting the government's interest in protecting young people, CPS home investigations are designed to be thorough and are therefore usually maximally intrusive, despite even the best intentions of CPS administrators and trainers.³¹²

Unlike the home inspection contemplated in *Camara*, for example, where a government official might be trained to limit their search to the basement to check out the wiring or knock on the pipes, CPS workers are not limited in the ambit or scope of their search. On the contrary, CPS agents are trained to examine a family's most intimate spaces³¹³—their bedrooms, bathrooms, and kitchen cabinets—with an eye toward evidence of the alleged maltreatment and any other evidence of maltreatment that they might uncover in their search. The federal CPS training manual suggests interviewing every child in the home, their parents, and everyone else in the household, often about the most private details of their lives.³¹⁴ Federal guidelines further suggest that CPS workers should sometimes ask children to remove their clothes to check for bruising and that workers might need to do the same with the adults. Under the same guidelines and some state statutes, parents are examined for evidence of intellectual and developmental disabilities. They are asked about the medicines they take, whether they use drugs, and how much alcohol they drink. Even where the allegations are unrelated, each member of the family is often asked to sign releases for their entire medical records and for their children's.³¹⁵

311. See *supra* Parts II.B, D, and E.

312. See *supra* Part I.B.2.

313. *Id.*

314. *Id.*

315. *Id.*

CPS home searches are designed to be thorough so as to obtain all information relevant to a determination on the allegations of neglect or abuse. Despite their thoroughness, the investigations are not designed to account for a family's Fourth Amendment rights, let alone to anticipate a moment where a home search—once challenged—might not proceed, owing to the insufficiency of the evidence upon which the investigation is premised.³¹⁶ Instead, when CPS knocks, parents are sometimes informed that home searches are required, and that if parents do not comply, CPS could request backup from criminal law enforcement or—worse—remove their children from their care.³¹⁷ Federal guidelines, state statutes, and training rarely require CPS agents to inform a parent that they can refuse entry to their home; some state statutes do not even require that a parent be informed of the allegations against them.

IV.

CPS HOME SEARCHES AND THE WARRANT REQUIREMENT

In Part I, I set the contemporary landscape for CPS home searches by outlining the legal frameworks that substantiate them, their purposes and modalities, and the way they play out in practice. In Part II, I described how CPS and CPS home searches emerged over the past sixty years, alongside an increasingly complex set of Fourth Amendment doctrinal exceptions to the traditional warrant and probable cause requirements. In Part III, I explained why each of those doctrinal exceptions is inapplicable to the CPS home search as a matter of both Fourth Amendment doctrine and the policy motivating the doctrinal developments.

With all of that established, in this fourth and final Part, I describe what CPS's actual obligations are under the Fourth Amendment and anticipate the implications of implementing those obligations. The Fourth Amendment always permits CPS to enter the home in an emergency, just as the criminal police can enter in such a situation. In the absence of such an emergency, a CPS agent can enter a home on one of two conditions: with voluntary consent or a valid search warrant. If the agent does not obtain voluntary consent, they must obtain a search warrant from an impartial magistrate. A magistrate may only issue a warrant upon probable cause that a search of the home would reveal evidence of the alleged unlawful conduct. Probable cause exists where an individualized evidentiary showing—based on a magistrate's holistic assessment of its reliability—amounts to something more than mere suspicion that the search would uncover evidence of wrongdoing.

316. *See supra* note 93.

317. *See supra* Part I.B.

A. Fourth Amendment Requirements

So what must a CPS agent who receives an assignment to investigate a family for allegations of neglect or abuse do to obtain entry into a home within the strictures of the Fourth Amendment?

1. Exigency

First, some ground rules. As in any investigation by government agents, the exigency exception is always available in an emergency. If an agent has reasonable suspicion that someone inside a home is seriously hurt,³¹⁸ likely to be hurt,³¹⁹ or in need of medical attention³²⁰ such that getting a warrant in time would be impossible,³²¹ CPS agents—just like the criminal police—are permitted to enter the home without a warrant under entirely familiar Fourth Amendment precedent. There is just one exigency standard, though; the Court has never recognized variable exigency based on the mandate, training, or identity of the government agent going into the home.³²² If a police officer were entitled to enter a home on exigency, a CPS agent could do the same. If, on the other hand, the police officer could not enter a home on exigency, the CPS agent could not either. What is good for the investigative goose is good for the investigative gander.

