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# Beyond Law Enforcement: *Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine

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# Beyond Law Enforcement: *Camreta v. Greene*, Child Protection Investigations, and the Need To Reform the Fourth Amendment Special Needs Doctrine

Josh Gupta-Kagan\*

*The Fourth Amendment “special needs” doctrine distinguishes between searches and seizures that serve the “normal need for law enforcement” and those that serve some other special need, excusing non-law-enforcement searches and seizures from the warrant and probable cause requirements. The United States Supreme Court has never justified drawing this bright line exclusively around law enforcement searches and seizures but not around those that threaten important noncriminal constitutional rights.*

*Child protection investigations illustrate the problem: millions of times each year, state child protection authorities search families’ homes and seize children for interviews about alleged maltreatment. Only a minority of these investigations involve suspected crimes, so most fall on the special needs side of the line. This result undervalues the consequences of child protection investigations on children (a severe infringement of their right to family integrity) and on parents (the loss of their children and the stigma of a child abuse or neglect charge).*

*This Article proposes a new approach to the special needs doctrine: the doctrine should distinguish between searches and seizures that implicate fundamental constitutional rights and those that do not. It breaks new ground in identifying a theoretical value to such a bright line: it gives governments less incentive to interfere with liberty by seeking alternative means to achieve their goals. To realize this value most effectively, the line must be drawn to value all fundamental constitutional rights, not only those connected to the criminal justice system. In child protection, it would push states to choose less-liberty-infringing models of providing assistance to vulnerable families, which the empirical record shows would serve children and the child protection system’s goals more effectively.*

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I.	INTRODUCTION	

Nimrod Greene is arrested for allegedly molesting a boy unrelated to him. The boy’s mother reports that Greene’s wife “had talked to her about how she doesn’t like the way [Greene] makes [their nine-year-old daughter] sleep in his bed when he is intoxicated, and she doesn’t like the way he acts when she is sitting on his lap.”<sup>1</sup> A child protection investigator goes to the nine-year-old child’s school,

1. See *Greene v. Camreta*, 588 F.3d 1011, 1016 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011) (internal quotation marks omitted).

takes her out of class, brings her to a private room, and closes the door. The girl denies that Greene abused her and signals that she does not want to talk further. But the investigator does not accept her denials and repeatedly asks about abuse. After two hours, she says that her father did abuse her. The investigator removes her from her parents' custody and places her in foster care. She recants the allegation. State officials have a doctor examine her; no evidence of sexual abuse is found. Three weeks later, lacking evidence to prove abuse, the state sends her home and closes the case.<sup>2</sup>

Under the prevailing Fourth Amendment "special needs" doctrine, the seizure of the child in the above scenario is likely constitutional. The doctrine provides that searches and seizures serving states' "normal need for law enforcement" require a warrant and probable cause, while searches and seizures serving "special needs beyond . . . law enforcement" do not.<sup>3</sup> The doctrine offers no means "to discriminate among distinct sorts of non-law-enforcement objectives,"<sup>4</sup> so the importance of the noncriminal constitutional rights implicated by the searches and seizures are of no import. With no law enforcement purpose, no warrant or probable cause would be required. Although the searches and seizures involved could still be tested for reasonableness, their qualification as a special need is almost certainly outcome-determinative. Following this analysis, millions of investigative steps like the fact pattern above (seizures of children and parents for nonconsensual interviews, searches of families' homes, and inspections of children's bodies) occur each year.<sup>5</sup>

This Article argues that the special needs doctrine should draw a line between searches and seizures that threaten fundamental constitutional rights beyond the searches and seizures themselves, and

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2. This fact pattern resembles that in *Greene v. Camreta*, which is discussed in Part II.A, with one difference: in *Greene*, a deputy sheriff joined the social worker in the interview and investigated the alleged sex abuse for possible criminal charges. *Greene*, 588 F.3d at 1016-20.

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

4. Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 89. Schulhofer argues that the law enforcement versus other purposes distinction is "chimerical and irrelevant." *Id.* He proposes replacing that distinction with one between government activity to achieve some kind of "social control" and searches and seizures "in aid of the internal governance objectives of public enterprises." *Id.* at 118. I discuss that proposal *infra* note 252 and accompanying text.

5. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2010, at 20, 22 (2011), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>.

those that do not.<sup>6</sup> By focusing only on the presence or absence of law enforcement purposes, the present doctrine ignores the searches' and seizures' infringements on children's and parents' privacy rights and the severe consequences (infringement on the fundamental substantive due process right to family integrity) that flow from these searches and seizures. The doctrine also ignores a basic purpose of Fourth Amendment law: to distinguish between searches and seizures that require a warrant and probable cause to check executive branch discretion and those that do not. When a search or seizure threatens fundamental constitutional rights and involves significant executive discretion, a warrant and probable cause should be required.

Child protection searches and seizures illustrate the problematic analysis and results created by the present special needs doctrine. Unlike special needs searches implicating public employment or other consequences beyond fundamental constitutional rights, child protection investigations implicate the Fourteenth Amendment family integrity rights of millions of children and parents every year. Child protection investigations have given rise to two United States Supreme Court special needs cases, including *Camreta v. Greene*, on which the above fact pattern is based, and which was decided in 2011 on jurisdictional, not Fourth Amendment, grounds.<sup>7</sup> Unlike the fact pattern above, *Camreta* involved a joint investigation between a deputy sheriff and a child protection worker, both of whom were present in the interview. The case centered on whether the deputy sheriff's involvement placed the seizure on the normal need for law enforcement side of the special needs line.<sup>8</sup> The special needs doctrine mandated this focus, but it ignores the profound questions that arise independent of any law enforcement involvement. Because the only potential criminal consequences in *Camreta* were faced by the suspected father, the doctrine's law enforcement focus ignored the consequences to the child, who was separated from her family and placed in state custody, infringing upon one of the most fundamental

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6. By "fundamental constitutional rights," I mean those rights that have been held to apply to the states because they are "the very essence of a scheme of ordered liberty" or that have been held to be fundamental constitutional rights through some other source, most likely the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see *infra* text accompanying note 255.

7. *Camreta v. Greene*, 131 S. Ct. 2020 (2011); see *Ferguson v. City of Charleston (Ferguson II)*, 532 U.S. 67 (2001).

8. *Greene v. Camreta*, 588 F.3d 1011, 1026 (9th Cir. 2009) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (internal quotation marks omitted)), *vacated in part*, 131 S. Ct. 2020 (2011).

liberty interests enjoyed by anyone, especially children. The doctrine ignored the invasiveness of the seizure itself, the consequences for the constitutional right of family integrity, and the level of discretion involved in performing the seizure. And when there is no law enforcement involvement (as occurs millions of times every year), the doctrine permits significant invasions of children's and families' privacy at home and elsewhere, implicating fundamental constitutional rights without consideration of the severity or credibility of allegations.<sup>9</sup> In the majority of cases, affecting millions of families, child protection investigations infringe on liberty and threaten family integrity without giving children or families any benefit in return.<sup>10</sup> Moreover, the doctrine ignores a troubling aspect of many child protection investigations: poorly performed interviews of children, such as the interview in *Camreta*, which are inadequately regulated by state agencies. When abuse or neglect has not occurred, these interviews may create false allegations that lead to unnecessary state intervention in families. When abuse or neglect has occurred, they create evidentiary problems when states appropriately seek to intervene in families.

The special needs case law offers no explanation of why law enforcement purposes make searches and seizures so different from all other searches and thus no adequate justification for the doctrine's handling of child protection cases. This doctrine, first coined in 1985 in *New Jersey v. T.L.O.*, is now the basis of multiple Supreme Court holdings and lower court litigation. But in the intervening quarter-century, the Supreme Court has not explained what makes searches and seizures with law enforcement purposes different, why searches that affect fundamental but noncriminal constitutional rights ought not be treated the same as those that do not affect constitutional rights, or how a line defined by law enforcement needs differentiates searches and seizures that need a warrant and probable cause from those that do not.

Despite its flaws, the special needs doctrine distinguishes searches and seizures that threaten important rights and are thus more invasive from those that do not. This Article breaks new ground by identifying the value of drawing a bright line between searches and seizures implicating some fundamental rights and those that do not. Such a bright line values constitutional liberties by creating incentives

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9. See *supra* note 5 and accompanying text.

10. See *supra* note 5 and accompanying text.

for policy makers to avoid more invasive forms of state intervention; by choosing a policy option that infringes on liberty less, governments can ensure the administrative state can do its work without the burdens and limitations that come with a warrant and probable cause requirement. By focusing on the administrative state's workings, the doctrine can also push the government to develop clear administrative procedures that adequately substitute for a warrant procedure. The doctrine should be reformed to account for searches and seizures conducted with the purpose of implicating significant noncriminal constitutional rights and for the level of executive branch discretion.

This Article connects child protection investigations and the special needs doctrine that governs them, both of which independently have received critical, academic focus. This Article builds off of that recent work, while offering new analysis of both child protection cases and the special needs doctrine. Doriane Lambelet Coleman has made a powerful normative argument against excepting child protection searches and seizures from warrant and probable cause requirements: the invasiveness of these searches, measured against the strength of privacy and liberty interests at stake, requires traditional Fourth Amendment protections.<sup>11</sup> Her normative case needs no repetition here. Her doctrinal argument, however, depends on the special needs doctrine in its present form and concludes that the entanglement between law enforcement and civil child protection authorities in these searches renders the special needs doctrine inapplicable.<sup>12</sup> This conclusion overstates the extent of law enforcement entanglement. Many, perhaps most, child protection searches and seizures do not involve law enforcement and do not threaten or result in law enforcement consequences. Absent such law enforcement entanglement, the currently prevailing special needs test will apply to most such searches and seizures and would likely approve of the warrantless searches and seizures that Coleman has argued so powerfully against. Considered from her perspective, then, the special needs doctrine needs reevaluation.

The academy has criticized the special needs doctrine, including the law enforcement purpose threshold, for its "doctrinal incoherence"<sup>13</sup> and for being "notoriously unclear,"<sup>14</sup> but the academy

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11. Doriane Lambelet Coleman, *Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 539-40 (2005).

12. *Id.* at 425-26.

13. Schulhofer, *supra* note 4, at 89.

has spent little time considering how the doctrine's bright line, which has existed for multiple decades and remains strong, could be tied more meaningfully to the rights implicated by specific searches and seizures. An early and oft-cited work called for replacing the "law enforcement versus other purposes" distinction with a distinction between searches and seizures serving "inter[n]al gover[n]ance imperatives of a self-contained public activity" and searches and seizures serving "external social control,"<sup>15</sup> an approach which only indirectly considers the constitutional rights at stake and less effectively incentivizes government to choose less-liberty-infringing policy options.

This Article will proceed as follows: Part II will explore child protection searches, both in *Camreta* and more broadly, arguing that the special needs doctrine has failed to shape sound decisions in those areas. Part II will also summarize research showing that children subject to child protection investigations are not helped by the status quo and argue that a less-liberty-infringing response can more effectively help the children and families, who are the subjects of child abuse and neglect allegations.

Part III will explore the special needs doctrine's origins, boundaries, and development, and, in so doing, it will reveal the doctrine's unjustified assumptions about law enforcement searches and failure to analyze when a warrant and probable cause are required, which are problems that lead directly to the doctrine's mishandling of child protection cases. In tracing the doctrine from its historical origins to the present day, Part III will also identify its focus not only on searches and seizures themselves but also on their consequences to individuals searched and seized.

Part IV will develop the important values contained in the special needs doctrine but never coherently theorized, especially its ability to push governments to invade liberty less and to develop legislative and regulatory regimes that check official discretion when such invasions occur. It will then explain how the Supreme Court should strip away the arbitrary distinction between law enforcement and other purposes and reform the doctrine to ask, instead, whether searches and seizures implicate fundamental rights and whether administrative procedures are adequate to replace a judicial warrant procedure. Applying this reformed test to child protection investigations, Part IV will illustrate

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14. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 257 (2011); see also *id.* at 257-58 (summarizing past criticism).

15. Schulhofer, *supra* note 4, at 89, 118.



how these reforms will lead to results that are more just, more coherent, and more consistent with a principled approach to the special needs doctrine.

## II. *CAMRETA V. GREENE* AND CHILD PROTECTION SEARCHES AND SEIZURES: ILLUSTRATING THE PROBLEM WITH THE CURRENT SPECIAL NEEDS TEST

The Fourth Amendment issues raised by child protection searches and seizures illustrate the problems that come from the special needs doctrine's bright line between law enforcement searches and all other searches. I focus on child protection searches and seizures for four reasons.

First, these searches and seizures effectively illustrate the special needs problem because they implicate the fundamental but noncriminal constitutional right of family integrity, "perhaps the oldest of the fundamental liberty interests recognized by th[e Supreme] Court."<sup>16</sup> Relatedly, the various fact patterns of child protection cases have presented hard special needs questions to the Supreme Court. Two different child protection cases, *Camreta* and *Ferguson v. City of Charleston (Ferguson II)*,<sup>17</sup> have already done so. Given the lack of resolution to the Fourth Amendment issue in *Camreta*, a case which the Court dismissed for mootness,<sup>18</sup> a future child protection case is likely to shape special needs doctrine.<sup>19</sup>

Second, analyzing child protection searches adds to our academic understanding of the special needs doctrine. Courts and academics have traditionally addressed all "administrative search" cases under

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16. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

17. 532 U.S. 67 (2001); see discussion *infra* Part III.C.

18. 131 S. Ct. 2020, 2026 (2011).

19. There are other possible scenarios. State action to commit individuals involuntarily to mental institutions requires clear and convincing evidence that the individual is mentally ill and must be institutionalized to protect the individual or others. *Addington v. Texas*, 441 U.S. 418 (1979). Evidence might include the individual's statements, medical records, and articles at their home, *e.g.*, *id.* at 421, and might be gathered by entering an individual's home or seizing the individual for a mental health evaluation, *Gooden v. Howard County*, 954 F.2d 960 (4th Cir. 1992) (en banc) (involving an entry into a private home, justified by reasonably perceived exigent circumstances). Civil schemes regulate individuals' right to own firearms—now recognized as a fundamental constitutional right and applied against states, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)—and some include provisions for seizing such guns, *e.g.*, D.C. CODE § 7-2502.10 (2012) (establishing an administrative procedure for revoking a certificate permitting gun ownership and compelling surrender of a weapon without mentioning a warrant or probable cause). If such procedures are valid, it is because the Second Amendment permits significant regulation, not because of the civil versus criminal distinction.

one heading, ignoring important differences between categories of cases. Others in the academy have contributed to “disentangling” different types of cases, and thus analyzing each category more coherently.<sup>20</sup> For example, Eve Brensike Primus identifies two categories: “dragnet” cases, such as police roadblock or health inspection cases, and “special subpopulation search” cases, relating to individuals with reduced expectations of privacy.<sup>21</sup> Child protection searches do not fall neatly into either category and thus raise unique questions about the doctrine. They are not dragnet searches because all individuals are not stopped equally; child protection investigations only follow individualized allegations of child abuse or neglect.<sup>22</sup> Nor do these investigations involve individuals with reduced expectations of privacy; children or parents who are searched or seized at their homes (as is common in child protection investigations) have no reduced privacy expectations. Arguably, children at school have reduced expectations of privacy (though this point was contested in *Camreta*,<sup>23</sup> the better view is that children do not have an across-the-board reduction in their privacy interests at school and the proper analysis is context-specific<sup>24</sup>), but that only addresses a slice of child protection investigations.

Third, child protection searches and seizures represent a widespread and important issue in their own right and affect millions of children (and millions more adults) every year.<sup>25</sup> Moreover, the scope of these searches and seizures illustrates important policy incentives that may result from reforming the doctrine. Child protection agencies receive nearly 1.6 million reports of alleged child abuse or neglect each year,<sup>26</sup> regarding nearly three million children.<sup>27</sup>

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20. Primus, *supra* note 14, at 260. Christopher Slobogin has agreed that scholars have “tended to lump all of these decisions together,” even if Eve Brensike Primus makes an “overstated” case. Christopher Slobogin, *The Implications of Disentanglement*, 111 COLUM. L. REV. SIDEBAR 103, 104 (2011).

21. Primus, *supra* note 14, at 260.

22. See *infra* note 140 and accompanying text.

23. *Infra* note 83 and accompanying text.

24. Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 68-69 (2011).

25. See *supra* note 5 and accompanying text.

26. The federal government counted 1,581,882 reports. CHILDREN’S BUREAU, *supra* note 5, at 11. This figure excludes child protection hotline calls which did not report alleged abuse or neglect. This figure only includes data from forty-five states; extrapolated to include all states and territories, there were more than 2 million reports. See *id.* at 5 (listing 3.3 million reports, multiplied by the “screened in” rate of 60.7%).

27. The federal government counted 2,987,515 children. *Id.* at 32. This only includes the “[c]hildren [w]ho [r]eceived a [r]esponse” from child protective services (CPS),

Those large numbers should be understood in the context of what happens in the resulting investigation. The majority of investigations, more than 80%, are closed without an administrative finding of abuse or neglect.<sup>28</sup> Perhaps even more of these investigations should close without findings of abuse or neglect. The United States Court of Appeals for the Second Circuit has described administrative findings of abuse or neglect as “at best imperfect,” noting that three-quarters of administrative challenges succeed in reversing such findings.<sup>29</sup>

Frequently, these challenges occur only when the administrative findings lead a parent to lose a job,<sup>30</sup> suggesting that many parents with legitimate claims do not challenge these administrative findings. Moreover, a long backlog of administrative challenges can occur in some jurisdictions.<sup>31</sup> (Of course, there may also be cases closed without a finding of abuse or neglect, in which such a finding would be justified.) Child protection agencies substantiate abuse or neglect in the remaining 20% of reports, affecting about 695,000 children.<sup>32</sup> Neglect is the type of maltreatment found by child protection agencies in the majority of cases; physical or sexual abuse accounts for no more than 26.8% of cases.<sup>33</sup>

Each of the three million children who are subject to these investigations has at least one parent or caretaker. Many have one or more siblings, and many share homes with people beyond their nuclear families. The total scope of child protection investigations is thus quite

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*id.*, meaning it excludes children subject to referrals “screened out” by CPS agencies, *see id.* at 5 (discussing screening procedures). Including children who were the subjects of multiple hotline calls and multiple CPS responses, the government counted 3,604,100 children—showing that a significant number of affected children face multiple CPS investigations each year. This is referred to as the “[d]uplicate count.” *Id.* at 32.

28. *Id.* at 20.

29. *Valmonte v. Bane*, 18 F.3d 992, 1003-04 (2d Cir. 1994).

30. *Id.*

31. *See* John O’Brien, *NY Denied Thousands Accused of Child Abuse the Chance To Clear Their Name*, SYRACUSE POST-STANDARD (Mar. 22, 2010), [http://www.syracuse.com/news/index.ssf/2010/03/ny\\_denied\\_thousands\\_accused\\_of.html](http://www.syracuse.com/news/index.ssf/2010/03/ny_denied_thousands_accused_of.html) (describing long delays that led state officials to shred administrative requests). Further details are available on the Web site for a related class lawsuit. *See* Law Offices of Thomas Hoffman, N.Y. ST. WIDE CENT. REGISTRY CHILD ABUSE & MALTREATMENT CLASS ACTION WEBSITE, <http://www.registryclassaction.com> (last visited Nov. 18, 2012).

32. CHILDREN’S BUREAU, *supra* note 5, at 20, 22.

33. *Id.* at 24. The number may be lower than 26.8% because that figure double-counts children found to have been both physically and sexually abused. The federal data does not separately report the proportion of child protection hotline reports of neglect (as compared with abuse). One study that used small samples of hotline calls suggests that the majority of hotline reports are also of neglect. JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 14 (1998).

large: several million—perhaps as many as ten million—children and adults are subject to searches and seizures at home, school, and elsewhere every year. Following their own protocols, child protection agencies insist on inspecting homes and interviewing children, parents, and other caregivers in each investigation.<sup>34</sup> After investigations that touch all of these individuals, the number of children that child protection agencies remove from their families is fairly small: about 254,000 children, or 8.5% of the 3 million children subject to these investigations.<sup>35</sup>

Examining the data has led some child welfare experts to argue that child protection agencies do not need to investigate several million children in order to protect a quarter million by removing them from parental custody. These commentators argue that the current rate of investigation requires child protection agencies to spend too much time investigating cases unlikely to lead to removal, either because the allegations are not credible or because the allegations are not sufficiently severe—unnecessarily intervening in many families and draining limited resources from cases that need greater attention.<sup>36</sup> Connecticut’s reformist child welfare director estimated that 40% of all investigations could be diverted to a less adversarial approach.<sup>37</sup> More traditional Fourth Amendment protections would create incentives for states to triage child protection hotline calls more effectively and thus reduce the scope of privacy invasions that these investigations entail.