This is especially important to recognize in the context of CPS investigations. As implemented, the likelihood of investigative error in CPS investigations is high since the vast majority of CPS home investigations result in an unsubstantiated case.³²³ Further, the need for invoking exigent circumstances is relatively low, as vanishingly few CPS investigations result in substantiation for allegations where serious injury was imminent or had already occurred.³²⁴ And as enforced, because there is no opportunity to address an unconstitutional search through the exclusionary rule, the likelihood of unredressed improper searches conducted via exigent circumstances is higher in CPS searches than in, say, the criminal context.

318. See LAFAVE, *supra* note 11, § 6.6(a) (describing emergency exigent circumstances).

319. *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (holding that exigent circumstances were met when police officers, responding to a three o'clock A.M. call, entered a home after hearing a "loud" and "tumultuous" altercation, with "people yelling 'stop, stop' and 'get off me,'" and observed a "fracas" through a screen window in which a juvenile struck an adult in the face "sending the adult to the sink spitting blood").

320. *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (holding that emergency aid exception was met when police officers, responding to a report of a disturbance, entered a home after observing someone outside "screaming and throwing things" and concluded that the "projectiles might have a human target" or that the individual would "hurt himself in the course of his rage").

321. *Schermer v. California*, 384 U.S. 757, 771 (1966) (holding that exigent circumstances exist when "there was no time to seek out a magistrate and secure a warrant").

322. See LAFAVE, *supra* note 11, § 6.6a.

323. See *supra* note 53.

324. See *supra* note 55.

2. *Voluntary Consent*

In every case where there are no exigent circumstances, CPS should only enter a family's home in one of two circumstances: with voluntary consent or pursuant to a traditional warrant backed by probable cause.

With respect to consent, the Fourth Amendment requirements are not terribly onerous for government agents. For one, the Constitution does not require CPS to inform a parent that they can refuse a home search.³²⁵ Nevertheless, in evaluating the voluntariness of consent, courts look at a totality of all circumstances around the search to determine whether a search was granted pursuant to duress or in reluctant submission to lawful authority.³²⁶ To that end, in future work, I will examine to what extent consent can be voluntary in the unregulated world of CPS home searches where consent is often premised on (1) the threat—explicit or implicit—of removal of the subject's children or (2) the threat or actual involvement of the criminal police as enforcer. In some instances, refusal is, on its own, offered to a magistrate as the basis for an application to enter the home. For purposes of this Article, though, beyond the coercive tools described above, a parent's ignorance of their right to refuse a CPS home search is directly relevant to the voluntariness analysis but not sufficient to render a search involuntary. Since the voluntariness analysis focuses on the coerciveness of government officials, the words and deeds of CPS agents are central to this part of the analysis, including whether the CPS agent communicated that the search would happen regardless of the subject's consent. Put differently, while most statutes do, in fact, require home searches, CPS cannot lawfully obtain consent to the search by telling the subject it is legally required as part of an investigation. At least one district court has held as much.³²⁷

3. *The Gates Warrant*

If a parent refuses to give voluntary consent in an ordinary CPS investigation, the only avenue left for a CPS agent seeking to enter a family's home is to request a warrant from an impartial magistrate.

As demonstrated in Part III.B.1, a warrant tailored to a blanket statutory standard like the administrative warrant created in *Camara* is neither well-suited nor doctrinally relevant to the CPS search. Even where a statute or regulation might provide for a search, a screened-in call to a SCR is not enough to establish probable cause for a search based on individualized suspicion of wrongdoing.

Instead, like in any other suspicion-based home search, to obtain a warrant, a CPS agent must demonstrate to an impartial magistrate probable cause that a

325. *United States v. Drayton*, 536 U.S. 194, 206 (2002).