Relatedly, some evidence exists that by *not* investigating families at lower risk of maltreatment, child protection authorities can better protect children in more-serious cases, and therefore create incentives to limit the number of child protection searches and seizures that could also serve the government’s interest in protecting children. A study of Missouri’s “differential response” pilot (through which state officials only investigated more-severe allegations and diverted less-severe reports) concluded that by reducing the number of less-serious investigations, authorities had more time to investigate sexual abuse

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34. See *infra* notes 68-69 and accompanying text.

35. The federal government counted 254,375 children who entered foster care in fiscal year 2010. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2010 ESTIMATES AS OF JUNE 2011, at 3 (2011), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf>.

36. E.g., WALDFOGEL, *supra* note 33, at 19 (describing a study in which over 60% of cases reported to CPS were unsubstantiated).

37. Jacqueline Rabe Thomas, *DCF Head Gets the Authority She Sought To Fix Troubled Agency*, CT MIRROR (June 10, 2011), <http://www.ctmirror.org/story/12907/DCF-wrap>.

cases. Those investigations were more comprehensive and allowed police to gather enough evidence to arrest more perpetrators of sexual abuse, preventing them from preying on more children.<sup>38</sup>

Fourth, these searches and seizures have occurred frequently and for many years without definitive rulings on their constitutionality or much attention from the academy.<sup>39</sup> *Camreta* is one of a relatively small set of cases challenging Child Protective Services' (CPS') investigatory tactics. As a result, Fourth Amendment concepts appear to be largely foreign to the day-to-day operations of child protection investigations. A 225-page manual guiding District of Columbia investigations, for instance, does not mention the Fourth Amendment and does not refer to "probable cause," "warrant," or "reasonable suspicion" as limits to investigators' authority.<sup>40</sup> Coleman has taken a crucial step toward addressing the Fourth Amendment status of child protection searches, making a compelling normative argument for applying traditional Fourth Amendment standards (probable cause and warrant requirements) to child protection searches and seizures.<sup>41</sup> But Coleman frames her argument in connection to her conclusion that the special needs doctrine should not apply to such searches; she argues against applying some other "child welfare exception" to the warrant and probable cause requirements for such searches. I am not so sanguine as to suggest that the current special needs doctrine would not apply to child protection searches;<sup>42</sup> at the very least, many cases will present less child protection and law enforcement entanglement than *Camreta* did, making Coleman's normative argument more difficult doctrinally.

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38. L. ANTHONY LOMAN, INST. OF APPLIED RESEARCH, DIFFERENTIAL RESPONSE IMPROVES TRADITIONAL INVESTIGATIONS: CRIMINAL ARRESTS FOR SEVERE PHYSICAL AND SEXUAL ABUSE (2005), <http://www.iarstl.org/papers/DiffRespAndInvestigations.pdf>.

39. Coleman's article is the clear exception to this lack of attention, and Coleman began her article by noting the "dearth of scholarly attention" to the subject. Coleman, *supra* note 11, at 423.

40. D.C. CHILD & FAMILY SERVS. AGENCY, CHILD PROTECTIVE SERVS. ADMIN., INVESTIGATIONS: PROCEDURAL OPERATIONAL MANUAL (2011), [http://cfsa.dc.gov/DC/CFSA/Publication Files/CFSA PDF Files/About CFSA/Publications/POMS/Investigations-POM.pdf](http://cfsa.dc.gov/DC/CFSA/Publication%20Files/CFSA%20PDF%20Files/About%20CFSA/Publications/POMS/Investigations-POM.pdf). The manual refers to probable cause as the standard by which the Superior Court of D.C.'s Family Court Operations Division will judge whether allegations of abuse or neglect are true and thus whether a child may be removed, *id.* at 58, but the standard is not used in connection to the child protection investigation itself. Similarly, the manual refers to search warrants executed by police that lead to evidence of child abuse or neglect, *id.* at 96, but not as something that limit child protection investigations.

41. Coleman, *supra* note 11, at 508-38.

42. See *infra* note 64 and accompanying text.

This Part will first explain *Camreta*'s facts, then the themes it illustrates in child protection searches and seizures beyond those facts. It will then explore how the case's litigation illustrates the core problems with the current version of the special needs doctrine, and why reforming that doctrine is required to provide coherent guidance in child protection investigations.

A. *Camreta v. Greene: Facts*

An Oregon Department of Human Services caseworker, Bob Camreta, and Deschutes County deputy sheriff, James Alford, received allegations that Nimrod Greene had molested his daughters, S.G. and K.G.<sup>43</sup> The allegations triggered a civil child protection investigation by Camreta and a criminal investigation by Alford. Greene was arrested for sexually abusing an unrelated seven-year-old boy who had told police that Greene had touched the boy's penis over his pants twice during a visit to the boy's home while drunk. The boy's mother told the police that Greene's wife, Sarah Greene, said, "[S]he doesn't like the way [he] makes [S.G. and K.G.] sleep in his bed when he is intoxicated" and that Sarah Greene had made other comments expressing similar concern regarding Greene's behavior toward his daughters while drunk.<sup>44</sup>

About one week later, Greene was released from jail. Camreta learned of his release and of his resulting unsupervised contact with S.G. and K.G. Three days passed without action or investigation. Camreta and Alford then went to the school of S.G., who, at the age of nine years, was the older sibling. Camreta intentionally chose not to seek the consent of either of S.G.'s parents and to interview S.G. at school so that she would be "away from the potential influence of suspects, including parents."<sup>45</sup> Camreta did not seek a warrant or any court order before the interview.

At Camreta's request, a school counselor took S.G. from her classroom to a private room at the school where she was left alone with Camreta and Alford. S.G. felt "scared." Camreta and Alford kept her alone in the room for two hours while they interviewed her.<sup>46</sup>

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43. The children are identified only by initials in all public court documents.

44. *Greene v. Camreta*, 588 F.3d 1011, 1016 (9th Cir. 2009) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (internal quotation marks omitted)), *vacated in part*, 131 S. Ct. 2020 (2011).

45. *Id.*

46. These facts reflect S.G.'s account. Some facts were disputed—for instance, Camreta and Alford claimed the interview lasted about one hour, not two. But the case was litigated and decided on the defendants' summary judgment motion and subsequent appeals,

Alford had his firearm visible and did not ask questions during the interview. Camreta took the lead, first asking S.G. if her father touched her. S.G. responded in the affirmative, but emphasized that these were good touches: hugs, kisses, “piggy-back rides, rides on his shoulders and horsey rides.”<sup>47</sup> Camreta did not accept that answer, and kept asking S.G. if her father touched her “in a bad way.” The questions repeated until, in S.G.’s words, “I just started saying yes to whatever he said.”<sup>48</sup>

Ironically, the facts most relevant to the litigation about this interview—Alford’s presence and the criminal investigation—had little relevance to S.G.’s understanding of the case. The United States Court of Appeals for the Ninth Circuit offered this summary of S.G.’s deposition: “With respect to Alford’s presence, S.G. stated that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him.”<sup>49</sup> Her brief to the Supreme Court emphasized that she was “scared” when a school counselor left her alone with two men she did not know, and that she decided to falsely report sexual abuse because she wanted “just to get out of the room” and feared that her school bus would leave without her, not because of any extra coercion created by Alford’s presence or behavior.<sup>50</sup> The coercive interrogation and its potential consequences, not Alford’s presence or involvement, left S.G. “so upset . . . that she vomited five times that night after returning home.”<sup>51</sup>

After the interview, both criminal and civil child protection authorities believed they had sufficient evidence to act.<sup>52</sup> A grand jury indicted Greene for felony sexual assault of S.G. and the unrelated boy. A court ordered Greene to have no contact with S.G. or K.G. Camreta discussed the no contact order with Sarah Greene, and he left convinced that she believed Greene was not abusive and that she would not protect her children from future abuse (an assertion Sarah

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so, like the courts deciding the cases, this Article takes the facts “in the light most favorable to” S.G. *Id.* at 1017 & n.1.

47. *Id.* at 1017.

48. *Id.*

49. *Id.*

50. Brief for Respondents at 2, 4, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454 and 09-1478) (internal quotation marks omitted), *available at* [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/09\\_1454\\_Brief\\_Updates/09-1454\\_Respondent\\_Brief.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/09_1454_Brief_Updates/09-1454_Respondent_Brief.authcheckdam.pdf).

51. *Id.* at 4.

52. *Greene*, 588 F.3d at 1018.

Greene denied).<sup>53</sup> Camreta then filed a petition in the local juvenile court asking for protective custody of S.G. and K.G. The court issued the order and the government removed S.G. and K.G. from their parents and placed them in foster care.<sup>54</sup>

S.G. and K.G. remained in state custody for twenty days. During that time, the state sent them both to the Kids Intervention and Diagnostic Service Center for interviews and physical exams. S.G. told interviewers that her father had not abused her and that her statements to the contrary that were made to Camreta and Alford were false. During the exam, S.G. was asked to undress, and examiners inspected her body, at times with a magnifying glass, and took pictures of her “private parts.”<sup>55</sup> The exam did not reveal evidence of sexual abuse.<sup>56</sup> The Department of Human Services then asked the juvenile court to return S.G. and K.G. to Sarah Greene’s custody, which the court did.<sup>57</sup>

The criminal charges against Greene resulted in a plea deal: Greene entered an *Alford* plea regarding the abuse of the unrelated boy, and the charges that he abused S.G. were dismissed.<sup>58</sup>

S.G. testified in her deposition that she continued to feel guilty for the false statements she made during her interrogation, and that she felt “real bad” because those statements led to her removal from her parents’ custody for several weeks and her father’s criminal prosecution.<sup>59</sup>

### *B. Similar Themes in Child Protection Searches and Seizures Beyond Camreta*

The *Camreta* facts evoke four key themes in child protection investigations. First, child protection searches are often, though not usually, genuinely joint efforts between civil and criminal law enforcement agencies. Camreta investigated the basis for a civil child welfare case and Alford the basis for a criminal case, and evidence does not suggest that one was cover for the other. Such joint investigations between civil child protection agencies and law enforcement are commonplace, especially for allegations of sexual or

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53. *Id.*

54. *Id.* at 1018-19.

55. The phrase “private parts” comes from S.G.’s deposition. *Id.* at 1019.

56. *Id.*

57. *Id.* at 1020.

58. *Id.*; see *North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970).

59. Brief for Respondents, *supra* note 50, at 12 & n.12.



physical abuse, where the facts, if accurate as alleged, typically establish both civil and criminal violations. And as Coleman has explained in detail, collaboration between child protection agencies and law enforcement “is diverse and wide-ranging,” and it is likely to expand because of pressure to coordinate investigations.<sup>60</sup>

Still, the extent of this collaboration ought not be overestimated, and Coleman asks it to prove too much. Laws requiring the notification of and cooperation with law enforcement apply to investigations of physical or sexual abuse, not generally to neglect or to less-severe allegations.<sup>61</sup> But the majority of child protection allegations and investigations are for neglect, not physical or sexual abuse. Nationally, only 26.8% of substantiated cases involve physical or sexual abuse, meaning the vast majority would not trigger mandatory law enforcement involvement.<sup>62</sup> Reported cases suggest that even some physical abuse investigations do not involve police officers or the expected sharing of information for law enforcement purposes, rendering law enforcement entanglement a “contingency [that] is certainly of secondary importance.”<sup>63</sup> As Wayne LaFave has pointed out, “[t]he police ordinarily need not be directly involved” in child protection investigations.<sup>64</sup> One nonlegal commentator has put it

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60. Coleman, *supra* note 11, at 492-96.

61. *E.g.*, TEX. FAM. CODE § 261.301(f), *quoted in* *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002). Although the line between allegations that must be shared and those that need not be shared varies by state, some line between severe and less-severe cases is common. *See, e.g.*, ARK. CODE § 12-18-504 (2012) (requiring reporting to law enforcement allegations of “severe maltreatment” only); CONN. GEN. STAT. § 17a-101b(c) (2012) (“sexual abuse or serious physical abuse” only); FLA. STAT. § 39.301(2) (2012) (“criminal conduct” only); GA. CODE § 19-7-5(e) (2012) (abuse only); 325 ILL. COMP. STAT. 5/7 (2012) (severe cases only, such as death, brain damage, skull fractures, torture of a child, or sexual abuse); IOWA CODE § 232.70 (2011) (sexual abuse only); MISS. CODE § 43-21-353(1) (2012) (sex abuse, serious physical injury, or other felony only); N.C. GEN. STAT. § 7B-307(a) (2011) (abuse only); N.H. REV. STAT. § 169-C:38 (2002) (sexual abuse, “serious bodily injury,” or other crime only); 23 PA. CONS. STAT. § 6365(c) (2012) (specifically referenced crimes such as homicide, sexual abuse, or serious physical injuries only).

62. *Supra* note 33 and accompanying text.

63. *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986). Some statutes presume police will infrequently join investigations of physical or sexual abuse. Texas law, for instance, provides that “[t]he inability or unwillingness of a local law enforcement agency to conduct a joint investigation” does not absolve a child protection agency of investigating. TEX. FAM. CODE § 261.301(g) (2011); *see also* FLA. STAT. § 39.301(2) (2012) (giving law enforcement discretion to accept or reject Florida Department of Children and Family Services reports for criminal investigation).

64. 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 10.3, at 105 (4th ed. 2010 update); *see also* Schulhofer, *supra* note 4, at 117 (permitting administrative and criminal sanctions for the same action “cannot by itself defeat an administrative scheme, if the administrative category is to exist at all”).

more strongly: “[C]hild welfare agencies bear almost the complete responsibility for investigating child abuse.”<sup>65</sup>

Second, even when law enforcement entanglement exists, the search or seizure at issue may not implicate the Fourth Amendment rights of the person who would bear any law enforcement consequences.<sup>66</sup> In *Camreta*, S.G. was seized and interrogated for two hours, but her father was arrested and charged with sexual abuse; S.G. faced no law enforcement consequences herself. *Camreta*’s argument to the Supreme Court evoked this fact, framing the question presented as the Fourth Amendment standard to be applied “when a witness is temporarily detained.”<sup>67</sup> This point affects searches and seizures of children only; searches and seizures of parents who are suspected of abuse or neglect, or of their homes, do implicate their Fourth Amendment rights.

Third, specific child protection investigation steps occur regardless of the veracity or severity of the allegation. For example, the *Investigations Practice Operational Manual* of the District of Columbia’s child welfare agency directs its investigators to “conduct a thorough investigation” into every allegation of child abuse or neglect.<sup>68</sup> Each allegation triggers a requirement “to interview and assess ALL children in the home,” and such interviews must include physical observations (including photographs “when applicable or appropriate”).<sup>69</sup> Social workers must “examine” all “family living areas,” “[d]etermine sleeping arrangements for all household members,” and interview all household members.<sup>70</sup> All these steps must occur whenever somebody alleges that a child in a home has been abused or neglected. That allegation could be severe (repeated sexual abuse) or relatively minor (if a parent leaves a ten-year-old child alone for several hours). The allegation could be from a credible source (a pediatrician who has a record of making accurate allegations and who saw the child in question immediately prior to making the allegation) or a less credible one (an anonymous caller, a neighbor, a

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65. RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* 53 (1996).

66. The special needs doctrine’s focus on law enforcement consequences to the individual seized is discussed *infra* Part III.C.

67. Brief for Petitioner at i, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454 and 09-1478), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_1454\\_PetitionerBobCamreta.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1454_PetitionerBobCamreta.authcheckdam.pdf).

68. D.C. CHILD & FAMILY SERVS. AGENCY, *supra* note 40, at 76.

69. *Id.* at 77.

70. *Id.* at 86.

family member, or an ex-partner of the parent who is in an ongoing dispute with that parent). The allegation may be the latest in a pattern of allegations from multiple sources about a family, or it may be the first allegation. None of these variables affects the steps to be taken: search every room of the home and interview all children and adults in that home.

This phenomenon distinguishes child protection investigations from law enforcement investigations, in which the probable cause standard requires officials to evaluate a tipster's "veracity," "basis of knowledge," and "overall reliability" before determining whether probable cause exists for a search or seizure in a criminal investigation.<sup>71</sup> No similar factual evaluation generally occurs in child protection cases. By removing discretion from the decision to investigate particular tips, the child protection system broadens the scope of invasive investigations beyond what is necessary to protect children. In an extreme example, a woman in a mental hospital reported that her brother-in-law (with whom she had no contact for eighteen months and regarding whom she had previously made a false allegation) was in a satanic cult and planned to murder his two-year-old son on the Fall Equinox.<sup>72</sup> Despite the informant's unreliability and lack of a basis of knowledge, authorities investigated the allegation, removed both the children from their parents, and subjected the children to abuse examinations (including body cavity examinations). The children stayed in state custody for 2½ months before being returned to their parents—with no evidence of any physical or sexual abuse discovered.<sup>73</sup> Less-extreme examples abound. A leading study of a set of child protection investigations found that to a large "extent . . . the system seems to be used for family and other quarrels," that is, ex-partners, family members, or neighbors reporting abuse or neglect based on spite rather than evidence.<sup>74</sup> The study found such reports less likely to be substantiated than others, yet they triggered the same invasive investigations.<sup>75</sup>

Although child protection law and policy prevent officials from exercising the discretion to decline to investigate particular reports, child protection investigators have a significant amount of discretion

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71. *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

72. *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126, 1131-32 (9th Cir. 2000).

73. *Id.* at 1132-35. The extreme state actions in *Wallis* should suffice to prove the search and seizure unreasonable even if the special needs test applied.

74. WALDFOGEL, *supra* note 33, at 19.

75. *Id.*

regarding when, where, and how to investigate, and they can use that discretion to invade liberty more. Camreta, for instance, chose to interview S.G. at her school, during the school day, and without contacting her mother first, and—at least as alleged by S.G.—chose to keep S.G. in a room with him until she agreed that her father had molested her. Other reported cases reflect the wide variety of searches performed by child protection investigators following their interpretation of case-specific facts. Some are quite disturbing. One investigator responded to a report that a six-year-old girl exhibited some sexualized behavior and decided to take photographs of the child's vagina and buttocks, despite having no training in physically examining children for evidence of sexual abuse. The investigator made the child's mother "spread [her] labia and buttocks" so that the investigator could take pictures.<sup>76</sup> The investigator's supervisor testified that this action was within the investigator's discretion.<sup>77</sup> The child soon developed anxiety symptoms that required counseling, and her mother was reduced to tears; no evidence of abuse was found.<sup>78</sup>

Fourth, it is exceedingly difficult to discern the truth about specific allegations, and investigative steps taken by child protection authorities can hinder the search for truth. Did Camreta pressure S.G. into making false allegations, which she recanted when his high-pressure interrogation ended? Or did S.G. tell the truth to Camreta, only to later change her story to protect her family or because of pressure from either or both of her parents? Quite simply, we will never know. If we assume that Greene was guilty of abusing his daughter, the facts of the interrogation (repeated, aggressive, leading questions of a nine-year-old child afraid she would be kept from going home) and S.G.'s subsequent recantation would make it difficult for the government to meet its burden of proving that Greene did, in fact, abuse S.G. These facts might make S.G.'s earlier statements inadmissible.<sup>79</sup> At the least, they would provide fertile grounds for cross-examination of both S.G. and Camreta and make for an

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76. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 398-99 (5th Cir. 2002).

77. *Id.* at 399.

78. *Id.*

79. *See Idaho v. Wright*, 497 U.S. 805 (1990). *Wright* ruled a 2½-year-old child's out-of-court statements inadmissible when they followed leading questions by a doctor. The Court did not require a set of fixed procedural safeguards, *id.* at 818, but found the particular statements at issue lacked sufficient guarantees of trustworthiness to satisfy the Confrontation Clause, *id.* at 827. *Wright* did not address whether such statements would be admissible under rules of evidence in a civil case.

uncertain trial. Moreover, S.G.'s statements to Camreta were not recorded, making independent verification of both her statements and his questioning impossible. Effective investigative techniques are essential to both identifying child abuse and neglect and to gathering convincing evidence so that the state may act on it when appropriate. States (including Oregon, where *Camreta* occurred) have developed detailed guidelines to ensure appropriate techniques.<sup>80</sup>

*C. Ninth Circuit and Supreme Court Litigation's Focus on Whether It Was Primarily a Law Enforcement or Child Protection Seizure*

The Ninth Circuit's opinion, and Camreta's and S.G.'s briefs to the Supreme Court, focused precisely where the special needs doctrine directed them to focus: on the presence of a law enforcement purpose to Camreta and Alford's seizure of S.G. In this focus, the Ninth Circuit opinion and Supreme Court litigation illustrate some of the deeper problems in that doctrine.

Judge Marsha Berzon's Ninth Circuit opinion concluded that the extensive entanglement between civil and criminal child abuse investigations generally, and in the investigations regarding S.G. and her father specifically, rendered the special needs doctrine inapplicable.<sup>81</sup> But the opinion also expressed some discomfort with that result, acknowledging that protecting children through the civil foster care system and criminally sanctioning child abusers are both "governmental activity of the highest importance."<sup>82</sup> Despite the great importance of both civil and criminal purposes, the existence of only the latter determined the Ninth Circuit's result.

Camreta's arguments to the Supreme Court in favor of applying the special needs doctrine, and S.G.'s rebuttals, also illustrate some of the difficulties created by the special needs binary. Camreta offered one argument relying on that binary, focusing on the lack of law enforcement consequences for S.G.,<sup>83</sup> then a second argument that explicitly sought to merge criminal and civil investigations.<sup>84</sup> The first

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80. SHERRY BOHANNAN ET AL., CRIME VICTIMS' ASSISTANCE SECTION, OR. DEP'T OF JUSTICE, OREGON INTERVIEWING GUIDELINES (2d ed. 2004), available at <http://www.doj.state.or.us/victims/pdf/orinterviewingguide.pdf>.

81. *Greene v. Camreta*, 588 F.3d 1011, 1025-30 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

82. *Id.* at 1029.

83. Brief for Petitioner, *supra* note 67, at 19-21, 27-29. Camreta also offered an analogy to school search cases, which he argued lessened children's expectation of privacy. *Id.* at 30-34. That argument is discussed *infra* note 141.

84. Brief for Petitioner, *supra* note 67, at 30-34.

argument ignores crucial elements of S.G.'s story, and the second runs headlong into the special needs doctrine's binary.

Camreta first argued that S.G. was a mere witness, an argument that only makes sense if one focuses entirely on criminal consequences. Camreta relied on an earlier special needs case, *Illinois v. Lidster*, that upheld police officers' right to briefly stop motorists to inquire whether they were witnesses to a crime at the location of the stop, and Camreta argued that like those motorists, S.G. was a potential witness to a crime and not a suspect.<sup>85</sup> If one considers only the criminal investigation, this analogy has some force. But S.G. faced much more serious consequences than being made a witness in a criminal case. Her seizure and interrogation led the state to forcibly remove her and her sister from both her father and her mother and to place them in state custody for several weeks. S.G.'s seizure and interrogation thus led directly to the emotional harms that are caused when the state separates children from their parents, deprived her of physical liberty by placing her in state custody, and subjected her to the various well-documented risks of living in foster care.<sup>86</sup> Those concerns, however, all fall on the noncriminal side of the special needs binary, preventing S.G. from making those arguments without also attacking the special needs doctrine that had granted her victory in the Ninth Circuit. Rather than argue those points, S.G. was forced to distinguish the motorist-witness case on other grounds: the length and character of the seizure.<sup>87</sup> These factors relate to the reasonableness of the seizure, an analysis that is only relevant when the special needs doctrine applies.<sup>88</sup>

Camreta next argued that states should be permitted to follow the "best practice" of interviewing potential child abuse victims in "a single joint interview with law enforcement and child-protective caseworkers present."<sup>89</sup> Joint interviews reflect the understanding that authorities can emotionally traumatize a child by forcing them to tell

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85. *Id.* at 19-21, 37-38 (citing *Illinois v. Lidster*, 540 U.S. 419, 425 (2004)). The United States, as amicus curiae, similarly argued that absent a "serious threat of prolonged incarceration or other punishment," S.G.'s seizure did not violate her Fourth Amendment rights. Brief for United States as Amicus Curiae at 26, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1451 and 09-1478), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_1454\\_PetitionerAmCuUSA.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1454_PetitionerAmCuUSA.authcheckdam.pdf).

86. Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 676-77 (2006).

87. Brief for Respondents, *supra* note 50, at 55-56.

88. See *infra* note 156 and accompanying text.

89. Brief for Petitioner, *supra* note 67, at 28-29.

and retell to multiple audiences how a close family member physically or sexually abused them.<sup>90</sup> Such teams could also include expert forensic interviewers, whose involvement could prevent false allegations or doubtful statements that flow from poorly conducted interviews.<sup>91</sup> But such multidisciplinary collaboration requires breaking down lines between law enforcement and other agencies—the same lines that are bolstered by the special needs test. Camreta’s brief left unclear exactly how the concern with higher-quality interviewers ought to fit into the Fourth Amendment analysis.

Like Camreta’s first argument, S.G. framed her presentation to the Court based on the special needs binary. The first sentence in her Fourth Amendment argument emphasized the law enforcement entanglement, noting that this case involved “an armed, uniformed sheriff’s deputy.”<sup>92</sup> S.G. focused on the extensive law enforcement entanglement in the particular search to argue against the special needs doctrine’s application.<sup>93</sup>

Several Justices’ questions during oral argument suggested some discomfort with the analysis created by this binary. Justice Ruth Bader Ginsburg asked, in essence, what was so special about a law enforcement purpose: “Suppose we take the sheriff, deputy sheriff, out. The only one who comes to the school and asks to talk to this child is the caseworker from the [child protection agency]?”<sup>94</sup> Counsel’s answer, taken straight from the special needs doctrine, was that “it would depend on . . . whether or not there was police entanglement.”<sup>95</sup> This answer, though rooted in the Supreme Court’s own, oft-repeated holdings, provoked an extended dialogue, in which

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90. Accordingly, Congress has urged states to use multidisciplinary teams to investigate abuse allegations. 42 U.S.C. § 5106a(a)(2)(A) (2006 & Supp. IV 2011), *cited in* Brief for Petitioner, *supra* note 67, at 28.

91. See Lindsay E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 *AGGRESSION & VIOLENT BEHAV.* 195, 196 (2006) (noting that poorly conducted interviews can lead to false allegations). That Camreta relied on this authority, Brief for Petitioner, *supra* note 67, at 29, is not without irony; Camreta and Alford did not interview S.G. through a multidisciplinary team or a trained forensic interviewer, and S.G. alleged that Camreta used precisely the kind of bad interviewing techniques that lead to false allegations. Moreover, S.G. alleged that her mother would have consented—and, in fact, did consent (though Camreta and Alford did not act on her consent)—to an appropriate multidisciplinary interview, which would have made any Fourth Amendment issues moot. Brief for Respondents, *supra* note 50, at 68-69.

92. Brief for Respondents, *supra* note 50, at 43.

93. *Id.* at 71-74.

94. Transcript of Oral Argument at 39, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1454 and 09-1478).

95. *Id.*

Justices Samuel Alito, Stephen Breyer, and Antonin Scalia proposed various hypotheticals suggesting that S.G.'s proposed test led to insupportable lines.<sup>96</sup> A school nurse could likely take a child into their office, but S.G. argued that an outside official could not do so "to deal with situations that are not related to the school."<sup>97</sup> S.G. conceded that an outside nurse could bring the child to their office to address the child's possible illness,<sup>98</sup> leading to this ultimate question from Justice Scalia: "[L]ikewise, it's not a nurse, but it's a social worker who's brought in to interrogate the child about something else that is going to very much harm that child, why is that any different?"<sup>99</sup> Counsel's answer: "Well, Your Honor, because child welfare investigations are also harmful to children. And when—when a child is asked, interrogated about whether or not her father touches her inappropriately, that's not a neutral action. Whether or not she has been abused that causes trauma to the child."<sup>100</sup>

The striking things about this dialogue are, first, how the Justices looked for a test other than law enforcement entanglement and, second, how nothing in the dialogue seemed to provide an adequate test. Counsel's final answer that child welfare investigations are different because the investigations themselves harm children may be right. But school disciplinary actions can also harm children.<sup>101</sup> And the law generally views medical treatment for an illness (an example identified as acceptable by Justice Scalia and S.G.'s counsel) as an infringement on bodily integrity and thus a battery unless done with consent.<sup>102</sup> Oral argument thus ended with several Justices hinting that the special needs framework may not suffice to answer Fourth Amendment questions in child protection cases and with the dialogue failing to identify satisfying alternative tests. The Court declined to discuss these issues further, deciding the case on jurisdictional grounds.<sup>103</sup>

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96. *Id.* at 40-46.

97. *Id.* at 40-41.

98. *Id.* at 43.

99. *Id.* at 43-44.

100. *Id.* at 44.

101. *See, e.g.*, RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO EVIDENCE, ZERO TOLERANCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf> (criticizing strict disciplinary policies).

102. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 710 (4th ed. 2010).

103. Transcript of Oral Argument, *supra* note 94, at 51.



*D. Circuit Court Opinions in Other CPS Search and Seizure Cases  
Also Focus on the Special Needs Test*

The *Camreta* litigants were not alone in their focus on law enforcement entanglement. Synthesizing various circuit courts' rulings in child protection cases, Wayne LaFave's Fourth Amendment treatise focuses on the existence of any such entanglement. When police are not included in the search, as they often are not, and when a child abuse investigation is "sufficiently disentangled from general law enforcement purposes," then the "valid administrative purpose" of protecting children from abuse creates a special need justifying a lower standard than probable cause.<sup>104</sup> Otherwise, they would not qualify for the lower standard applied via the special needs doctrine.

LaFave accurately accounts for how at least five circuit courts (including the Ninth Circuit, in *Camreta* and earlier decisions) have addressed these cases, with a particular focus on whether they fall on the special needs or normal law enforcement side of the special needs doctrine's bright line.<sup>105</sup> The United States Court of Appeals for the Fifth Circuit's 2008 decision in *Gates v. Texas Department of Protective and Regulatory Services* illustrates the point.<sup>106</sup> Investigating allegations that Gary Gates physically abused some or all of his thirteen children, child protection investigators took several steps that involved law enforcement. They took one child to a "child

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104. LAFAVE, *supra* note 64, § 10.3, at 106.

105. See *Calabretta v. Floyd*, 189 F.3d 808, 816-17 (9th Cir. 1999) (explaining why it would not apply *T.L.O.* to a child protective search).

106. 537 F.3d 404 (5th Cir. 2008). The Second Circuit has illustrated the same point, declaring a vaginal and anal examination of a five-year-old child that revealed no evidence of abuse unconstitutional because no special need existed in that particular case, though it suggested such a need might exist in a future case. *Tenenbaum v. Williams*, 193 F.3d 581, 588-91, 603-04 (2d Cir. 1999) (summarizing the facts of the underlying search and seizure). So has the Seventh Circuit, applying *T.L.O.* to a child protection worker's search of a child's body for injuries on public school premises absent any law enforcement involvement or purpose. *Darryl H. v. Coler*, 801 F.2d 893, 900-02 (7th Cir. 1986); see also *Jones v. Hunt*, 410 F.3d 1221, 1227-29 (10th Cir. 2005) (discussing, but not deciding, whether *T.L.O.* applied because the alleged conduct would have violated any Fourth Amendment standard); *J.B. v. Washington County*, 127 F.3d 919, 929-30 (10th Cir. 1997) (noting the special needs question, but concluding that probable cause existed and so the search was valid regardless of the doctrine's application).

*Tenenbaum* received prominent discussion in a later edition of the seminal work, *The Best Interests of the Child: The Least Detrimental Alternative*. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996). They conclude that *Tenenbaum's* search and seizure "traumatized both [the daughter] and her parents" and had "no justification." *Id.* at 124. Goldstein and his coauthors' broader comments that suggest a significant change in child protection investigations are discussed *infra* note 307 and accompanying text.

advocacy center” interview that was witnessed by child protection and law enforcement authorities.<sup>107</sup> They also searched the Gates’ family home with deputy sheriffs.<sup>108</sup> The Fifth Circuit concluded that the search of the Gates’ home “was closely tied with law enforcement” and thus the special needs doctrine did not apply.<sup>109</sup>

The special needs doctrine’s current iteration has failed to lead to results that create clear rules or justifiable distinctions between the wide variety of child protection searches and seizures. The United States Court of Appeals for the Seventh Circuit has distinguished between child protection searches and seizures that take place at public schools (and where authorities have a freer hand within the Seventh Circuit) and those at private schools. Seventh Circuit cases have created that distinction without analyzing the law enforcement entanglement (or lack thereof).<sup>110</sup> And in another setting, the Seventh Circuit has adjudicated a Fourth Amendment child protection case challenging state officials’ seizure of a child from his home without reference to its prior precedent or to the special needs doctrine.<sup>111</sup> The United States Courts of Appeals for the Second and Tenth Circuits have explicitly left open the question of whether the special needs doctrine applies to any child protection searches, or only to those with law enforcement involvement.<sup>112</sup>

*E. Special Needs Doctrine’s Failure To Provide Satisfying Answers in Camreta and Other Child Protection Search and Seizure Cases*

If courts followed the special needs doctrine in *Camreta*, they might reasonably reach the same results as the Ninth Circuit and several other circuit courts. I agree with that result, but the reasoning would be unsatisfying. It would vindicate S.G.’s claim based on a

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107. *Gates*, 537 F.3d at 413.

108. *Id.* at 414. The sheriff’s office may also have been called because Texas law requires child protection authorities to notify law enforcement authorities of all child abuse reports and to engage law enforcement in a joint investigation of allegations of immediate risk of physical abuse—as was the case in this investigation. *Id.* at 423 (citing TEX. FAM. CODE §§ 261.105(b), .301(f)).

109. *Id.* at 424. In an earlier case, the Fifth Circuit had held that Texas law entangled sex abuse investigations with law enforcement, even without law enforcement participation in a search, by requiring notification of cooperation with law enforcement for such investigations. *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002).

110. *Michael C. v. Gresbach*, 526 F.3d 1008, 1018 (7th Cir. 2008).

111. *Brokaw v. Mercer County*, 235 F.3d 1000, 1009-12 (7th Cir. 2000) (discussing a Fourth Amendment claim without reference to the special needs doctrine).

112. *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999); *J.B. v. Washington County*, 127 F.3d 919, 919 (10th Cir. 1997).

factor—Alford’s involvement and presence—that was of little importance to S.G. herself. It would fail to provide a meaningful analysis of a significant purpose of child protection searches and seizures: investigative steps to determine if the state should infringe on the fundamental right of family integrity. It would instead elevate the state’s law enforcement purpose above the civil child protection purpose despite the fact that both represent, as the Ninth Circuit noted, “governmental activity of the highest importance.”<sup>113</sup> It would draw a line between those two highly important purposes when the current trend rightly seeks to merge those purposes into a united investigation to minimize the number of interviews of potential child victims.<sup>114</sup> And it would entirely ignore the millions of child protection investigations (probably the majority of such investigations) that lack a law enforcement component, yet implicate the same fundamental rights. In so doing, it would lead to odd, if not perverse, results: it would be easier for child protection authorities to invade family privacy to investigate allegations of neglect, which are the kind of allegations that do not trigger automatic requirements of reporting to law enforcement,<sup>115</sup> than it would be to investigate allegations of more serious abuse.<sup>116</sup>

Applying the current special needs doctrine could also plausibly have led to a different result in *Camreta*. As *Camreta* argued, S.G., and children in child protection investigations more generally, do not face criminal consequences, thus making them appear more like potential witnesses than targets of ordinary law enforcement activity. This analysis might lead to a different result than the Ninth Circuit reached in *Camreta*, but would not change the result in child protection investigations of parents’ homes, as in *Gates*, where law enforcement was also involved in those searches. This result, too, makes little sense. It would unduly prioritize parents’ privacy interests over

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113. *Greene v. Camreta*, 588 F.3d, 1011, 1029 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

114. Barbara Bennett Woodhouse has suggested that avoiding duplicative interviews both reduces the risk of traumatizing children through forced discussions of potential abuse and improves the quality of interviews. Barbara Bennett Woodhouse, *Constitutional Rights of Parents and Children in Child Protective and Juvenile Delinquency Investigations* 13 (Sept. 28, 2011) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1934868>.

115. *See supra* note 61 and accompanying text.

116. *Cf.* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994) (“If taken seriously, this [focus on criminal purpose] would mean that, as between two equally unintrusive but low-probability searches, the search justified by a *more* compelling purpose—criminal enforcement to protect person and property—is *less* constitutionally proper.”).

children's, even though it is children who are at risk of being taken into state custody, and it would prioritize the potential criminal consequences for parents over the loss of their children to foster care.

Neither approach furthers sound analysis of child protection investigations. Neither accounts for the immense family integrity interests at stake for both children and parents. Neither incentivizes higher-quality interviews than those in *Camreta* by prioritizing high-quality forensic interviewing techniques. And neither requires child protection agencies to adjust their one-size-fits-all approach to investigations and to calibrate the level of investigation to the specific allegation and its credibility.

### III. SPECIAL NEEDS DOCTRINE'S UNJUSTIFIED LINE AROUND LAW ENFORCEMENT SEARCHES AND SEIZURES

The difficulties apparent in *Camreta* and other child protection cases result directly from the special needs doctrine developed by the Supreme Court. That doctrine requires one to discern the “primary . . . programmatic purpose”<sup>117</sup> of a particular search and seizure: “the normal need for law enforcement”<sup>118</sup> or some other end. This Part will explore how that binary developed without ever adequately justifying what distinguishes law enforcement searches and seizures from all other searches or seizures. The absence of a law enforcement purpose links the various types of cases that fall under the special needs rubric: home safety inspections, suspicionless drug testing, school discipline searches, highway checkpoints, and others.<sup>119</sup> That absence is the threshold criteria for all special needs cases, and, as such, the Court's failure to provide some insight into it is glaring.

Despite failing to justify the bright line around law enforcement searches and seizures, the special needs case law provides some support for the reforms proposed in Part IV. The case law focuses on the constitutional consequences that result from particular searches and seizures, which form one of the bases for the proposal to redraw the special needs' bright line around all searches and seizures that threaten a significant invasion of fundamental constitutional rights.

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117. *Ferguson II*, 532 U.S. 67, 81 (2001).

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

119. Different types of special needs cases do involve somewhat different analyses; for instance, executive branch discretion may be less concerning in a school discipline search, which depends on giving school officials discretion to respond to varied circumstances, than it is when applying a blanket drug test or checkpoint regime to all people meeting certain criteria. *Primus*, *supra* note 14, at 271 (contrasting special subpopulation and dragnet searches).

And the case law does discuss the value of some limitation on government officials' discretion, an important value that a reformed special needs doctrine should reflect.

This Part will trace the special needs doctrine from its origins in *Camara v. Municipal Court* through its naming in *T.L.O.* and its development in the quarter-century since, highlighting both the absence of a justification for the bright line around law enforcement searches and seizures and the presence of other themes relevant to a reformed doctrine.

A. *Origins: Camara v. Municipal Court*

A critical analysis of the Court's first modern administrative search case, *Camara*, supports three points important to this Article's argument.<sup>120</sup> First, *Camara* demonstrates the importance of the constitutional consequences that result from a particular search or refusal to consent to such a search. Second, *Camara's* attempt to distinguish between criminal investigations and health and safety inspections shows the lack of a historical basis for a bright line around the former. Third, *Camara* highlights the importance of evaluating executive discretion when determining whether a warrant is important, a key point missing from the current special needs doctrine.