326. *Schneekloth v. Bustamante*, 412 U.S. 218, 233 (1973).

327. *Phillips v. Cnty. of Orange*, 894 F. Supp. 2d 345, 372 (S.D.N.Y. 2012) (“Because the Parent Plaintiffs have alleged that they were told that the search was required to be done, they have stated a plausible claim that the home inspection violated their Fourth Amendment right to be free of unreasonable searches.”).

search of the home is likely to yield evidence of the alleged wrongdoing. The Supreme Court laid out the prevailing warrant probable cause standard in *Illinois v. Gates*, a 1983 decision by Justice William Rehnquist. In *Gates*, the Court famously overturned a two-pronged test that required search warrants to be based on both “veracity” and “basis of knowledge.” It instead replaced it with a more permissive totality-of-the-circumstances test to substantiate a probable cause warrant. The Court in *Gates* was reviewing a home and automobile search warrant that a magistrate had issued based partly on an anonymous lead. The Court held that

the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.³²⁸

In evaluating the evidence presented before it, the Court held that a magistrate is to grant a warrant only when they have a substantial basis for concluding that a search would uncover evidence of wrongdoing.³²⁹

On its terms, the Fourth Amendment requires a CPS agent seeking a home search warrant to submit a sworn statement to a magistrate.³³⁰ *Gates* sets the prevailing probable cause baseline for the contents of that affidavit.³³¹

First, *Gates* requires the CPS agent to set out specific facts, including a concrete means for the magistrate to assess the credibility of those facts.³³² A conclusory affidavit setting out facts without offering “a substantial basis for determining probable cause” is constitutionally insufficient because the grant of a warrant “cannot be a mere ratification of the bare conclusion of others.”³³³

Second, in the facts set out in an affidavit, the CPS agent must specifically establish that a search of the *home* targeted by the search warrant would uncover evidence of the wrongdoing alleged in the affidavit.³³⁴ Probable cause of

328. *Id.* at 238.

329. *Id.* at 237.

330. U.S. CONST. amend. IV.

331. In some states, both CPS and the criminal police are restricted by higher state constitutional Fourth Amendment standards. In New York, for example, ACS would be held to the more demanding two-pronged *Aguilar-Spinelli* standard that *Illinois v. Gates*, 462 U.S. 213 (1983), overturned. *See* *People v. Griminger*, 524 N.E.2d 409, 410 (N.Y. 1988). Under that standard, ACS could only substantiate a probable cause warrant with an affidavit when it “(1) provide[s] sufficiently detailed information to indicate the informant’s reliability as an informant . . . and (2) convey[s] information showing a reliable basis for the informant’s knowledge” of the wrongful conduct. *People v. Argyris*, 27 N.E.3d 425, 433 (N.Y. 2014) (Abdus-Sallam, J., concurring).

332. *Gates*, 462 U.S. at 239.

333. *Id.* at 239.

334. *Id.* at 237.

wrongdoing outside the home may not necessarily give rise to probable cause to search a home.³³⁵

Third, while a CPS agent's affidavit can rely on hearsay, it must include sufficient indicia of reliability for a magistrate to conclude that the assertions in the affidavit are probably accurate.³³⁶ In *Gates* itself, the Court held that an anonymous letter sent to a police department would not alone satisfy probable cause, despite the level of factual detail it contained.³³⁷ The letter was insufficient in that it "provide[d] virtually nothing from which one might conclude that its author is either honest or reliable" and offered no "basis for the writer's predictions."³³⁸ In addition to the letter, the Court required that there be some form of corroboration providing "a substantial basis for crediting the hearsay."³³⁹ In *Gates*, that corroboration came via a separate surveillance investigation confirming details of the letter that could only have been known to the target or someone they trusted; that separate investigation was launched and concluded before government agents sought entry into the home.³⁴⁰

4. *Home Searches and the Gates Warrant*

The *Gates* decision is fairly permissive to both the government agents seeking warrants and the magistrates evaluating them.³⁴¹ The Court emphasized the "practical, nontechnical conception" of the probable cause requirement as a product of the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."³⁴² Further, the Court highlighted the need for relaxed scrutiny of police affidavits because police might otherwise "resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search."³⁴³ To that end, the Court held that a "magistrate's determination of probable cause should be paid great deference by reviewing courts."³⁴⁴

335. See, e.g., Edward G. Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from Illinois v. Gates*, 6 W. NEW ENG. L. REV. 331, 354 (1983); Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269, 280 (2020).