*Camara's* holding relates directly to the consequences of a proposed administrative search: Roland Camara faced a criminal prosecution for refusing to permit a municipal employee to inspect his home for compliance with the local housing code. The Supreme Court held that one could not be criminally punished for refusing to consent to a warrantless search of one's home, a holding that followed the dicta of an earlier case, which indicated that "[t]he right to privacy in the home holds too high a place in our system of laws to justify" a criminal consequence for refusal to permit an administrative actor's warrantless entry.<sup>121</sup>

Before reaching that conclusion, the Court analyzed how the proposed health and safety inspection might trigger different concerns than a criminal investigation, an analysis so muddled that it illustrates the absence of a principled line around law enforcement purposes. The Court first wrote as if it would deny the entire concept of administrative searches and treat them identically to criminal searches: "It is surely anomalous to say that the individual and his private

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120. 387 U.S. 523 (1967).

121. *District of Columbia v. Little*, 339 U.S. 1, 7 (1950).

property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.<sup>122</sup> But the *Camara* Court then significantly limited its holding, acknowledging the importance of such searches and that “routine periodic inspections of all structures” were necessary to enforce reasonable municipal regulations.<sup>123</sup> This necessity correlated to a relatively small privacy interest “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.”<sup>124</sup> *Camara* thus simultaneously suggests that the noncriminal purpose of a search does not justify diminishing Fourth Amendment protections and that a noncriminal purpose reduces the privacy interest to the point that individualized suspicion is not necessary, the seed of the doctrine later named “special needs.”

*Camara* overruled a 1959 health inspection case, *Frank v. Maryland*,<sup>125</sup> and tried, unpersuasively, to rely on statements by the *Frank* majority and dissent to support a distinction between law enforcement and other types of searches.<sup>126</sup> Although the *Frank* majority had suggested such a distinction,<sup>127</sup> its view was overruled in *Camara*, and the *Frank* dissent (whose viewpoint became the majority viewpoint in *Camara*) merely said that the facts necessary to establish probable cause would differ in a health inspection case from those in a criminal investigation.<sup>128</sup> The relevant sections of both the majority and dissent in *Frank* cited an earlier case,<sup>129</sup> *Boyd v. United States*,<sup>130</sup> but disputed its meaning.<sup>131</sup> *Boyd* itself was ambiguous regarding which

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122. *Camara*, 387 U.S. at 530.

123. *Id.* at 535-36.

124. *Id.* at 537.

125. 359 U.S. 360 (1959). *Frank* held that a criminal conviction for refusing a warrantless health inspection of a home did not violate the Fourth or Fourteenth Amendments. *Id.* at 373. *Camara* explicitly overruled this holding. 387 U.S. at 528.

126. *Camara*, 387 U.S. at 537-38.

127. The *Frank* Court opined that “the safeguards necessary for a search of evidence of criminal acts” would “greatly hobble[.]” health inspections. 359 U.S. at 372, *quoted in Camara*, 387 U.S. at 537.

128. *Frank*, 359 U.S. at 383 (Douglas, J., dissenting) *quoted in Camara*, 387 U.S. at 538. Justice William Douglas’s dissent also argued that the Fourth Amendment provides meaningful protections beyond criminal investigations, describing anything else as a “fallacy.” *Id.* at 377.

129. *Id.* at 372-73 (majority opinion); *id.* at 383 (Douglas, J., dissenting).

130. 116 U.S. 616 (1886). *Boyd* referred to “official acts and proceedings” that triggered the warrant requirement. *Id.* at 624.

131. The *Frank* majority distinguished “official acts and proceedings” from the health inspections at issue, 359 U.S. at 372-73 (majority opinion), while the dissent treated the

types of searches and seizures would trigger a warrant requirement. On one hand, *Boyd* applied the warrant and probable cause requirements to a *civil* case involving forfeiture of goods that the government alleged to have been imported without payment of the proper customs duty.<sup>132</sup> On the other hand, the *Boyd* Court also discussed how the forfeiture proceeding, “though technically a civil proceeding, [was] in substance and effect a criminal one,” or at a least a “*quasi* criminal” one, because evidence justifying forfeiture would also have justified criminal sanctions for defrauding the government of revenue.<sup>133</sup> Whatever lesson might be taken from *Frank* and *Boyd*, it is not, as *Camara* asserted, that a clear Fourth Amendment distinction exists between civil and criminal searches and seizures.

*Camara* did impose a warrant requirement for a reason that continues to resonate (even if the present special needs doctrine avoids it): some check on executive branch discretion must exist to protect individual privacy, and only a warrant decision by a “disinterested party” could suffice.<sup>134</sup> Limiting executive discretion is undoubtedly an essential purpose of the warrant requirement,<sup>135</sup> and the Court discussed the level of discretion permitted by varying administrative schemes in a variety of cases decided in the fifteen years following *Camara*.<sup>136</sup>

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health inspection as precisely within the *Boyd* “official acts and proceedings” category, *id.* at 383 (Douglas, J., dissenting).

132. The government had acted under a statute permitting it to obtain business records of importers as long as the demand occurred in “suits and proceedings other than criminal.” *Boyd*, 116 U.S. at 619 (quoting Law of June 22, 1874, ch. 391, § 5, 18 Stat. 187 (1874)). This view of *Boyd* comports with the Framers’ concern about British “writs of assistance,” which permitted searches of any location without probable cause and without any criminal purpose. Schulhofer, *supra* note 4, at 115.

133. 116 U.S. at 634. This language is also tied to the specific litigation purpose for which the government sought documents in *Boyd*: the government filed a civil forfeiture suit, at least partly as a vehicle to demand production of documents regarding the items seized, that could have incriminated the individuals involved, thus raising Fifth Amendment concerns. *Id.* at 634-35; *see also id.* at 639 (Miller, J., concurring) (“[T]he effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself.”).

134. A government could obtain a warrant “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Camara*, 387 U.S. at 538. Schulhofer described this flexible standard as “antithetical to the traditional conception of ‘probable cause.’” Schulhofer, *supra* note 4, at 91; *see Camara*, 387 U.S. at 532-33.

135. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974).

136. These cases are discussed in some detail by Primus, *supra* note 14, at 268-70, and underscore the essential point from *Camara*: that the level of discretion held by a government official under a particular statutory or regulatory scheme is important in

*B. T.L.O. Special Needs Test*

Eighteen years after *Camara*, Justice Harold Blackmun gave the special needs doctrine its name and stated the rule that would be applied in future cases in a concurring opinion in *T.L.O.*: “Only in those exceptional circumstances in which special needs, beyond 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,”<sup>137</sup> that is, to determine whether a search meets Fourth Amendment “reasonableness” standards rather than demand a warrant and probable cause. *T.L.O.* upheld a high school assistant principal’s search of a fourteen-year-old student. The decision (including Justice Blackmun’s concurrence) lauded school officials’ use of discretion, and thus broke with *Camara*’s focus on a warrant requirement as a check on executive branch discretion. Justice Blackmun was also silent regarding the consequences of the challenged search. Justice Blackmun was consistent with *Camara* on other central points: he articulated a bright line between law enforcement purposes and all other purposes without any adequate justification. He also articulated a test that has the potential to permit the modern administrative state’s operation and to prevent its less-invasive actions from providing cover for its more invasive actions.

In *T.L.O.*, an assistant principal suspected T.L.O. of smoking a cigarette in the school bathroom, which was a violation of school rules, but not a crime. He took T.L.O. to his office and searched her purse, finding both a pack of cigarettes and rolling papers. Suspecting, based on the rolling papers, that her purse might contain more evidence of illegal drug possession, a crime, he searched further and found marijuana, drug paraphernalia, and documents implicating T.L.O. in drug dealing. The assistant principal then turned the evidence over to the police. The case reached the Supreme Court through litigation over T.L.O.’s motion to suppress the evidence found by the assistant principal in the state’s ensuing delinquency case against her.<sup>138</sup> Finding a warrant requirement and probable cause inapplicable to searches

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determining whether a detached and neutral magistrate must issue a warrant. *See also* Schulhofer, *supra* note 4, at 93-101 (summarizing developments in the law between *Camara* and *T.L.O.*).

137. 469 U.S. 325, 351 (1984) (Blackmun, J., concurring).

138. *Id.* at 329 (majority opinion).



motivated by school discipline, which required quick, flexible, and informal action, the Court approved the search.<sup>139</sup>

The most important difference between *T.L.O.* and *Camara* rests in their treatment of the warrant requirement. While *Camara* looked to the warrant requirement as a means to limit executive branch officials' discretion, *T.L.O.* saw it as an obstacle to the exercise of executive branch officials' discretion in a situation where such discretion is important.<sup>140</sup> The search of T.L.O.'s purse qualified as a special need beyond the need for law enforcement because it was incident to establishing discipline and maintaining order in schools, tasks which require immediate action and which a warrant requirement would impede, even though children did have some expectation of privacy at school.<sup>141</sup> Although analysis of how an administrative scheme can cabin officials' discretion and thus replace a judicial warrant continues in business regulation cases,<sup>142</sup> *T.L.O.* represented a sharp shift in which limiting discretion no longer became a requirement of avoiding a warrant procedure.

But the special need of prompt school discipline only partly explains *T.L.O.*; the absence of a law enforcement purpose is equally important. It is certainly true that the warrant requirement would interfere with school officials' actions to enforce school rules. But it also interferes with police officers' criminal investigations—

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139. *Id.* at 347-48.

140. See Primus, *supra* note 14, at 278 (describing dragnet searches as those that required some mechanism to "cabin[] executive discretion" and special subpopulation searches as those that "required that the Court give executive officials the discretion necessary to pick out certain individuals for differential treatment").

141. *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring); see also *id.* at 338-41 (majority opinion). Primus categorizes *T.L.O.* as a special subpopulation search, because children at school have reduced expectations of privacy. Primus, *supra* note 14, at 270-71. Indeed, the Court has sometimes suggested that children have less privacy rights at school. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) ("[W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." (citation omitted) (quoting *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))). Nonetheless, a generalization that *T.L.O.*'s holding applies equally to *any* search or seizure of a child at school, regardless of any connection to maintaining discipline, takes *T.L.O.* a step too far. Henning, *supra* note 24, at 68-69. The state officials pushed exactly that broad a generalization in *Camreta*, arguing that children's lessened privacy in school justified the seizure of S.G. Brief for Petitioner, *supra* note 67, at 30-34. A child protection investigation does not fit well into *T.L.O.*'s focus on prompt discipline: the investigation responds to out-of-school allegations, not to any student behavioral issues in school, and not to any curricular or pedagogic purposes.

142. E.g., *New York v. Burger*, 482 U.S. 691 (1987). *Burger*'s potential lessons for special needs cases are discussed more broadly *infra* notes 233-235 and accompanying text.

interference the law accepts.<sup>143</sup> As important as public education is, it would be hard to argue that it is so much more important than public safety and criminal justice that it should be excepted from the Fourth Amendment limitations imposed on criminal investigations. The difference between the two types of searches, therefore, rests on the level of intrusion into protected privacy interests. And by the plain language of the special needs doctrine, it is not only the presence of a special need, but also the absence of a law enforcement purpose that establishes such a limited intrusion.

Like *Camara*, *T.L.O.* failed to explain what it is about normal law enforcement searches that makes them so special that only individuals subject to them should enjoy the fullest Fourth Amendment protections. Justice Blackmun's opinion identified non-law-enforcement needs; his examples included the need to police the border and to ensure an officer's safety during a *Terry* stop-and-frisk,<sup>144</sup> but did not justify the general rule. His only reference to law enforcement's special status is an oblique reference to *Camara's* language about searches not "aimed at the discovery of evidence of crime."<sup>145</sup> Moreover, both Justice Blackmun's concurrence and the plurality ignored the law enforcement consequence that actually resulted from the search: a delinquency case against T.L.O. The Court did not address whether the assistant principal intended to involve law enforcement at the time he extended his search or only decided to do so after completing the search.<sup>146</sup> It is certainly plausible, if not likely, that when the assistant principal decided to search T.L.O.'s purse further, he did so intending to find evidence of a crime and turn it over to law enforcement, thus transforming the purpose of a search from a school discipline search to one that also had law enforcement purposes. But the plurality simply concluded that the assistant principal had reasonable suspicion to search T.L.O.'s purse for more evidence of drugs, without considering whether that search had a law

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143. *Cf. Olmstead v. United States*, 277 U.S. 438, 479 & n.12 (1928) (Brandeis, J., dissenting) (noting that the "beneficent" law enforcement purpose is "immaterial" to the constitutionality of a warrantless wiretap and favorably quoting the argument that "it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government").

144. *T.L.O.*, 469 U.S. at 352.

145. *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967). Justice Blackmun cited the page of *Camara*, including the quoted language, without explanation as to what exactly on that page he relied upon. *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring). Justice Blackmun's text prior to this cite related to roving United States Border Patrol stops, which are not discussed in *Camara*. *Id.*

146. *See Schulhofer, supra* note 4, at 101 (criticizing *T.L.O.* on similar grounds).

enforcement purpose.<sup>147</sup> Justice Blackmun's concurrence did not even address this issue. *T.L.O.* thus left unexplored the question of how to determine the validity of a search that could have had both law enforcement and school disciplinary purposes, and at which point the latter serves as a subterfuge for the former—questions that have become more important as school discipline and law enforcement have become increasingly entangled.<sup>148</sup>

### C. *Special Needs Test Applied*

Since *T.L.O.*, several developments have occurred. First, the Supreme Court has applied the special needs test repeatedly, making it “the official formulation of the threshold inquiry” and essential to the results in administrative search cases.<sup>149</sup> Second, the Supreme Court has refocused the special needs doctrine on the consequences that result from a particular search and seizure, and not simply the search and seizure itself. The present special needs doctrine is best understood with this gloss on Justice Blackmun's language: the presence or absence of a law enforcement consequence to the individual who was searched or seized is highly relevant, and likely determinative, of whether a particular action qualifies as a special need or normal law enforcement search or seizure.

The Supreme Court has applied the *T.L.O.* concurrence's test repeatedly in a range of administrative search cases. In *O'Connor v. Ortega*, the Court addressed a state hospital's search of the office of a doctor following allegations of financial mismanagement, but no element of the search was turned over to law enforcement authorities.<sup>150</sup> The search furthered the hospital's needs as an employer, not its need to establish a criminal case, thus, with multiple cites to Justice Blackmun's *T.L.O.* concurrence, the Court upheld the search.<sup>151</sup> Applying *O'Connor's* analysis, *City of Ontario v. Quon* upheld a search of a public employee's text messages sent on a government-owned mobile device as part of an investigation into excess mobile charges and where the only consequence was job discipline.<sup>152</sup> The Court also upheld blood and urine drug tests of railway employees for

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147. *T.L.O.*, 469 U.S. at 347.

148. Josh Kagan, *Reappraising T.L.O.'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 295-96 (2004).

149. Schulhofer, *supra* note 4, at 109; *see also* Primus, *supra* note 14, at 288 (describing “extension” of the special needs test to dragnet cases).

150. 480 U.S. 709, 714 (1987).

151. *Id.* at 720, 724-25.

152. 130 S. Ct. 2619, 2632-33 (2010).

the purpose of ensuring railway safety, relying on *T.L.O.*<sup>153</sup> The Court similarly upheld urinalysis drug testing of customs employees in positions that involved access to drugs, firearms, or classified material, and where employees who tested positive could be fired, but would have faced no criminal consequences.<sup>154</sup> Urinalysis of public high school students participating in athletics and other extracurricular organizations, where drug test results would lead to school consequences but no criminal or delinquency case, was similarly upheld, with the Supreme Court emphasizing the absence of law enforcement consequences.<sup>155</sup>

The Court's application of the special needs test is generally outcome-determinative. If a search or seizure serves a special need apart from ordinary law enforcement, the Court proceeds to balance an individual's reasonable expectation of privacy with the government's and public's interests in the challenged action.<sup>156</sup> In practice, determining that a search serves a special need other than law enforcement nearly invariably leads to the conclusion that the search or seizure is reasonable.<sup>157</sup> Conversely, when the Supreme Court has found that a challenged action has a law enforcement purpose, it has held that action to be a Fourth Amendment violation.<sup>158</sup> When the Court has found a special need apart from ordinary law enforcement, it has upheld challenged searches and seizures.<sup>159</sup> It took twenty-four years from the time *T.L.O.* was decided for the Court to provide an exception to this rule,<sup>160</sup> holding in *Safford Unified School District No.*

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153. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))).

154. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 662 (1989).

155. *Bd. of Educ. v. Earls*, 536 U.S. 822, 829, 833-34 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651, 658 (1995).

156. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (stating that only when special needs beyond law enforcement exist "is a court entitled to substitute its balancing of interests for that of the Framers").

157. *See Primus*, *supra* note 14, at 257 (searches deemed special needs "are almost always deemed reasonable").

158. *Ferguson II*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

159. *Earls*, 536 U.S. at 838; *Acton*, 515 U.S. at 664-65; *Von Raab*, 489 U.S. at 662; *T.L.O.*, 469 U.S. at 347-48.

160. *Chandler v. Miller*, 520 U.S. 305 (1997), is not an exception to this rule, even though the Court found a Fourth Amendment violation in a case not involving a law enforcement search. *Id.* at 323. In *Chandler*, the Court held that a state law requiring candidates for certain offices to take a drug test violated their Fourth Amendment rights. *Id.* at 322-23. Although there was no contention that such searches served law enforcement needs—"the results of the test are given first to the candidate, who controls further

*I v. Redding* that a strip search of a teenage girl, with no law enforcement purpose or consequence, violated her Fourth Amendment rights.<sup>161</sup> But even *Safford* is not particularly strong; the Court claimed it simply applied *T.L.O.*'s balancing test, yet still found that qualified immunity protected the defendants, and so the teenager had no actual remedy.<sup>162</sup>

The two most important post-*T.L.O.* special needs cases, for this Article's purposes, are *Ferguson II*<sup>163</sup> and *Illinois v. Lidster*.<sup>164</sup> Both focus on the particular consequences of a challenged search or seizure to the individual searched or seized as the primary means of applying the special needs test. *Ferguson II* involved drug tests designed to protect children from prenatal drug exposure. In 1989, a task force including a South Carolina public hospital, local police, the county Substance Abuse Commission, and the Department of Social Services developed a policy for testing women for substance abuse during pregnancy and immediately after childbirth.<sup>165</sup> Hospital staff would notify police of positive drug tests, and arrest and prosecution would soon follow.<sup>166</sup> Involved staff would follow chain-of-custody procedures, "presumably to make sure that the results could be used in subsequent criminal proceedings."<sup>167</sup>

The challenged policy also allowed information to be shared with child protection authorities, although the Court did not note this fact. Hospital officials disclosed the results of drug tests with an interdisciplinary group that met at the hospital for Suspected Child Abuse and Neglect (SCAN) meetings that included the Department of

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dissemination of the report"—the Court found that no special need existed. *Id.* at 318, 322. Without evidence of an actual problem of drug users holding particular offices, the Court found that the state's proffered need was not "important enough" to qualify as a special need. *Id.* at 318. *Chandler* thus stands for the proposition, tangential to this Article, that a special need must indeed be special. *Id.*

161. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

162. Barry Feld describes *Safford* as a "fact-specific limited right without any practical remedy," not a significant challenge to the rule. Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 *Miss. L.J.* 847, 870 (2011).

163. 532 U.S. 67 (2001).

164. 540 U.S. 419 (2004).

165. *Ferguson II*, 532 U.S. at 70-71.

166. *Id.* at 72 & n.5. The hospital soon adjusted its procedures: after a first positive drug test, women could avoid police involvement by consenting to substance abuse treatment. A second positive drug test would trigger police notification. *Id.*

167. *Id.* at 71-72.

Social Services.<sup>168</sup> The hospital informed women who tested positive upon birth that “a referral had been made to the Department of Social Services.”<sup>169</sup> A hospital letter to patients summarized its policy and listed the police, prosecutors, child protection authorities, and others who would be involved if women did not obtain treatment.<sup>170</sup> But these facts did not feature prominently in the *Ferguson II* litigation, which focused instead on the role of law enforcement and ignored child protection, starting with the district court’s jury instructions.<sup>171</sup> The circuit court’s first opinion did not even address the child protection agency’s involvement,<sup>172</sup> and its second opinion (on remand from the Supreme Court) summarized the facts of each case without mentioning the child protection agency’s involvement.<sup>173</sup> Indeed, it appears, from the reported decisions, that the plaintiffs never challenged the sharing of information with child protection authorities. This entirely understandable litigation choice demonstrates how the special needs test’s line around law enforcement searches has hardened, shaping litigation to focus on that line.

*Ferguson II* is particularly important for three reasons. First, it demonstrates how the special needs doctrine draws lines between law enforcement and other severe consequences. If the hospital had created a policy to turn positive drug tests over to child protection authorities with the same chain-of-custody procedures and if the child protection authorities removed the children, the doctrine, in its current form, does not suggest a Fourth Amendment violation would have occurred. *Ferguson II* thus highlights a core task for anyone seeking to justify the special needs doctrine: explaining why an arrest is a more severe consequence than losing one’s child immediately after birth or, from the child’s perspective, being placed in state custody. *Ferguson II* did not attempt this task.

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168. Brief for Petitioners at 15, *Ferguson II*, 532 U.S. 67 (2001) (No. 99-936), available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Petitioners%20Supreme%20Court%20Brief.pdf>.

169. *Ferguson v. City of Charleston (Ferguson III)*, 308 F.3d 380, 389 (4th Cir. 2002).

170. *Id.* at 388.

171. The district court’s jury instruction, for instance, included the statement, “But what makes this case unusual and *what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.*” Brief for Petitioners, *supra* note 168, at 5 (quoting the district court’s jury instruction (emphasis added)); see also *Ferguson III*, 308 F.3d at 393 (summarizing the district court’s decision as “reject[ing] the special needs theory” because of law enforcement entanglement).

172. *Ferguson v. City of Charleston (Ferguson I)*, 186 F.3d 469 (4th Cir. 1999).

173. *Ferguson III*, 308 F.3d at 390-93.

Second, it clarified doctrinally that one should look to the “primary” and “programmatic” purpose of a particular search.<sup>174</sup> This programmatic inquiry focuses on policies, not the subjective intent of individuals involved in a particular search, and thus creates a legal incentive to develop policies that avoid excessive entanglement between a legitimate special need and law enforcement.<sup>175</sup> The Court identified a law enforcement policy that was not based on the details of the actual search itself, which looked like any mundane hospital blood draw or urine test. Rather, the purpose was evident in the use of the fruits of that search, which the hospital promptly turned over to police, and the reasonably expected consequences of that decision.<sup>176</sup>

Third, *Ferguson II* demonstrates the special needs test’s ability to preserve important constitutional rights in the face of political pressure. The hospital’s actions arose in a particular social and political context: “[T]he problem of ‘crack babies’ was widely perceived in the late 1980[s] as a national epidemic, prompting considerable concern both in the medical community and among the general populace.”<sup>177</sup> The Court did not note that the most widespread legal effect of society’s concern about women exposing developing fetuses to crack cocaine was in child welfare. The foster care population swelled as child protection agencies responded to increased use of crack cocaine in those years. Removals of children born to substance-abusing mothers formed a hugely disproportionate amount of this increase; removals of infants increased 89% in New York and 58% in Illinois over three years, and most of those removals occurred “within days following birth.”<sup>178</sup> Subsequent longitudinal studies express significant doubt regarding the wisdom of these removals. Cocaine use during pregnancy is undeniably bad (although less severe than feared in the 1980s and 1990s), with increased risks of attention and self-regulation problems, but no significant effects on a child’s

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174. *Ferguson II*, 532 U.S. 67, 81 (2001).

175. See *infra* notes 237-249 and accompanying text.

176. *Ferguson II*, 532 U.S. at 84-85. This feature of *Ferguson II* also evokes some of the most powerful language of *Boyd*—the case relied upon in *Frank* and, by extension, in *Camara*. See discussion *supra* notes 120-134. *Boyd* found a Fourth Amendment violation even without authorities conducting a physical search: “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his infeasible right of personal security, personal liberty and private property . . . .” 116 U.S. 616, 630 (1886).

177. 532 U.S. at 70 n.1.

178. Eugene M. Lewit, *Child Indicators: Children in Foster Care*, 3 FUTURE OF CHILDREN 192, 196-98 (1993), available at [http://www.princeton.edu/futureofchildren/publications/docs/03\\_03\\_Indicators.pdf](http://www.princeton.edu/futureofchildren/publications/docs/03_03_Indicators.pdf).

physical growth, developmental test scores, or language outcomes.<sup>179</sup> Moreover, rather than removing infants exposed to drugs in utero by their mothers, at least one child protection system has placed such cases on a differential response track, in which the family is not even investigated nor generally subject to a finding of neglect that could lead to a removal.<sup>180</sup>

*Lidster* is important for a different reason: it focuses on a law enforcement consequence *to the individual searched or seized*, and was thus relied upon by the state officials in *Camreta*.<sup>181</sup> *Lidster* upheld the use of a highway checkpoint with which police stopped cars at the same location and time of day as a fatal hit-and-run that had occurred several days prior. Police asked motorists if they had witnessed the crime, but did not expect to stop the culprit. The police officers' goal, to catch a criminal distinct from the individuals seized at the checkpoint, distinguished *Lidster* from a highway checkpoint designed "to look for evidence of drug crimes committed by occupants of those vehicles," which the Court had ruled unconstitutional.<sup>182</sup> Even the *Lidster* dissent recognized the "valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier."<sup>183</sup>

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179. These conclusions are from a 2010 review of multiple studies on the effect of in utero cocaine exposure on children's first six years of life. John P. Ackerman et al., *A Review of the Effects of Prenatal Cocaine Exposure Among School-Aged Children*, 125 PEDIATRICS 554, 554 (2010), available at <http://pediatrics.aappublications.org/content/125/3/554.full.html>; see also Susan Okie, *Encouraging New on [sic] Babies Born to Cocaine-Abusing Mothers*, N.Y. TIMES (Feb. 7, 2009), <http://www.nytimes.com/2009/01/27/world/americas/27iht-coca.3.19716510.html> (summarizing recent research on the harm of in utero cocaine exposure and the comparative harms of in utero alcohol and tobacco exposure).

180. CHILD & FAMILY SERVS., DIFFERENTIAL RESPONSE: WORKING AS ONE TO KEEP THE DISTRICT'S CHILDREN SAFE 14 (2011) (listing "newborn positive toxicology" as a category of cases eligible for a "family assessment" rather than an investigation) (on file with author).

181. *Supra* note 85 and accompanying text.

182. 540 U.S. 419, 423 (2004) ("The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."). The prior case was *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Four highway checkpoint cases are discussed *infra* notes 222-224 and accompanying text.

183. 540 U.S. at 428 (Stevens, J., concurring in part and dissenting in part). Justice John Paul Stevens dissented in part because he concluded that the search was unreasonable, an analysis entered only after the Court applied the special needs doctrine. *Id.*



The *Lidster* Court thus applied the special needs doctrine despite an undisputed law enforcement purpose.<sup>184</sup> The essential gloss is that the special needs test looks for state action that identifies the individual searched or seized as the target of a criminal investigation. This gloss is not readily apparent in the special needs language from *T.L.O.* and subsequent cases, but that may simply reflect the reality that in all of those cases, the individual searched or seized was the individual who bore the consequences (criminal or otherwise) of those searches and seizures. Until *Lidster*, the Court did not have the opportunity or need to decide how to apply the special needs test when the individual searched or seized was not a criminal target.<sup>185</sup>

#### D. *Boundaries of the Special Needs Doctrine*

Clearly defining what qualifies as a special needs case and what qualifies as a case considering some other warrant and probable cause exception is essential for various reasons. Mixing together different categories of administrative search cases can lead not only to confused analysis, but to the erosion of important Fourth Amendment safeguards.<sup>186</sup> It is thus important to treat searches that have a law enforcement purpose regarding the individual searched, yet which do not trigger the warrant and probable cause requirements, as something other than a special needs search.<sup>187</sup>

Recent Supreme Court cases suggest clearer boundaries around the special needs doctrine, by delineating other doctrines that exempt certain state action from warrant and probable cause requirements and

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184. *Lidster* did not use the phrase “special needs,” so one can question whether it is a true special needs case. See *infra* Part III.D. But it relied heavily on *Edmond*. See *Lidster*, 540 U.S. at 423-24, 426-27 (citing *Edmond*, 531 U.S. at 35, 40-41, 44). *Edmond* was framed as a special needs case that sought to discern the traffic stops’ “primary purpose.” 531 U.S. at 40, 44.

185. Primus has criticized *Lidster* for failing to discuss the level of executive discretion at issue when the officials decided to set up the specific roadblock and selected the particular time and location they did, thus failing to consider the core purpose of the warrant requirement as identified in *Camara*. Primus, *supra* note 14, at 282. But if the Court is right that seizures that are limited to eliciting witness statements do not significantly invade privacy, at least when the seizure is brief and minimally invasive (as in *Lidster*), then checking executive branch discretion is of much less importance; checking discretion to invade individual privacy more significantly is a greater value.

186. See *id.* at 277-301 (arguing that conflation of dragnet and special subpopulation cases has led to a weakening of protections in both categories).

187. See Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 849 (2010) (describing law enforcement searches as those “that cannot be justified by the special needs doctrine”). Simmons also persuasively argues why suspicionless antiterrorism searches—like those at airports, public buildings, and elsewhere—cannot be justified by a special needs analysis. *Id.* at 887-93.

by analyzing searches with law enforcement purposes directed at the individual searched under a reasonableness framework. The Court has found a set of searches targeting individuals with such reduced expectations of privacy that are permissible without a warrant or probable cause. The most recent and most clearly articulated example is *Samson v. California*, in which the Court upheld suspicionless and warrantless searches and seizures of state parolees; the opinion makes no effort to present the searches as justified by a special need beyond law enforcement and did not pretend the searches served any purpose other than ensuring criminal convicts had not slid into recidivism upon their parole.<sup>188</sup> Similarly, the Court in *United States v. Knights* upheld a warrantless search of a probationer's apartment, with explicit consideration of the state's "interest in apprehending violators of the criminal law," given the high recidivism rate of probationers.<sup>189</sup>

One can question the results and analysis in *Samson* and *Knights*, but at least the Court did not push them into the boundaries of the special needs doctrine, thus avoiding the intellectual contortions of earlier cases.<sup>190</sup> Two cases decided one week apart in 1987 confused the line between special needs and reduced privacy cases. In *Griffin v. Wisconsin*,<sup>191</sup> from which *Knights* and *Samson* trace their lineage,<sup>192</sup> the

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188. 547 U.S. 843, 847, 855 n.4 (2006); see also *id.* at 858 (Stevens, J., dissenting) ("Not surprisingly, the majority does not seek to justify the search of petitioner on 'special needs' grounds.").

189. 534 U.S. 112, 118, 121 (2001). One factual distinction may explain the unanimity of the *Knights* Court: reasonable suspicion (but not probable cause) existed to search Knights' apartment. *Id.* at 116. The *Samson* dissenters focused on this difference: they would have permitted the warrantless search in *Knights* on reasonable suspicion, but prohibited the warrantless search in *Samson* because it lacked any individual suspicion. *Samson*, 547 U.S. at 857 (Stevens, J., dissenting). The difference goes to a "reasonableness" analysis—whether some individualized suspicion should be necessary to render the search reasonable—which is a debate beyond the scope of this Article.

190. Many have questioned *Samson* and *Knights*. E.g., Robert Cacace, *Samson v. California: Tearing Down a Pillar of Fourth Amendment Protections*, 42 HARV. C.R.-C.L. L. REV. 223 (2007); Primus, *supra* note 14, at 296-97, 308 (criticizing *Samson* for not applying the special needs doctrine); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1 (2008) (criticizing the Court's Fourth Amendment "reasonableness" cases).

191. 483 U.S. 868 (1987). In his *Ferguson II* dissent, Justice Antonin Scalia cited *Griffin* for the proposition that "the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches by law enforcement officials who, of course, ordinarily have a law enforcement objective." 532 U.S. 67, 100 (2001) (Scalia, J., dissenting). The majority appropriately focused the special needs doctrine on law enforcement purposes and entanglement. *Id.* at 79 n.15 (majority opinion).

192. *Knights* twice cited *Griffin* to support its reasonableness analysis. *Knights*, 534 U.S. at 117-20. *Samson* cited *Griffin* in support of its reasonableness analysis. *Samson*, 547 U.S. at 848-49, 854.

Court upheld a warrantless search of a probationer's home, holding that probation presented a special need beyond normal law enforcement.<sup>193</sup> The majority weakly argued that supervision (including warrantless searches) of probationers helped ensure their reentry into society without harming society via recidivism.<sup>194</sup> The Court similarly squeezed a different type of search into the special needs box in *New York v. Burger*, upholding a warrantless and suspicionless search of an automobile junkyard.<sup>195</sup> The "ultimate purpose" of the search was, undeniably, to deter and catch criminal behavior (specifically, the frequent use of automobile junkyards to hide stolen cars and parts), yet the Court described it as another situation of special need.<sup>196</sup> Tellingly, the Court omitted the second half of the special needs test: whether the special need was beyond that of ordinary law enforcement.<sup>197</sup> Some more recent lower court cases addressing DNA testing of criminal convicts also reflect the weak arguments that come from trying to squeeze searches designed to gather evidence of crimes committed by the individuals searched into a special needs analysis.<sup>198</sup>

*E. What Makes Law Enforcement Purposes So Important?*

The presence of ordinary law enforcement needs defines the line between special needs and other searches. But *T.L.O.* did not explain what was so special about law enforcement purposes that they, but nothing else, should be exempt from special needs treatment.<sup>199</sup> *Camara* suggested, but did not support, such a distinction.<sup>200</sup> A justification for treating law enforcement, and only law enforcement, differently remains necessary.

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193. *Griffin*, 483 U.S. at 874.

194. *Id.* at 875.

195. 482 U.S. 691 (1987). The bulk of *Burger* explained the Court's ruling that the search could occur because automobile junkyards were a "pervasively regulated industr[y]," *id.* at 693, in which business owners' reasonable expectation of privacy is reduced, *id.* at 700-01.

196. *Id.* at 693, 702; *see also id.* at 708 ("[M]otor vehicle theft has increased in the State and . . . the problem of theft is associated with this industry."). Schulhofer aptly explained this flaw in *Burger*: Schulhofer, *supra* note 4, at 103.

197. I do not suggest that *Burger* is unimportant to the special needs doctrine. Once the Court applied the special needs doctrine to *Burger*—however flawed that decision may have been—the Court embarked on an important discussion of when an administrative scheme can adequately cabin officials' discretion and replace a warrant procedure. *Infra* notes 233-235 and accompanying text.

198. *Infra* notes 231-232 and accompanying text.

199. *Supra* notes 144-145 and accompanying text.

200. *See* cases cited *supra* note 125 and accompanying text.

Later Supreme Court cases have briefly discussed factors that might explain what makes law enforcement searches so different. But none are satisfying.<sup>201</sup> First, *O'Connor* noted that supervisors in government agencies should focus on running an efficient government office and, unlike police officers, should not “learn the subtleties of the probable cause standard.”<sup>202</sup> Indeed, many state actors have far less interaction with the justice system than police officers and, one may argue, should not face the same restrictions on their behavior.<sup>203</sup> One circuit court evoked this concern when, citing *O'Connor*, it wrote:

If forcing a non law-enforcement government officer to follow ordinary law-enforcement requirements under the Fourth Amendment would impose intolerable burdens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be . . . subjected to less stringent reasonableness requirements instead [of probable cause and warrant requirements].<sup>204</sup>

This concern does not recognize that many state actors, such as child protection officials, are, like police officers, frequently involved in court or other legal proceedings and can be fairly expected to understand legal concepts. And any state official implementing a regulatory scheme should understand the legal issues that arise in the course of that implementation. Moreover, the *O'Connor* argument does not justify what the *T.L.O.* test did in that case: impose a reasonable suspicion standard on school searches, which still requires teachers and administrators to understand the subtleties of a Fourth Amendment concept.

Second, Justice Lewis Franklin Powell’s *T.L.O.* concurrence suggests that law enforcement officials have an inherently “adversarial” relationship with criminal suspects, unlike the relationship school officials have with students.<sup>205</sup> That distinction may have surprised *T.L.O.*, who would likely have characterized her relationship with the assistant principal who searched her purse and

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201. *Cf.* Schulhofer, *supra* note 4, at 114 (“Unfortunately, Justice Blackmun’s concurrence and the Court opinions based on it never attempt to justify the permissive side of his test. . . . And [later cases] cited his formulation as one already accepted and in no need of defense.”).

202. 480 U.S. 709, 724-25 (1987).

203. *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring) (noting that teachers should not be expected to determine the existence of probable cause quickly).

204. *Tenenbaum v. Williams*, 193 F.3d 581, 603 (2d Cir. 1999).

205. *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring).

turned her over to the police as adversarial.<sup>206</sup> The point is even weaker when applied to child protection searches. Just as police “have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial,”<sup>207</sup> child protection investigators have the responsibility to investigate child abuse and neglect, locate abusive and neglectful parents, remove abused and neglected children from those parents, and facilitate legal proceedings to effectuate such removals. Child protection investigations are inherently adversarial to parents and to children who do not want protection from the state.<sup>208</sup>

Third, the Court has suggested that the probable cause requirement is “rooted . . . in the criminal investigatory context.”<sup>209</sup> But the authorities relied on for this assertion focus less on anything unique to criminal investigations and more on the distinction between individualized investigations and “routine administrative caretaking functions,”<sup>210</sup> a reference that evokes standardized, discretionless

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206. The Ninth Circuit similarly described the relationship between network administrators and network users as nonadversarial. *United States v. Heckenkamp*, 482 F.3d 1142, 1148 (9th Cir. 2007) (citing *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring)). But, as in *T.L.O.*, the facts seem adversarial: a network administrator played a cat-and-mouse game with a hacker and, upon identifying the suspect, searched his computer to determine if he had hacked into the university’s server and committed a federal crime. *Id.* at 1143-45.

207. *T.L.O.*, 469 U.S. at 349.

208. In the federal government’s terms, investigations have an “adversarial orientation.” CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., DIFFERENTIAL RESPONSE TO REPORTS OF CHILD ABUSE AND NEGLECT 6 (2008), available at [http://www.childwelfare.gov/pubs/issue\\_briefs/differential\\_response/differential\\_response.pdf](http://www.childwelfare.gov/pubs/issue_briefs/differential_response/differential_response.pdf); see also HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW: A PRIMER 65 (2005) (stating that child protection investigation “is most often adversarial rather than cooperative”). The issue of a child who wishes to speak with authorities is discussed *infra* notes 344-345 and accompanying text.

209. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989); *O’Connor v. Ortega*, 480 U.S. 709, 723 (1987).

210. Both *O’Connor*, 480 U.S. at 723, and *Von Raab*, 489 U.S. at 667, cite *Colorado v. Bertine*, 479 U.S. 367, 371 (1987), which, in turn, relies on a footnote in *South Dakota v. Opperman*. *Opperman* states: “The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.” 428 U.S. 364, 370 n.5 (1976) (citation omitted). *Bertine*, like *Opperman*, involved a police inventory search of automobiles (searches governed by a separate category of Fourth Amendment law) that provided no occasion to address a nonroutine, noninventory search or seizure implicating an important constitutional right other than the various rights associated with criminal procedure. *Bertine*, 479 U.S. at 369. *Bertine* also cited a footnote in *United States v. Chadwick*, 433 U.S. 1 (1977), that is even less relevant to the special needs doctrine. *Bertine*, 476 U.S. at 371 (citing *Chadwick*, 433 U.S. at 10 n.5). The *Chadwick* footnote simply notes the *Opperman*

searches like those at border checkpoints or airports and says nothing about “noncriminal” investigations, which are anything but routine and which implicate important constitutional rights. The Court might have cited *Cady v. Dombrowski*, which recognized a “community caretaking” exception to the warrant and probable cause requirements, when a search or seizure is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”<sup>211</sup> *Cady*’s language is roughly analogous to the special needs doctrine.<sup>212</sup> But *Cady*, too, offers little explanation, offering no citation for its “totally divorced” language.<sup>213</sup> In context, *Cady*’s language merely explains that local law enforcement officers have frequent contact with automobiles for a variety of noncriminal purposes: enforcement of traffic, parking, and vehicle safety laws. *Cady* does not explain why a bright line exists between criminal and noncriminal purposes.<sup>214</sup> Then again, like early special needs cases, *Cady* did not deal with noncriminal searches or seizures that implicate important constitutional rights.