336. *Gates*, 462 U.S. at 231.

337. *Id.* at 225 (recounting the full text of the letter).

338. *Id.* at 231.

339. *Id.* at 245.

340. *Id.* at 243.

341. See J. Michael Hunter & Paul R. Joseph, *Illinois v. Gates: A Further Weakening of Fourth Amendment Protection*, 6 BRIDGEPORT L. REV. 19, 42–43 (1985) ("[I]t may be argued after *Gates* that in almost all cases the officer will be justified in relying upon the magistrate's determination under the cloudy totality of the circumstances standard, and the good faith exception will apply."); Lee, *supra* note 335, at 284–86 (discussing a bad tip permitted under *Gates* that resulted in "the government's very weak showing of basis of knowledge [being] overcome by its strong showing on the veracity front").

342. *Gates*, 462 U.S. at 231.

343. *Id.* at 236.

344. *Id.*

Despite the leniency of the *Gates* standard, while a report screened in by a state maltreatment hotline administratively launches a CPS investigation, the report will ordinarily not, on its own, meet the *Gates* probable cause standard.

First, as explained in Part I.A, the standard for screening reports in for investigation is especially low. Because most states screen in every report where the allegations meet the state's definition of neglect or abuse, screened-in reports will often amount to the sorts of conclusory affidavits that are explicitly disallowed by *Gates*.³⁴⁵

Second, screened-in reports will often lack the indicia of trustworthiness—veracity and basis of knowledge, among others—for a magistrate to properly assess the reliability of the allegations in the report. This is true both in the context of anonymous and mandatory reports. For anonymous reporters, as with the letter in *Gates*, there is usually “nothing from which one might conclude whether its reporter is honest or reliable”³⁴⁶ and often no way of assessing the basis of the reporter's knowledge. Those states allowing anonymous reporting do not require either basis for assessing reliability.³⁴⁷ For mandated reporters, reliability is undermined for other reasons. Mandated reporters are trained and required to over-report concerns of maltreatment, regardless of their certitude.³⁴⁸ While they are usually not trained on the potential impacts of a report on a family—including that a report will likely result in a home search—mandated reporters are threatened with punishment for not reporting, and they are immunized from the consequences of any good-faith report.

Finally, because the CPS home search is a default element of a CPS investigation, screened-in reports rarely articulate a nexus between the allegations of maltreatment and the CPS agent's search of the home. A CPS agent requesting a search warrant would need to show that a search of the home would probably uncover evidence of the alleged maltreatment, and this will not necessarily be the case. Imagine, for example, the case described above regarding the children playing on the sidewalk, or the case study below about an anonymous screened-in call raising concerns about educational neglect.

All told, under the Fourth Amendment, a CPS agent seeking to enter a home without the subject's consent will usually need to offer more than the contents of the report to establish probable cause that a search of the home would uncover evidence of the allegations described. Corroboration of the allegations could come through independent investigation, including a more thorough conversation with the source of the report, assessment of publicly available

345. See *id.* at 239; Lee, *supra* note 52.

346. *Gates*, 462 U.S. at 227.

347. See, e.g., NEW YORK OFF. OF CHILD. AND FAM. SERVS., *supra* note 59, at Ch. 3 A-2 (describing the elements necessary to register a report including allegations, the relationship of the subject to the children, and a jurisdictional relationship to New York); see also *id.* at Ch. 3 A-3 (“The SCR never requires the caller's contact information as a condition of registering a report.”).