Fourth, Justice Stephen Breyer suggested in *Lidster* that searches or seizures that place the individual searched or seized at risk of arrest and prosecution are particularly likely “to provoke anxiety or to prove intrusive.”<sup>215</sup> Justice Breyer distinguished highway checkpoints designed to identify, stop, and punish criminal drug activity from “information-seeking” stops designed to ask the public for “help in providing information about a crime in all likelihood committed by others.”<sup>216</sup> On one hand, Justice Breyer’s focus on the likely consequence to the individual searched or seized is an essential element of a more analytically sound special needs doctrine, as argued in Part IV.B. But

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holding regarding police inventory searches and states “the salutary functions of a warrant simply have no application in that context.” *Chadwick*, 433 U.S. at 10 n.5.

211. 413 U.S. 433, 441 (1973).

212. For a comparison of the community caretaking and special needs doctrines, see Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1519-27 (2009). In addition, *Opperman*—the ultimate source of the Court’s assertion that the warrant requirement is “rooted” in criminal investigations—cited *Cady* multiple times. 428 U.S. at 367, 368, 369 n.4, 374-76, 376 n.10 (citing *Cady*, 413 U.S. 433). *Opperman* particularly focused on *Cady*’s description of “noncriminal in nature” contact between police and individuals. *Id.* at 368.

213. 413 U.S. at 441.

214. Justice William Brennan made this point in his *Cady* dissent, arguing that the Fourth Amendment applies both when an individual is a criminal suspect and when they are not. *Id.* at 453-54 (Brennan, J., dissenting).

215. 540 U.S. 419, 425 (2004).

216. *Id.* at 423-24.

on the other hand, this focus says nothing about why law enforcement searches, in particular, should be treated differently. In *Camreta*, a seizure “provoke[d] anxiety” and “prove[d] intrusive” because of the *civil* consequences to a child’s home life (she was removed from her parents’ custody for several weeks) rather than because of any criminal consequence to the child.<sup>217</sup>

In sum, in the twenty-seven years since *T.L.O.* and the forty-five years since *Camara*, the Supreme Court has offered no sufficient explanation of what makes law enforcement purposes or entanglement so important that it distinguishes special needs searches and seizures from those that will trigger the warrant and probable cause requirements. As Akhil Amar wrote, the Supreme Court’s criminal versus other searches distinction provides “no answer.”<sup>218</sup>

#### F. *Concluding Synthesis*

The special needs doctrine is now a well-established element of Fourth Amendment law, directing courts and litigants to analyze whether a particular search falls on the law enforcement or non-law-enforcement side of the doctrine’s bright line. Despite its frequent application, the doctrine remains without any adequate justification for drawing this bright line where it does. In addition, since *T.L.O.*, it has lost its focus on the reasons noted in *Camara* and other cases for why the warrant requirement exists (cabining executive branch officials’ discretion). As discussed in Part II, these faults are on vivid display in *Camreta* and other child protection cases, which involve state action which implicates civil, but fundamental, rights and which involves significant discretion.

The doctrine’s evolution, however, contains two themes that are highly relevant to a reformed and more coherent doctrine for the future. First, the special needs doctrine focuses on the intended and reasonably foreseen consequences to the individual searched or seized; those consequences are a primary mechanism for determining on which side of the doctrine’s bright line a particular case falls. Second, the doctrine now focuses on the programmatic or policy purpose of a search or seizure, suggesting a focus on how the doctrine can shape governments’ policy choices.

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217. *Id.* at 425; *supra* notes 49-51 and accompanying text.

218. Amar, *supra* note 116, at 770 (“The unsupported idea that the ‘core’ of the [Fourth] Amendment is somehow uniquely or specially concerned with criminal law is simply an unfortunate artifact . . .”).

## IV. TOWARD AN IMPROVED SPECIAL NEEDS TEST

The Supreme Court should reform the existing special needs binary to protect individuals from warrantless searches and seizures that implicate fundamental constitutional rights. The current doctrine's valuation of law enforcement purposes above all others has never been adequately justified. The test's application to child protection searches and seizures illustrates its limitations and lack of theoretical grounding. This Part will outline steps toward an improved special needs test. It will first describe the values embedded in the Court's formulation. It will then describe how a reformed test that better accounts for those values can lead to better results and sounder analysis.

A. *Special Needs Test's Value*

One can reasonably question whether the Supreme Court ought to jettison the special needs test entirely: after all, the Fourth Amendment's text says nothing about the particular type of search nor suggests in any way that a search by a police officer ought to be treated differently than a search by a social worker or health inspector.<sup>219</sup> I do not share this view. The special needs test has the potential to allow the Fourth Amendment to regulate meaningfully and rationally the wide variety of searches and seizures performed by the modern administrative state and the different privacy interests those actions involve. The test reflects three important values.

First, drawing a bright line recognizes that many administrative searches involve minimal privacy intrusions while providing important social benefits and permits those to occur without allowing them to serve as cover for more invasive government action. *Camara* dealt with a housing code search, and the Court acknowledged the "vigorous" case "that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures."<sup>220</sup> Modern constitutional law respects this role of

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219. See *id.* at 758 (describing as false Fourth Amendment case law's distinction between criminal and civil purposes because the Amendment's text "applies equally to civil and criminal law enforcement" and "[i]ts history is not uniquely bound up with criminal law").

220. *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967). An earlier case, not decided on constitutional grounds, addressed health department inspections. *District of Columbia v. Little*, 339 U.S. 1 (1950).



government, and the special needs doctrine protects that role from overly burdensome Fourth Amendment regulation. Accordingly, *Camara* acknowledged that the warrant requirement may be inappropriate if “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,” a theme reiterated by the Supreme Court and lower courts.<sup>221</sup>

Conversely, the special needs test also provides a mechanism to ferret out administrative searches used as subterfuge for criminal investigations, and the Supreme Court’s record shows the promise of enforcing a line between true special needs and something else. *Ferguson II* aptly demonstrates the Court’s ability to enforce the line. But it is not the only case. In a series of highway checkpoint cases, the Court has distinguished between those with a primary purpose of “general . . . crime control” and those focusing on “roadway safety.”<sup>222</sup> A highway checkpoint with the “primary purpose of interdicting illegal narcotics” does not qualify for the special needs doctrine,<sup>223</sup> while a “sobriety checkpoint” to take drunk drivers off the road, and thus prevent accidents in the immediate future, does.<sup>224</sup> In analogous areas, state courts have distinguished between police who entered a home to determine if unconscious individuals had overdosed on drugs and needed medical attention from police who seized a teenager in no

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221. *Camara*, 387 U.S. at 533; see also, e.g., *O’Connor v. Ortega*, 480 U.S. 709, 721 (1987); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 316 (1978) (discussing a potential warrant requirement’s burden on the Occupational Safety and Health Act’s entire regulatory scheme); *Tenenbaum v. Williams*, 193 F.3d 581, 603 (2d Cir. 1999) (“If forcing a non law-enforcement government officer to follow ordinary law-enforcement requirements under the Fourth Amendment would impose intolerable burdens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be relieved of those requirements and subjected to less stringent reasonableness requirements instead.”).

222. *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979).

223. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

224. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990). *Sitz* is not directly framed as a special needs decision. In response to plaintiffs’ argument that there was no special need beyond law enforcement because drunk drivers were not only taken off of the road but arrested and charged with driving under the influence, the Court said that a separate body of “prior cases dealing with police stops of motorists on public highways” governed, and that those cases permitted a balancing test. *Id.* at 450. That statement was somewhat odd since Justice Blackmun had cited some of those highway stop cases in his *T.L.O.* special needs opinion. *New Jersey v. T.L.O.*, 469 U.S. 325, 352 (1985) (Blackmun, J., concurring) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Birgnoni-Ponce*, 422 U.S. 873 (1975)). Regardless, the result is the same as it would have been if the Court had explicitly found a special need. (The Court went on to apply a balancing test to determine if the stops were reasonable).

obvious distress whom they suspected of drug involvement.<sup>225</sup> One need not agree with the precise lines courts have drawn (for instance, one can question whether a sobriety checkpoint designed both to take drunk drivers off the road and to arrest and charge them with driving under the influence ought to qualify for the special needs doctrine) to recognize that the line exists and thereby provides some meaningful protection of Fourth Amendment interests.

I acknowledge that the Court's record in policing against subterfuge is imperfect. Justice Blackmun, the original author of the special needs test, was rightly criticized in *Burger* for applying a special needs framework to a search designed to determine if a vehicle-dismantling business possessed stolen property.<sup>226</sup> Other courts have engaged in some intellectual contortions to fit a particular search on the special needs, and not ordinary law enforcement, side of the line. For instance, a Ninth Circuit panel held that the search of a computer that was suspected to have been the source of recent and potentially ongoing hacking into a public university's network was justified by the special needs doctrine.<sup>227</sup> The search was done in consultation with police officers to protect the university's server and network from the effects of a federal crime (recklessly causing damage by intentionally accessing a protected computer without authorization).<sup>228</sup> Distinguishing a search conducted in consultation with law enforcement to prevent or interrupt an ongoing crime from a search for ordinary law enforcement purposes is far too fine a distinction.

Courts' difficulty in enforcing the line between true special needs cases and law enforcement searches and seizures arises with greater frequency when courts do not respect the boundaries of the special needs doctrine discussed above.<sup>229</sup> That was the case in *Burger*, which was largely decided based on the reduced expectation of privacy held

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225. Compare *State v. Pinkard*, 785 N.W.2d 592 (Wis. 2010) (finding that officers were engaged in a community-care function because they had received a tip about someone sleeping next to drugs, arrived to find the front door open, and knocked and received no response before entering), with *State v. Kinzy*, 5 P.3d 668 (Wash. 2000) (en banc) (finding that officers were reasonable in approaching a small, teenage girl in a high-narcotics area to determine whether she was at risk but had no right to seize her when she tried to walk away).

226. *New York v. Burger*, 482 U.S. 691, 724 (1987) (Brennan, J., dissenting). Whether Justice Blackmun's point that a "closely regulated" business had a reduced expectation of privacy justifying a warrantless search is valid, apart from his misapplication of his own special needs framework, is a point beyond the scope of this Article. *Id.* at 613-14.

227. *United States v. Heckenkamp*, 482 F.3d 1142, 1147 (9th Cir. 2007).

228. *Id.* at 1144-46 (citing 18 U.S.C. § 1030(a)(5)(B)).

229. *Supra* Part III.D.

by a “closely regulated” business.<sup>230</sup> Lower court cases showing difficulty policing the special needs line similarly confuse reduced privacy cases with special needs cases. One Ninth Circuit judge, echoing several circuit courts, has written that extracting DNA from convicted criminals counts as a special need when done to aid the offender’s “rehabilitation through deterrence,” even if that action will, “of course[,] aid in catching him” if said rehabilitation fails.<sup>231</sup> A later Ninth Circuit opinion held that taking a convict’s DNA for purposes of including it in a “cold case file” renders the special needs doctrine inapplicable.<sup>232</sup> This distinction only teaches law enforcement officials to assert a goal of “rehabilitation through deterrence” rather than catching repeat offenders. It would be more appropriate to determine whether the fact of a criminal conviction so reduces the individual’s reasonable expectation of privacy that extracting their DNA does not violate their Fourth Amendment rights.

Second, a test designed to permit the administrative state to function helpfully focuses Fourth Amendment doctrine on the machinery of the administrative state and incentivizes legislative and regulatory standards to protect individual privacy. Thus, in *Burger*, Justice Blackmun wrote for the Court that to justify an exception to the warrant requirement, a regulatory scheme must adequately substitute a warrant by giving notice that particular searches are lawful, with a delineation of the search’s scope that limits the discretion of state officials performing such searches.<sup>233</sup> Again, the potential for poor application of this regulatory and legislative focus lies in the fact that *Burger* itself exemplifies how the Supreme Court’s examination of a regulatory regime’s adequacy can be “flaccid.”<sup>234</sup> But *Burger*’s discussion of how a detailed regulatory regime can provide the same value that a warrant provides is an important element of explaining the value of the special needs test, which also permits replacement of a

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230. 482 U.S. 691, 693 (1987); see *supra* note 195 and accompanying text.

231. *United States v. Kincade*, 379 F.3d 813, 841 & n.2 (9th Cir. 2004) (Gould, J., concurring). Various state and federal courts have upheld mandatory DNA testing of convicts under a special needs analysis. *Id.* at 830-31 (majority opinion) (collecting cases); see also Sandra J. Carnahan, *The Supreme Court’s Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 19-28 (2004) (arguing that special needs justify DNA databases).

232. *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009).

233. 482 U.S. 691, 703 (1987). Whether Justice Blackmun’s analysis lived up to that standard in *Burger* is another matter. Primus argues it failed to do so. Primus, *supra* note 14, at 283-84.

234. See Schulhofer, *supra* note 4, at 98; see also *id.* at 102-03 (describing the relatively minimal limits imposed by the regulatory scheme at issue).

warrant requirement with an administrative scheme. It also creates incentives for legislatures and agencies to more specifically delineate procedures for special needs searches and seizures to increase the likelihood of deference to challenged searches and seizures,<sup>235</sup> and thus to impose some modest limits on official discretion to balance administrative search regimes with individual privacy and reduce the wide variations in responses to similar facts.<sup>236</sup>

Third, through its focus on “programmatically purpose”<sup>237</sup> (rather than individual officials’ subjective intent), the special needs doctrine creates an incentive for policy makers to limit the most invasive form of state intervention. Commentators have recognized how the special needs test encourages state and local governments to “develop more effective, flexible approaches” to various social problems “without imposing the often ignored costs of enlarging the scope of criminal liability.”<sup>238</sup> The school setting at issue in *T.L.O.* provides the most apt examples of the special needs doctrine’s incentive structure. *T.L.O.* and its progeny encouraged school districts that are developing drug testing policies to draw bright lines in those policies (the districts whose drug test policies were upheld in *Vernonia School District 47J v. Acton* and *Board of Education v. Earls* decided, by policy, to neither threaten to, nor actually, turn over drug test results to the juvenile justice system and instead offered those students assistance and less-severe, non-law-enforcement punitive consequences). Whatever the pedagogic or disciplinary benefits of those drug tests, the special needs test helps limit those policies to school issues and avoid more-severe consequences.<sup>239</sup>

*T.L.O.* has been less successful at limiting the severity of state intervention following school disciplinary incidents. School districts and law enforcement agencies have grown closer to a point that the mainstream media has prominently explored—how fourth graders’ school-yard offenses can become law enforcement and courtroom matters—and the United States Attorney General and United States

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235. Amar, *supra* note 116, at 816-17.

236. Amsterdam, *supra* note 135, at 416-19.

237. *Ferguson II*, 532 U.S. 67, 81 (2001).

238. Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1062-63 (2003).

239. For example, Justice Ginsburg challenged the reasonableness of a policy that required of drug testing all students engaged in extracurricular activities, which was upheld in *Earls*, for irrationally “steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.” *Bd. of Educ. v. Earls*, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting).

Secretary of Education have called for such practices “to stop.”<sup>240</sup> This problem results from an inability to enforce *T.L.O.*’s rule. Summarizing school search cases, the Illinois Supreme Court has observed that the decisive variable tends to be the level of involvement of law enforcement officers in particular searches.<sup>241</sup> While police involvement in a particular search certainly is relevant, overemphasizing this point violates *Ferguson II*’s instruction to focus on the programmatic purpose of many of these searches. That purpose is increasingly to identify evidence to turn over to law enforcement, a trend which should lead (but has not yet led) courts to enforce more seriously the special needs test in school contexts. Schools would have authority to maintain safety and discipline, but should be prevented from routinely and programmatically turning school-yard offenses into criminal cases, a key element of the school-to-prison pipeline.<sup>242</sup> Schools should be forced to choose between using the informal procedures permitted by *T.L.O.* for school disciplinary consequences only or the more formal warrant and probable cause procedures if they turn students over to law enforcement.

Child protection investigations could provide another example of the programmatic purpose test’s value if the special needs doctrine focused on serious non-law-enforcement consequences. Requiring probable cause and a warrant before seizing children for interviews or inspecting homes would impose an administrative burden on state child protection officials.<sup>243</sup> That burden creates an important and valuable incentive for those officials to find some alternative means to achieve their goals without triggering those Fourth Amendment

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240. Donna St. George, *Texas Students Sent from Classroom to Courtroom*, WASH. POST (Aug. 21, 2011), [http://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ\\_story.html](http://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ_story.html) (summarizing the conviction of a Houston-area fourth grader for fighting on a school bus and reporting on statements of United States Attorney General Eric Holder and United States Department of Education Secretary Arne Duncan).

241. *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); see also Feld, *supra* note 162, at 889 (“Courts’ assessments of the proper standard—reasonable suspicion or probable cause—to search often hinge on whether a school official or a police officer initiated it.”).

242. Kagan, *supra* note 148, at 310-12.

243. An administrative burden must be distinguished from a burden that would prevent the government from achieving its purpose in child protection investigations. The defendants in *Camreta* argued that the latter was the case, an argument which requires establishing that obtaining a warrant would prevent the government from adequately investigating alleged abuse. Brief for Petitioner at 43-46, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (Nos. 09-1478 and 09-1454), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_1478\\_PetitionerJamesAlford.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1478_PetitionerJamesAlford.authcheckdam.pdf). That point was contested by S.G. Brief for Respondents, *supra* note 50, at 53.

protections. As discussed above, the majority of child protection investigations involve relatively low-risk allegations, and the vast majority do not lead to removals,<sup>244</sup> leading some child protection systems to develop differential response systems.<sup>245</sup> These systems ask families who are the subject of low-risk allegations to participate in voluntary “family assessments” to determine which, if any, services would help the family and help keep the children safe. Such families generally would not be subject to substantiation for abuse or neglect or removal of children.<sup>246</sup> Crucially, the core, fundamental right of family integrity would not be at stake with such assessments; thus, the special needs doctrine would apply. Investigative resources, including those necessary to seek warrants and document probable cause, would focus on higher-risk cases. Some jurisdictions now assign up to 70% of abuse and neglect allegations to family assessment tracks,<sup>247</sup> something that more meaningful Fourth Amendment protections could make the norm.

Incentivizing family assessment tracks will reduce invasions of children’s and families’ privacy and likely serve children’s interests more effectively than the status quo of investigating all children who are the subject of child protection hotline reports. One of the remarkable features of the status quo is how little good is done when child protection authorities investigate families for suspected abuse or neglect but do not remove children.<sup>248</sup> A longitudinal study of children who had been the subjects of a child maltreatment investigation found that these children, as compared to children with similar family problems but no child protection contact, had no perceptible differences in social support, family functioning, or child behavior problems.<sup>249</sup> The bottom line, as the study’s title states, is that these investigations were “A Missed Opportunity for Prevention”

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244. See *supra* notes 26-38 and accompanying text.

245. See *supra* note 38 and accompanying text.

246. A child protection agency might still choose to investigate a family assigned to an assessment track. See, e.g., D.C. CODE § 4-1301.04(c)(3) (2012). States’ experience with differential response suggest that such decisions are made rarely. See, e.g., VA. DEP’T OF SOC. SERVS., EVALUATION OF THE DIFFERENTIAL RESPONSE SYSTEM 12 (2008), available at [http://www.dss.virginia.gov/files/about/reports/children/cps/all\\_other/2008/differentialresponsesystem\\_evaluation\\_annualreport\\_2008\\_12-08.pdf](http://www.dss.virginia.gov/files/about/reports/children/cps/all_other/2008/differentialresponsesystem_evaluation_annualreport_2008_12-08.pdf) (reporting that only 2% of families referred to an assessment track were subsequently referred for an investigation).

247. VA. DEP’T OF SOC. SERVS., *supra* note 246, at 5.

248. I do not advocate removing these children. Rather, I advocate for more-effective interventions to resolve serious problems without traumatizing children via removal.

249. Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943, 943 (2010).

(specifically, to provide proven services).<sup>250</sup> The study's findings were so dramatic that the medical journal that published the study simultaneously published an editorial radically asserting that "Child Protective Services has outlived its usefulness" and recommending that the better response to allegations of neglect is to provide various service interventions rather than formal investigations.<sup>251</sup>

These incentive benefits are less powerful under an older proposal to reform the special needs doctrine. In 1989, Stephen Schulhofer proposed drawing a bright line between state action to exert "social control" over "private activity" and "searches in aid of the internal governance objectives of public enterprises" (such as school discipline), with any search or seizure serving internal governance subject only to a reasonableness analysis.<sup>252</sup> This approach would create incentives to avoid social control and thus maximize liberty, an important benefit.<sup>253</sup> But once a search or seizure qualifies as an internal governance action, the Fourth Amendment incentive for the state to limit the extent to which an action invades individual liberty would disappear. The potential to incentivize less-liberty-infringing responses to school disciplinary incidents, which Schulhofer categorizes as internal governance issues,<sup>254</sup> would be lost.

*B. Reasonably Foreseeable Consequences to Fundamental Constitutional Rights, Not Just Law Enforcement Purposes*

The first and most important reform to the special needs test should be to broaden its focus beyond the existence or absence of law enforcement purposes and to focus instead on the reasonably foreseeable consequences of a challenged search or seizure on fundamental constitutional rights. Fundamental constitutional rights

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250. *Id.*

251. Abraham B. Bergman, *Child Protective Services Has Outlived Its Usefulness*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 978, 978-79 (2010).

252. Schulhofer, *supra* note 4, at 118.

253. As Schulhofer acknowledges, the terms "social control" and "internal governance" do not have crystal-clear boundaries. *Id.* at 116. It is likely that there would be significant overlap between his approach and mine, as many (if not most) searches and seizures that affect fundamental constitutional rights would also work to achieve some form of social control. The primary, principled difference between his approach and mine is that a test focusing on the constitutional rights that are implicated by a search or seizure more directly invites analysis of such actions in their full constitutional context. *Infra* notes 284-293 and accompanying text. In practice, we differ in our approaches to school search cases, which Schulhofer categorizes as internal governance actions, Schulhofer, *supra* note 4, at 118, but which I contend often implicate fundamental constitutional rights.

254. Schulhofer, *supra* note 4, at 118.

include all those either deemed “implicit in the concept of ordered liberty” and thus incorporated against the states via the Fourteenth Amendment<sup>255</sup> or, like the right to family integrity, deemed to be a fundamental right provided by another amendment.<sup>256</sup> A focus on criminal consequences is already present, even if the Supreme Court has not adopted that language. Limiting that focus to criminal consequences cannot be justified, and the doctrine must be reformed to account for constitutional consequences beyond those of the criminal justice system. If the purpose of the search or seizure makes it reasonably likely or foreseeable that a consequence significantly implicating a constitutional right beyond the Fourth Amendment, the special needs doctrine should not apply.

#### 1. Focus on Consequences Explains Results in Special Needs Cases

Focusing on the presence or absence of intended or reasonably foreseen criminal consequences best explains the results of special needs cases.<sup>257</sup> The intended criminal consequences explain the decisions against those searches and seizures in *Camara*, *City of Indianapolis v. Edmond*, and *Ferguson II*, and the absence of such consequences explains the decisions in *Acton*, *Earls*, *Skinner v. Railway Labor Executives Ass’n*, *National Treasury Employees Union v. Von Raab*, *O’Connor*, and *Quon. T.L.O.* may be explained by the lack of an intended law enforcement consequence at the initiation of the search, when the assistant principal thought he was searching for cigarettes (and not marijuana), and may be criticized for ignoring the (presumably intended) law enforcement consequence that followed.<sup>258</sup> *Lidster* may be explained by the absence of expected or intended criminal consequences to the individuals stopped. Given the “notoriously unclear” state of this particular doctrine,<sup>259</sup> a focus on reasonably foreseen consequences does not explain every case, especially *Burger* and *Michigan Department of State Police v. Sitz*. But, as argued above, the Court did not properly conceive of *Burger* as a special needs case (even if that misconception led to an important

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255. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

256. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

257. The risk that officials may unexpectedly find some evidence of a crime and turn that evidence over to the police does not make the discovery reasonably foreseeable. For instance, the seizure in *Lidster* led to the discovery of admissible evidence of and prosecution for drunk driving. *Illinois v. Lidster*, 540 U.S. 419, 422 (2004).

258. *Supra* notes 146-148 and accompanying text.

259. *Primus*, *supra* note 14, at 257.



discussion of administrative substitutes for a warrant procedure),<sup>260</sup> and the Court drew a flawed line in *Sitz*.<sup>261</sup>

Indeed, the Court's first major administrative search case, *Camara*, struck down a scheme that imposed *criminal* sanctions on individuals who refused to consent to a particular search.<sup>262</sup> *Camara* also framed its discussion of law enforcement purposes in terms of consequences to the individual searched: the home search minimally invaded privacy because the search was not "aimed at the discovery of evidence of crime," implying that the intended or reasonably expected consequences relate to the level of privacy invaded.<sup>263</sup> Schulhofer offered a similar analysis of *Camara*, writing that the Court must have "meant to stress not [law enforcement] motivation but [law enforcement] effects."<sup>264</sup>

The Court reinforced the conclusion that consequences matter to the administrative search analysis just four years later in *Wyman v. James*.<sup>265</sup> The Court upheld a state law requiring individuals to consent to home visits as a condition of receiving welfare benefits. Barbara James refused to give such consent, but the only consequence was her loss of welfare benefits.<sup>266</sup> No criminal consequence followed, and because individuals lack a constitutional entitlement to welfare benefits, "nothing of constitutional magnitude [was] involved."<sup>267</sup> A similar statement could be made regarding later cases upholding searches and seizures under the special needs doctrine: where all that is at issue is public employment (*O'Connor* and *Quon*), railway and sensitive employment positions (*Skinner* and *Von Raab*), or extracurricular school activities (*Acton* and *Earls*), no constitutional rights are involved, and criminal prosecution is neither likely nor intended.

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260. *Supra* notes 195-197 and accompanying text.

261. *Supra* note 224 and accompanying text.

262. 387 U.S. 523, 540 (1967). Summarizing the case, the Court wrote: "[A]ppellant has been *charged with a crime* for his refusal to permit housing inspectors to enter his leasehold without a warrant. . . . [W]e therefore conclude that . . . *appellant may not constitutionally be convicted* for refusing to consent to the inspection." *Id.* (emphasis added).

263. *Id.* at 537.

264. Schulhofer, *supra* note 4, at 93.

265. 400 U.S. 309 (1971).

266. *Id.* at 317-18 ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.").

267. *Id.* at 324.

The United States Court of Appeals for the Fourth Circuit has misread *Wyman* and other special needs cases as holding that “investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context,” even when the search at issue is by a child protection social worker.<sup>268</sup> This superficial analogy (it was a social worker in *Wyman*, and it is a social worker in a child protection case) ignores the different implications of the two social workers’ visits. In *Wyman*, the social worker could take away something to which the individual had no constitutional right. In the child protection context, the social worker could take away a parent’s and child’s right to family integrity, something with the utmost constitutional protection. The Fourth Circuit’s superficial analogy is understandable given the special needs doctrine’s binary, but it is no less wrong.

The consequences of a search were again decisive in *Ferguson II*. The search itself, in which blood was drawn routinely from pregnant women admitted to the hospital by medical personnel without the presence of police, did not raise constitutional concerns. Only the subsequent reporting of positive drug test results to law enforcement, and the resulting criminal prosecutions, made the hospital’s actions unconstitutional.<sup>269</sup> This is *Ferguson II*’s key lesson: a search’s consequences, not its circumstances, matter most. One might argue that law enforcement purposes deserve special treatment because police officers’ orders to submit to a search or seizure impose extra anxiety on individuals. Indeed, it would surely unsettle a woman in labor or immediately postpartum to be interrupted in her hospital room by a uniformed and armed police officer insisting that she take a drug test. Precisely because that did not happen in *Ferguson II*, that case stands for the proposition that something else (namely, the consequences of a search or seizure) determines the side of the special needs binary on which the search or seizure falls.

*Ferguson II* reached this conclusion through explicit references to the constitutional rights at stake when law enforcement became involved, stating that the intention to “incriminat[e]” patients triggers constitutional protections for criminal suspects.<sup>270</sup> Child welfare cases also trigger a set of constitutional protections identified by the

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268. *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993).

269. *Supra* notes 165-180 and accompanying text.

270. *Ferguson II*, 532 U.S. 67, 85 (2001) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Supreme Court: a hearing on a parent's fitness,<sup>271</sup> an elevated burden of proof if the case reaches the termination-of-parental-rights stage,<sup>272</sup> and any other protection required by procedural due process. These cases also trigger a set of statutory provisions designed to protect children's and parents' right to family integrity and to codify their procedural due process rights (such as a right to counsel,<sup>273</sup> a right to an agency's "reasonable efforts" to prevent removal of a child from a parent,<sup>274</sup> and a right to regular judicial reviews of ongoing foster care<sup>275</sup>).

Less dramatically, the Supreme Court focused on the consequences to individuals who are searched and seized in *Lidster*, which approved of a highway checkpoint that sought information from the public about a hit-and-run on the roadway the previous week, and which led to police arresting a drunk driver.<sup>276</sup> The checkpoint had an undeniable law enforcement purpose: to obtain evidence leading to an arrest in the hit-and-run. But the consequence of that purpose was not directed at the individuals stopped at the checkpoint who, "in all likelihood," would not include the culprit.<sup>277</sup> In another checkpoint case, a search was ruled unconstitutional when the checkpoint's purpose was "to determine whether a vehicle's occupants were committing a crime," that is, when the expected consequences of the seizure were directed at the individuals seized.<sup>278</sup>

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271. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

272. *Santosky v. Kramer*, 455 U.S. 745, 748 (1982). Multiple states also apply a heightened burden of proof to an initial adjudication of abuse or neglect. *E.g.*, *In re G.S.*, 630 S.E.2d 607, 610 (Ga. Ct. App. 2006); *Adoption of Mary*, 610 N.E.2d 898, 902 (Mass. 1993); *In re D.D.H.*, 875 S.W.2d 184, 186 (Mo. Ct. App. 1994).

273. A large majority of states provide parents with a right to counsel throughout a child abuse or neglect case. Vivek Sankaran, *A National Survey on a Parent's Right to Counsel in Termination of Parental Rights and Dependency Cases*, UNIV. MICH. L. SCH. CHILD ADVOCACY CLINIC, [http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/National Survey on a Parent's Right to Counsel.pdf](http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/National%20Survey%20on%20a%20Parent's%20Right%20to%20Counsel.pdf) (last visited Nov. 18, 2012). Describing children's right to counsel is more difficult because some states provide a right to an attorney who will represent the child's views and others provide a right to an attorney who will represent what they believe to be in the child's best interest. Regardless, the vast majority of states provide some kind of legal representation to children in child abuse and neglect cases. JEAN KOH PETERS, U.S. JURISDICTION SUMMARY CHART (2006), [http://www.law.yale.edu/rcw/rcw/us\\_summary\\_chart.ppt](http://www.law.yale.edu/rcw/rcw/us_summary_chart.ppt).

274. 42 U.S.C. § 671(a)(15)(B)(i) (2006).

275. *Id.* § 675(5)(C).

276. 540 U.S. 419, 425 (2004).

277. *Id.* at 423.

278. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)) (distinguishing *Edmond*'s general crime-control checkpoint from *Lidster*'s information-seeking checkpoint).

This focus on consequences also helps respond to one critique of the special needs doctrine. Ric Simmons accuses the Court of “weakening . . . the ‘noncriminal purpose’ requirement” in the special needs cases that followed *T.L.O.*<sup>279</sup> While *T.L.O.* asserted a clear non-law-enforcement purpose (maintaining school discipline), Simmons argues that the later cases approving suspicionless drug testing of students were “barely distinguishable from a standard law enforcement purpose: ‘[d]eterring drug use by our Nation’s schoolchildren.’”<sup>280</sup> This riddle is solvable if we look past the stated special need and analyze the intended and foreseeable consequences of the search. Drugs’ illegality does not mean that concern about drug use necessarily has a criminal purpose or consequence. Explicitly refusing to turn over evidence of drug use to law enforcement and instead requiring that students engage in drug treatment places a search on the noncriminal side of the line. Conversely, *T.L.O.* wrongly approved a criminal consequence (turning over the evidence found in the search to police, leading to prosecution of *T.L.O.* as a delinquent) without considering whether the search had a purpose or reasonable expectation of imposing such a consequence.<sup>281</sup> That criticism stands despite the more clearly noncriminal purpose articulated in that case.<sup>282</sup>

## 2. Analyzing the Constitutional, Not Just Criminal, Consequences of a Search or Seizure

The special needs doctrine usefully focuses on consequences. But its limited focus on criminal consequences is unjustified.<sup>283</sup> A better approach is to reform the doctrine to focus on important constitutional consequences. If a search or seizure is reasonably likely

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279. Simmons, *supra* note 187, at 863.

280. *Id.* at 865 (alteration in original) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

281. *Supra* note 148 and accompanying text.

282. A focus on consequences, and, specifically, the absence of criminal consequences, also explains the results in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602 (1989) (upholding suspicionless drug testing of certain public employees). Paralleling his criticism of the school drug testing cases, Simmons criticizes these cases as involving searches whose purpose “was essentially to deter illegal activity (drug use), with the dubious argument that deterring illegal activity went beyond the standard goals of law enforcement because of the highly dangerous or sensitive positions that the employees occupied.” Simmons, *supra* note 187, at 868. The holding is less dubious when one considers the absence of any criminal consequences imposed on employees whose drug tests show evidence of illegal conduct. *Id.*

283. *Supra* Part III.E.

to threaten another constitutional right, it should not satisfy the special needs doctrine.

Significant Supreme Court precedent exists for weighing other constitutional consequences similarly. Those consequences form the constitutional context for any specific search or seizure; they determine whether anything of “constitutional magnitude is involved.”<sup>284</sup> And context matters to the Fourth Amendment analysis. As the Court wrote in *Safford*, “Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as . . . degrading . . . .”<sup>285</sup> That is, one cannot determine how invasive particular conduct is by looking at the precise, physical actions involved (in *Safford*, a teenager undressing) in isolation from its context.

My approach would place the Fourth Amendment special needs doctrine within the constitutional context of specific searches and seizures. Though a novel idea for the special needs doctrine, it is hardly novel for other constitutional rights or for the Fourth Amendment. In the Supreme Court’s procedural due process jurisprudence, the greater the importance of the private interest affected, the greater the process required to affect that interest.<sup>286</sup> Not coincidentally, modern procedural due process law, like the special needs doctrine, developed in response to the modern administrative state and the need to develop legal tests that recognized the different impacts of different types of government action. Similarly, when a search or seizure implicates a private interest of a constitutional dimension, that fact should be an essential element of the search’s context.

The Court has also explicitly integrated First and Fifth Amendment values into the Fourth Amendment. A proposed search and seizure of items with First Amendment protections (a reporter’s notebook or a mosque’s building) calls for applying the Fourth Amendment with “scrupulous exactitude.”<sup>287</sup> The Court has integrated

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284. *Supra* note 267 and accompanying text.

285. 129 S. Ct. 2633, 2642 (2009).

286. *Mathews v. Eldridge* built this principle into its procedural due process test, requiring analysis of “the private interest that will be affected by the official action” as the first element of the three-part procedural due process test. 424 U.S. 319, 335 (1976). A commentator has recognized that the *Mathews* test “calls for more formal procedures where more grievous deprivations are threatened.” Amy Sinden, “*Why Won’t Mom Cooperate?*”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 373 (1999).

287. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). Justice William Douglas made a similar point in his *Frank v. Maryland* dissent, connecting the First, Fourth, and Fifth

Fifth Amendment self-incrimination values into the Fourth Amendment. *Boyd*, the nineteenth-century case indirectly relied upon in *Camara*, explicitly connected the Fifth Amendment implications of the document seizure at issue to the Court's holding that the seizure violated the Fourth Amendment.<sup>288</sup> Though the Court may not have applied this principle scrupulously in all cases,<sup>289</sup> it stands for the proposition that people have a greater expectation of privacy when other fundamental constitutional rights are at stake.<sup>290</sup> Similarly, in applying the community caretaking doctrine (itself somewhat analogous to the special needs doctrine), the Washington Supreme Court has explicitly weighed individuals' constitutional rights beyond the Fourth Amendment, including the freedoms of association and expression.<sup>291</sup>

The lesson, as Akhil Amar put it, is that we should look to the entire Constitution “to identify constitutional values that are elements of *constitutional* reasonableness” under the Fourth Amendment.<sup>292</sup>

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Amendments as “safeguarding not only privacy and protection against self-incrimination but ‘conscience and human dignity and freedom of expression as well.’” 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) (quoting *Ullmann v. United States*, 350 U.S. 422, 445 (1956)). Justice Douglas's dissenting view became the majority view when *Camara* overturned *Frank*. A First Amendment concern can also be raised in child protection investigations. *E.g.*, *In re Steed*, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652 (Ct. App. May 22, 2008).

288. *Supra* note 133 and accompanying text.

289. Amar has criticized the Court for its handling of *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), for failing to apply the *Stanford* principle faithfully. Amar, *supra* note 116, at 805-06.

290. Avoiding law enforcement consequences by imposing First Amendment consequences should not resolve special needs doctrine. Alafair S. Burke hypothesized civil seizures of noisemaking devices as an attractive alternative to criminal sanctions of noisemakers, and a positive illustration of the policy incentives served by the special needs test's focus on law enforcement purposes. Burke, *supra* note 238, at 1031. Civil seizure may indeed be preferable to criminal sanctions, but that fact alone should not place the proposed seizures under a relaxed Fourth Amendment framework, because such seizures could directly affect First Amendment rights. (If the particular devices lack significant First Amendment protection, it is a different matter.)

291. *State v. Kinzy*, 5 P.3d 668, 679 (Wash. 2000) (en banc).

292. Amar says to examine the Bill of Rights, in which he includes the Fourteenth Amendment. Amar, *supra* note 116, at 805 & n.170. For clarity of application, I would examine all substantive constitutional rights deemed fundamental—either deemed “implicit in the concept of ordered liberty” and thus incorporated against the states via the Fourteenth Amendment, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or deemed to be a fundamental right under another amendment, Amar, *supra* note 116, at 805. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). As the phrase “constitutional *reasonableness*” suggests, Amar calls for a review of the reasonableness of most searches and seizures, rather than a warrant and probable cause approach—this is an approach I do not share. His separate insight that Fourth Amendment analysis must incorporate other constitutional concerns directly applies to my approach.

That a search or seizure, as in *Camreta*, affects a fundamental constitutional right protected by the Fourteenth Amendment must be considered in evaluating the action's constitutionality. The failure of the present special needs doctrine is that it avoids such an evaluation by focusing entirely on the presence or extent of a law enforcement purpose. Schulhofer's line between social control and internal governance searches and seizures would be a dramatic improvement over the status quo, but that line less precisely directs consideration of other constitutional values, unlike a test focused on whether a search or seizure implicates constitutional rights.<sup>293</sup>

Of course, delineating fundamental constitutional rights is no obvious task. I would include all substantive rights that spring from the Constitution itself, most of which are found in the Bill of Rights or later amendments (especially the Fourteenth Amendment). As an illustration, one can distinguish searches and seizures of public school students, which threaten juvenile justice or child protection consequences, from searches and seizures implicating school disciplinary actions, like short suspensions. The former implicates rights substantively created by the Constitution<sup>294</sup> while the latter implicates rights created by state law, which only trigger modest procedural constitutional protections.<sup>295</sup> A more difficult case might involve more severe disciplinary consequences like expulsion.<sup>296</sup> Litigation would necessarily focus on which reasonably foreseeable consequences of various searches and seizures trigger constitutional protections, a task entirely in line with the special needs doctrine's focus on consequences and a contextual, constitutional understanding of the Fourth Amendment.