348. See *supra* notes 19–28.

material, or voluntary conversations with stakeholders. Importantly, a parent’s refusal of a government agent’s request to search does not establish reasonable suspicion, let alone the probable cause necessary to obtain a search warrant.³⁴⁹ The majority of courts ruling on the question have held that “such refusal may not even be considered with other information in making a determination of probable cause or reasonable suspicion.”³⁵⁰

5. A Case Study

The following is an excerpt from an actual report:³⁵¹

A 15-years-old male (name unknown) resides with his mother (Maria) and father (Fernando), grandfather (Guillermo), and younger brother (age 8, name unknown). Over the course of several weeks, the 15-years-old child is at home during school hours. Today (03-21-22), the 15 years-old-child was accompanying his grandfather who is elderly to possibly a medical appointment. The grandfather has a cane and he is on oxygen. It is unknown if the child is academically progressing in school, but a student of the same age and ability who has missed a significant amount of days should be failing. The child is also seen outside at late as 2 o’clock and 3 o’clock in the morning on a school night hanging out with his girlfriends and friends. The parents allow the 15-years-old to act as an adult and do as he pleases without providing him with necessary structure and supervision. The role of the 8-years-old male child is unknown.

The caller states that he wishes to remain anonymous. Several years ago he was aware of the parents smoking marijuana in the home but that is not happening now. The caller has no concerns for the 8-years-old child because the child regularly attends school.

The caller provided the family’s address and apartment number. They could not provide specific birthdates but estimated the ages of each person named in the report.

Held up against the *Gates* standard above, this report is plainly insufficient to substantiate the facts alleged—inadequate guardianship for failure to ensure that a teenager was attending school—were true. First, because the reporter is anonymous, there is no way to determine whether they are honest or whether the allegations in the report are reliable. For example, based on the report alone, there is no way for a magistrate to assess the probability that Maria actually has a fifteen-year-old son, that her son is registered in school, or that her son has been cutting school for the past few weeks. Secondly, especially because of the absence of indicia of reliability, the report offers little reason to believe that a search of the home would reveal evidence of wrongdoing. Even if a search of

349. See LAFAVE, *supra* note 11, § 8.1 n.10 (collecting cases).

350. *Id.*

351. N.Y. OFF. CHILD. FAM. SERVS., INTAKE REPORT (2022) (on file with author). All names have been changed to protect identities. Errors are internal.

Maria's home during a weekday revealed a young man, the report alone offers no reason to believe that the young man's presence would be evidence of wrongdoing. What evidence has the agent presented that a teenager in Maria's home is not, say, a nephew visiting from abroad or a child that Maria is homeschooling? Furthermore, *Gates* would restrict ACS's search to the allegations in the affidavit. Absent probable cause of wrongdoing with respect to Maria's younger child, ACS would be restricted to a search investigating those allegations. The search could not continue onto other children absent independent probable cause.

If Maria refused a search of her home, CPS would not be out of options. Before seeking authority to search the home, the CPS agent could try to call Maria and confirm some of the details of the report. In some states, the agent might call the school to confirm that Maria has a child registered there who has not been in school over the past few weeks. They might be able to speak directly with the source of the call to gather some corroborating information, such as: how does the source know that Maria has a fifteen-year-old son? How do they know that her son is registered in school and skipping? This sort of corroborating information could be incorporated into an affidavit seeking a warrant to enter the home. The scope of the home search would be a question for the magistrate to determine. After receiving the necessary corroborating information, a magistrate might decide that a search of the home would be necessary during a school day to determine that the child was, in fact, not attending school. But a magistrate may decide that a search of the home is not necessary at all.

In this case, New York City's ACS did search the home with Maria's tepid consent. They determined that Maria did not, in fact, have a fifteen-year-old son. Her son was nineteen and in college, taking classes at home. He was beyond ACS's mandate. But because Maria had an eight-year-old son as well, ACS agents told her that they were required to continue their search, even though there were no specific allegations about him. They searched the bedrooms and kitchen cabinets, and they inquired after all the family's medications, including those belonging to Maria's elderly father. They asked the eight-year-old to remove his clothes to confirm there was no bruising, and they asked Maria to sign waivers to review his medical and educational information. As she left, the ACS worker told Maria that she would be back every few weeks and that Maria would need to comply with a drug test.

B. Consequences

If the suggestion that CPS searches must be conducted within the bounds of the Fourth Amendment seems drastic, it is likely because CPS agents have operated so freely outside its bounds for the past sixty years. They have escaped meaningful scrutiny in this period for the reasons described in Part II—the relatively recent emergence of CPS as an investigative body, the increased Supreme Court complication of Fourth Amendment rules as they applied to non-

criminal searches, and CPS's reliance on consent in an environment where parents were unaware or too afraid to refuse searches of their homes. That said, recent federal district and state supreme court decisions considering this question have agreed with the above conclusion. Late last year, the Pennsylvania Supreme Court held that "the Fourth Amendment applies equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation . . . which have the same potential for unreasonable government intrusion into the sanctity of the home."³⁵² On the question of probable cause, the court held that "while state agencies have an interest in investigating credible allegations of child neglect, nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court determines whether or not to authorize a home visit."³⁵³ The Southern District of New York is heading down a similar path.³⁵⁴

Some may raise practical concerns about what the warrant requirement would mean. CPS advocates defending home searches highlight the state's *parens patriae* interest in safeguarding children from harm, including harm by their own parents in their own homes.³⁵⁵ They argue that without broad search authority, CPS risks failing children who would otherwise require support or intervention.³⁵⁶

The figures do not bear out CPS's effectiveness in achieving these ends through investigation. As described in Part I, for example, CPS launched 1.5 million investigations in 2019, usually including a full home search. About 85 percent of the investigations did not uncover evidence of maltreatment. Of the remaining 15 percent, more than three-fourths were substantiated for neglect, often stemming from poverty-related concerns, where a home search was likely unnecessary. One-fourth of substantiated claims—the remaining 5 percent of all claims investigated—were substantiated with some evidence of abuse.

To the extent that entry into the home is an emergency, CPS agents may enter under the exigency exceptions without a warrant, much like their criminal policing counterparts. But in all but the most critical cases, states allow at least twenty-four hours to conduct an investigation, which is more than enough time to seek a court's approval.³⁵⁷

Regardless, given the poverty-based nature of most neglect allegations, many investigations may not require the sort of fulsome home search described in the abovementioned case studies. Where some sort of investigation is

352. *Int. of Y.W.-B.*, 265 A.3d 602, 627–628 (Pa. Super. Ct. 2021); *see also Phillips v. Cnty. of Orange*, 894 F. Supp. 2d 345, 369–72 (S.D.N.Y. 2012).

353. *Int. of Y.W.-B.*, 265 A.3d at 625.

354. *See Phillips*, 894 F. Supp. 2d at 369.

355. *See supra* notes 226–227.

356. *Id.*

357. *See supra* note 41.

nonetheless necessary, CPS could attempt phone calls, video conferences, or other correspondence on the basis of consent—the same way that it gains access to the home. Even if a parent does not consent to the investigation, choosing not to enter the home realigns the power dynamic between CPS and the family in question, setting the stage for a relationship based on the parent's identification of necessary resources and not CPS's coercive mode of engagement.

In the nearly 95 percent of investigations where home searches were a CPS nice-to-have, families endured the invasive searches described in the case studies above, resulting in long-lasting trauma to children and their parents and undermining their mutual trust and attachment. Ultimately, if CPS determines that a home search would be necessary in a non-exigent investigation, agents can always seek permission from a magistrate. They would just need to demonstrate that searching the home would likely yield evidence of their concerns.

Others organizing to restrain the harms of family policing may highlight the limitations of a legal conclusion that the full force of the Fourth Amendment applies to CPS home searches. By virtue of their mandate and statutory obligations, CPS agents will continue to rely on or even compel a parent's consent to search the home as an element of each investigation. As long as families under investigation lack meaningful information about their right to refuse a home search, resources for meaningfully enforcing their right to refuse a home search, and a precedent for refusal, parents will consent as a means of safeguarding their family from further state violence. As parents begin to enforce their rights under the Fourth Amendment with the support of attorneys engaging during the investigation phase, CPS agents and their supervisors will have to make a choice about the need to search the home as part of their investigations. If agents think they can satisfy *Gates* after additional investigation and corroboration, they can go to a magistrate and request a warrant. In the rare cases where they do not think they have enough information to satisfy *Gates*, they may be better off investigating without searching the home.

This approach to the Fourth Amendment in CPS home searches is important for at least three reasons. First, the risk of error in CPS investigations is high. CPS investigations overwhelmingly target poor Black and brown families. While each CPS investigation involves a home search, the vast majority of investigations are unsubstantiated. Those cases that are substantiated are often neglect cases, where an investigation could have been conducted without a thorough search of the home or any search of the home at all. In all of these cases, families like Maria's will have unnecessarily experienced the trauma of a CPS home search with no real benefit. To the extent that the facts may have required a home search in other cases, those searches could have been done with a warrant appropriately restricting the scope of the search.

Second, holding CPS to its obligations under the Fourth Amendment could encourage CPS to be intentional about the nature of its investigations and to pursue searches of homes only in cases where they are necessary to address the

allegations in question, not just as a matter of default practice. Of course, just as with criminal police, in any case where it is required, exigency is available under prevailing doctrine for CPS to conduct a search to forestall injury or imminent harm.

Third, given the paucity of procedural protections in child protective cases, the Fourth Amendment is a core tool for families whose homes are searched by CPS, both as a disincentive to CPS workers who may overreach as part of a search and as a collective bulwark against unnecessary searches. Such protection is the main legal tool available where most cases do not end up in family court, where the exclusionary rule does not apply, and where most affected families do not have the resources to sue for constitutional violations.

CONCLUSION

This account of CPS's emergence as an independent investigative body explains how CPS home searches have gone largely unregulated since their emergence in the early 1970s. At inception, CPS assumed old responsibilities previously assigned to criminal police and newer responsibilities with which the Supreme Court had never been forced to contend. As the Court developed new exceptions to the Fourth Amendment, it simultaneously sidestepped opportunities to explicitly safeguard the privacy and family integrity interests of the hundreds of thousands of families—disproportionately poor and of color—subjected to CPS home searches each year. Most of these families were investigated for poverty-related allegations of neglect; most investigations did not substantiate any wrongdoing. The Court's sidestep—this *slip*—left those families in the lurch, as parents and children alike experienced the trauma of government intervention into the most intimate spaces of their lives.

This Article addresses this slip in the doctrine and scholarship by demonstrating that CPS home searches are not the type of administrative search excepted from the warrant and probable cause requirement. Instead, for half a century, CPS searches have been a means of suspicion-based government investigation involving state agents' painstaking search of a family's home based on particularized suspicion of unlawful conduct, relayed by a mandated or anonymous reporter. While different from criminal police, CPS agents have uniquely coercive authority at their disposal, including the authority to remove children from their parents without court order and even to initiate proceedings that can ultimately result in the termination of the bond between parent and child. All of this begins with a knock at the door.

We return, once more, to the Introduction. Imagine you are that same mother in East Harlem. After work, you pick up your kids from school, and the three of you hop on a city bus. You look up and see an ad posted by a community group. There's an illustration of a Black mother reading a book to her child. The

text reads: “Families Belong Together. Know Your Rights If ACS Knocks.”³⁵⁸ You follow the link in the ad and read the website as the bus bumps along. Your eyes widen: if they ever knock again, you realize you can say no. And if you do, the agent at the door has to come back with a warrant after convincing a judge that there is an actual reason for them to come in. Last time, you got a letter saying the report had been “unsubstantiated.” So what was it all for? You look at your kids, both of whom are still reeling from the last time the agent came. The older one has had a harder time sleeping at night. The younger one holds on a second or two longer before leaving for school in the morning, and you realize you do too. You look up as the bus creaks to a halt. You breathe a sigh of relief and grab each of your kids by the hand. You are home.

358. @JMacForFamilies, TWITTER (Aug. 18, 2022, 8:27 AM), <https://twitter.com/JMacForFamilies/status/1560287308758253570> [<https://perma.cc/HGB2-H283>].