More generally, this contextual analysis flows from Fourth Amendment principles that animate the seminal case of *Katz v. United States* and its discussion of what creates a "reasonable expectation of privacy" that the Fourth Amendment will protect.<sup>297</sup> Justice John Harlan's concurrence explained that the Fourth Amendment protects

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293. Schulhofer, *supra* note 4, at 116.

294. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing a right to family integrity); *In re Gault*, 387 U.S. 1 (1967) (recognizing a right to juvenile justice).

295. *Goss v. Lopez*, 419 U.S. 565, 572 (1975). In addition, state constitutions do provide a substantive right to an education. See Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003) (discussing state constitutional provisions). A state constitutional analog to the Fourth Amendment, therefore, might lead to a different result than a federal constitutional analysis.

296. *Goss*, 419 U.S. at 584.

297. 389 U.S. 347 (1967).

an expectation of privacy “that society is prepared to recognize as ‘reasonable.’”<sup>298</sup> Justice Harlan later expounded, “This question must . . . be answered by assessing the nature of a particular practice and the *likely extent of its impact on the individual’s sense of security* balanced against the utility of the conduct as a technique of law enforcement.”<sup>299</sup> If an action “significantly jeopardize[s] the sense of security which is the paramount concern of Fourth Amendment liberties,” then it deserves significant Fourth Amendment protection.<sup>300</sup>

Applying these lessons to child protection investigations powerfully illustrates why constitutional rights beyond those accorded to criminal suspects must be included. Child protection searches directly affect Fourteenth Amendment rights. They threaten to support state action to take custody of a child away from a parent, which is the most fundamental interference with a parent’s constitutional right to “care, custody, and control” of their child and to the child’s right to remain with the parent.<sup>301</sup> Indeed, in *Camreta*, the child suffered precisely that kind of “uncertainty and dislocation” when placed in foster care for three weeks as a result of her allegedly coerced statements.<sup>302</sup> It should be plain that this type of action can shake an individual’s “sense of security.”

Even when a child protection investigation does not lead to the removal of a child from their family, it affects Fourteenth Amendment rights. The Constitution gives parents immense authority: the right to be a “despot,” likely benevolent, over their children.<sup>303</sup> The seizure of children to discuss allegations of abuse or neglect is itself a sharp limit of this parental authority. Indeed, that limitation is the entire point: state officials seek to isolate children from their parents to discuss, free of parental influence, whether the parents have provided adequate care.<sup>304</sup> Searches of the family home and compelled interviews of

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298. *Id.* at 361 (Harlan, J., concurring).

299. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (emphasis added).

300. *Id.*

301. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court has expressed its concern that unnecessary intervention in family life will cause children to “suffer from uncertainty and dislocation.” *Stanley v. Illinois*, 405 U.S. 645, 647 (1972). Circuit courts have consistently found that children have a right to family integrity. *E.g.*, *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000); *Franz v. United States*, 707 F.2d 582, 599 (D.C. Cir. 1983).

302. *See Stanley*, 405 U.S. at 647.

303. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 675-76 (2006).

304. The *Camreta* defendants acknowledged this point. *Supra* note 45 and accompanying text.



everyone in the home necessarily imply a limit to the parents' authority over their home, the physical location where a parent's constitutional rights are at their highest and unmediated by school or other authority figures.

Child development theory, on which the Supreme Court has relied in other cases involving children's constitutional rights,<sup>305</sup> is consistent with constitutional protections against such interventions into the parent-child relationship. Doriane Lambelet Coleman has summarized the scientific evidence that children have a sense of privacy and bodily integrity from very young ages, a sense which searches and seizures may violate—and those violations “cause real emotional and psychological harm.”<sup>306</sup> In their seminal work on state intervention in children's lives, Joseph Goldstein and his coauthors wrote:

Any invasion of family privacy alters the relationships between family members and undermines the effectiveness of parental authority. Children, on their part, react with anxiety even to temporary infringements of parental autonomy. The younger the child and the greater her own helplessness and dependence, the stronger is her need to experience her parents as her law-givers—safe, reliable, all-powerful, and independent. Therefore, no state intrusion ought to be authorized unless probable and sufficient cause has been established . . . .<sup>307</sup>

Goldstein and his coauthors thus suggest a dramatic break from current child protection practices. Child protection authorities impose similar “temporary infringements of parental authority” in response to virtually any allegation of abuse or neglect.<sup>308</sup> Goldstein and his coauthors would replace that current regime with one requiring that some standard be met before such invasive, investigatory steps could occur. The authors do not describe the legal mechanism they would use, but the phrase “probable and sufficient cause” suggests Fourth Amendment procedures.<sup>309</sup>

Child protection cases also illustrate why the special needs doctrine ought not elevate criminal consequences over all other consequences because they show that criminal consequences are not inherently more severe than others. To maintain the current special

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305. *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).

306. Coleman, *supra* note 11, at 515-16, 520-21.

307. Goldstein et al., *supra* note 106, at 97.

308. *See supra* notes 68-71 and accompanying text.

309. Goldstein et al., *supra* note 106, at 97.

needs doctrine, one must accept that it is worse to be placed in prison for a short period of time than to lose your children or, from the child's perspective, to be taken from your parents and placed with strangers. As Amy Sinden has convincingly written:

Considering the fear and trauma that removal can invoke in a child, it seems reasonable to suppose that many parents, if given the choice, would rather themselves spend several days in prison, than see their child taken away from all people and things familiar to spend even a few nights with well-meaning strangers in foster care.<sup>310</sup>

The Supreme Court has occasionally suggested that it views the fundamental substantive due process right of family integrity and the right to liberty, at stake in a criminal case, as similarly serious.<sup>311</sup> The most detailed discussion came in *Santosky v. Kramer*, which addressed the burden of proof borne by the state in a termination-of-parental-rights case.<sup>312</sup> Having decided that a preponderance of the evidence burden gave insufficient deference to the fundamental constitutional rights at stake, the Court addressed whether a beyond a reasonable doubt burden, with analogies to criminal cases, was needed, or whether a clear and convincing burden would suffice.<sup>313</sup> The Court chose the latter because termination-of-parental-rights cases often involved psychiatric evidence on issues “difficult to prove to a level of absolute certainty.”<sup>314</sup> This explanation does not suggest that the rights at stake in a termination case are less than the rights at stake in a criminal trial. Rather, it suggests that the type of facts that need to be proven (whether a child is “permanently neglected”<sup>315</sup> in the former, compared with whether a defendant committed specific acts in the latter) necessitates a partially elevated burden. By declining to hold that the interests at stake in child welfare cases are categorically less important

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310. Sinden, *supra* note 286, at 360-61. Sinden gives a fuller critique of the too-often-assumed primacy of loss of physical liberty over other forms of liberty. *Id.* at 358-68; see also DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 17 (2002) (“Removing children from their homes is perhaps the most severe government intrusion into the lives of citizens.”).

311. At least one state court has equated the Fourth Amendment rights of children in child protection cases to adults accused of crimes, while ruling that a requested sex abuse exam of a teenage girl was unnecessary when conclusive proof of such abuse already existed. *In re Shernise C.*, 934 N.Y.S.2d 171 (App. Div. 2011) (“An innocent child should certainly have as much right to be free from an unreasonable search and seizure as someone suspected of committing a crime.”).

312. 455 U.S. 745 (1982).

313. *Id.* at 768.

314. *Id.* at 769.

315. *Id.* at 747.

than those in criminal cases, *Santosky* evoked the dissenting opinions written the prior term in *Lassiter v. Department of Social Services*, in which the Court held by a five-to-four vote that parents do not have a constitutional right to counsel in termination-of-parental-rights proceedings.<sup>316</sup> One Justice wrote that “there can be few losses more grievous than the abrogation of parental rights.”<sup>317</sup> Another went further: “Although both deprivations [a prison sentence and termination of parental rights] are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law.”<sup>318</sup>

Such statements are not limited to family integrity cases. The Court recently noted that the nominally civil sanction of deportation is “sometimes the most important part” of consequences that flow from a criminal conviction.<sup>319</sup> That is, core criminal sanctions (a prison sentence, a fine, the public stigma associated with a criminal conviction) may all impose a less grievous harm to many individuals than a sanction imposed by the civil immigration law.

Still, the law generally prioritizes criminal consequences over civil ones, even those that implicate fundamental rights and severely limit liberty. An earlier burden of proof case highlighted how the beyond a reasonable doubt burden serves to bolster the “moral force of the criminal law” and thus is unlikely applicable to civil actions, even those leading to severe liberty infringements.<sup>320</sup> The moral force of criminal law also reflects the social stigma that accompanies a conviction.<sup>321</sup> It is therefore unsurprising that at least one commentator has suggested that the special needs doctrine serves to distinguish “morally stigmatizing” government goals from less stigmatizing

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316. 452 U.S. 18 (1981).

317. *Id.* at 40 (Blackmun, J., dissenting).

318. *Id.* at 59 (Stevens, J., dissenting).

319. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010). *Padilla* noted that deportation is “not, in a strict sense, a criminal sanction,” but emphasized the “close connection” between the criminal and civil bodies of law. *Id.* at 1481-82.

320. *Addington v. Texas*, 441 U.S. 418, 428 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970) (internal quotation marks omitted)). Like *Santosky*, *Addington* also focused on other differences between criminal cases and the problem at issue—civil commitment of the mentally ill. “The subtleties and nuances” of mental health conditions and diagnoses threatened to make the beyond a reasonable doubt burden insurmountable in any case. *Id.* at 430. Which dicta in *Santosky* and *Addington* are most important cannot be definitively determined from the text of the opinions themselves.

321. Merely describing conduct as criminal—even if prosecution cannot or does not occur—creates a stigma worthy of the Supreme Court’s attention. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

ones.<sup>322</sup> Put another way, criminal investigations can “damage reputation or manifest official suspicion,”<sup>323</sup> and impose a “targeting harm” distinct from the harm to one’s privacy caused by a particular search or seizure.<sup>324</sup>

But even this morally stigmatizing force does not justify drawing a line around criminal consequences. For instance, the stigma attached to drunk driving (at least, when it does not lead to harmful accidents) is less than that attributed to drug use.<sup>325</sup> Yet searches aimed at identifying the latter can be distinguished from criminal enforcement purposes (as *Von Raab*, *Skinner*, *Acton*, and *Earls* make clear) while the seizures aimed at the former (in *Sitz*) lead to criminal consequences. *Ferguson II* provides an even more powerful example by illustrating the tremendous stigma applied to maternal drug use, especially among poor, African-American women.<sup>326</sup>

One can broaden the point: society holds somewhat stereotypical and idealized views of parenthood, especially motherhood, and concomitantly places a tremendous stigma on bad parents, especially bad mothers.<sup>327</sup> The stigma is both gendered and racial; our country’s long and troubled racial history “has long stereotyped poor Black women . . . as incompetent, uncaring, and even pathological mothers.”<sup>328</sup> Beyond legal literature, other writers have identified the powerful social meaning attached to judgments of one’s quality as a mother, and how deeply rooted such judgments are in American history and society.<sup>329</sup> It should be apparent that this social stigma has nothing to do with whether evidence of maternal drug use supports a criminal charge against the mother, a civil action to remove a child

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322. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL’Y 1, 30 (2002).

323. Schulhofer, *supra* note 4, at 116; see also Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 274.

324. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1486-87 (1996).

325. Taslitz, *supra* note 322, at 67-72.

326. *Id.* at 76-77.

327. See Marie Ashe, “Bad Mothers,” “Good Lawyers,” and “Legal Ethics,” 82 GEO. L.J. 2533, 2547 (1993) (describing the “gendered focus of child dependency law” as imposing a “stigma of ‘badness’” on women).

328. ROBERTS, *supra* note 310, at 28.

329. See generally “BAD” MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA (Molly Ladd-Taylor & Lauri Umansky eds., 1998) (discussing the social impacts of mother-blaming theories). For a more recent and mass-marketed topic on similar themes, see AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* (2009).

from that mother's custody, or both. Any use of such evidence would impose a severe stigma. That is particularly so when such evidence is used to establish that mothers are unfit parents, as occurs in child protection cases (that is, to target individuals for a formal, adverse, and stigmatizing judgment). And when authorities place children in foster care, the stigma passes down by a generation.<sup>330</sup>

Finally, lower federal court child protection cases aptly illustrate why the special needs doctrine should focus on important constitutional consequences of searches and seizures because federal appellate courts have already begun linking Fourteenth Amendment analyses to Fourth Amendment analyses. These cases arise when parents and children challenge what they allege to be an unnecessary and unconstitutional removal of the child by child protection authorities. Parent and child plaintiffs typically allege that the challenged removal violated their Fourteenth Amendment right to family integrity and the child's Fourth Amendment protections against unreasonable seizures. In *Tenenbaum v. Williams*, the Second Circuit addressed a Fourteenth and Fourth Amendment challenge to the state's removal of a child and subsequent medical examination of her.<sup>331</sup> After discussing, but not deciding, whether the special needs doctrine applied, the Second Circuit stated, "Whatever Fourth Amendment analysis is employed, then, it results in a test for present purposes similar to the procedural due-process standard."<sup>332</sup> That test raised a colorable claim of unconstitutional removal and thus demanded a ruling in favor of the parents and child. At least two other circuits have held similarly.<sup>333</sup>

The connection drawn, in *Tenenbaum* and similar cases, between the Fourth and Fourteenth Amendments is particularly clear in cases that challenge the removal of a child as a violation of both Amendments. A removal involves physically taking custody of a child and is thus undeniably a seizure for Fourth Amendment purposes. A removal directly infringes on a parent's due process right to care,

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330. *E.g.*, ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X*, at 21 (Grove Press 31st ed. 1992) (1964) (describing the stigma of being a "state child").

331. 193 F.3d 581 (2d Cir. 1999).

332. *Id.* at 605.

333. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 428-29 (5th Cir. 2008); *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) ("The action challenged in this case involved not only a warrantless search, but also the removal of a child from his parents[, which implicates] the interest of the parents in keeping the family together." (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982))); *Wallis ex rel. Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000) ("[T]he same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children [as applies to parents' claims].").

custody, and control, which the Supreme Court has held may generally not occur without a hearing on the parent's fitness.<sup>334</sup> A less clear connection exists to a CPS investigation like the seizure at issue in *Camreta*, which involved state action that intervened in family integrity to a lesser degree immediately and only threatens a future removal. But the fundamental point that the Fourteenth Amendment rights at stake affect the Fourth Amendment analysis applies in full force.

*C. Refocus on the Warrant Requirement's Purpose*

The special needs doctrine asks when government officials should be able to avoid the burden of the Fourth Amendment's warrant clause. Focusing instead on the existence of a law enforcement purpose distracts from the ultimate purpose of the test. *Burger* suggests a useful line of analysis for cases involving special needs searches.<sup>335</sup> When administrative standards advise individuals that a search or seizure is legal, has a defined scope, and limits the discretion of government officials, then a warrant is less likely to add value.<sup>336</sup> On the other hand, when the decision to search or seize, or the decision regarding scope and methods to be used, involves discretion or does not follow clear limits, then a detached and neutral magistrate provides essential protections.

Child protection again demonstrates how the special needs doctrine's focus on law enforcement purposes prevents it from fulfilling its goal of determining when a warrant is required. Child protection investigations have substantial, case-by-case variation necessitating significant executive discretion regarding when and how to perform an investigation. These investigations are inherently adversarial,<sup>337</sup> creating an "often competitive enterprise" in which child protection investigators try to ferret out evidence of abuse or neglect.<sup>338</sup> Even with some regulatory guidance, these investigations call out for a check on state officials' discretion. And the regulatory guidance that does exist can be violated, as the *Camreta* facts (leading questions asked in violation of state guidance for interviewing children) reveal.<sup>339</sup>

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334. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

335. As argued *supra* notes 195-196 and accompanying text, *Burger* incorrectly held that the search at issue served special needs rather than law enforcement purposes.

336. *New York v. Burger*, 482 U.S. 691, 703 (1987).

337. *Supra* note 208 and accompanying text.

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

339. Oregon guidelines caution against "asking numerous leading questions" and "making coercive statements" because they will lead to "a higher possibility that some

Yet, unless the special needs doctrine can consider purposes beyond law enforcement, it will likely permit an unjustified exception to the warrant requirement for child protection searches and seizures, and fail even to consider violations of government guidelines for child protection investigations. Just as *Burger* required an administrative scheme to limit discretion in a business regulation case, at the very least the special needs doctrine should inquire whether a warrant is necessary in order to check executive branch discretion in child protection investigations.

*D. Applying a Reformed Special Needs Test in Child Protection Cases*

Applying a reformed special needs test can lead to a clearer and more analytically sound resolution of Fourth Amendment questions in child protection cases. The first and most important point in the analysis is that the foreseeable consequence of child protection searches and seizures—removal of children from their parents and placement in state custody—is severe and of immense constitutional magnitude to both parents and children. It directly implicates fundamental constitutional rights of such a pedigree that they trigger many procedural protections. This point values not only severe civil consequences similarly to criminal consequences, but it values the impact of this governmental action on children (who experience only the civil consequences) as highly as it values the impact on parents (who may experience both civil and criminal consequences). This point is true regardless of the involvement of law enforcement or the presence of an allegation of physical or sexual abuse that would be relatively likely to trigger law enforcement involvement.<sup>340</sup>

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children will make false accusations.” BOHANNAN ET AL., *supra* note 80, at 28. In *Camreta*, the social worker repeatedly made coercive statements: In response to S.G.’s denial of any abuse by her father, “He would say, ‘No, that’s not it,’ and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers.” *Greene v. Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

340. The majority of administrative findings of child maltreatment are for neglect, not physical or sexual abuse. *Supra* note 33 and accompanying text. Likewise, state-specific data shows that a similar proportion of removals result from neglect and not physical or sexual abuse. *E.g.*, CHILD & FAMILY SERVS. AGENCY, DIST. OF COLUMBIA, ANNUAL REPORT FY 2010, at 23 (2011) (listing “neglect” as the primary reason in 531 of 809 removals, with physical and sexual abuse accounting for only 202; the remainder falling into categories accurately counted as neglect and not abuse, like a parent’s drug abuse, incarceration, or “caretaker ill or unable to cope”).

Secondly, child protection searches involve significant discretion. Although every allegation, no matter how severe or how credible, must be investigated, and every investigation must include certain steps, essential details remain within individual caseworkers' discretion: when to search a home or seize a child; whether to request consent before such steps; how to interview a potential victim, perpetrator, or witness; and whether a physical exam is needed and, if so, who should perform it.<sup>341</sup> These decisions follow a subjective and case-specific evaluation of evidence.

Under this analysis, *Camreta* becomes fairly easy.<sup>342</sup> The seizure at issue implicated fundamental constitutional rights and led state officials to remove S.G. from her family for three weeks. The time, place, and manner of the seizure were discretionary. *Camreta* and Alford chose when to seize and interview S.G. (several days after receiving the allegation, without performing much background investigation, and without requesting consent from either of S.G.'s parents), chose where to do it (at school, to best isolate S.G. from her parents), and chose how to do so (with a series of leading and high-pressure questions). Moreover, the interview's details illustrate the problems that arise when child protection authorities exercise unchecked discretion.

A ruling that child protection searches and seizures should require probable cause would have significant benefits, as suggested throughout this Article. States would have incentives to limit the number of investigations triggering such severe consequences to children through mechanisms like differential response. States would also face incentives to individualize investigations to a greater extent, considering an allegation's severity and its credibility. The answer to

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341. *Supra* notes 68-70 and accompanying text. Court procedures can direct child protection agencies to use forensic interviewers, rather than less-well-trained investigators. For instance, the Indiana Court of Appeals upheld a court order that directed the interview of a child at a local child advocacy center. *In re G.W.*, No. 07A01-1201-JM-6, slip op. at 10-11 (Ind. Ct. App. Oct. 10, 2012), available at <http://www.in.gov/judiciary/opinions/pdf/10101203tac.pdf>. The case arose under a statutory provision empowering child protection authorities to seek a court order for a parent "to make the child available to be interviewed" IND. CODE § 31-33-8-7(d) (2012), when "good cause" exists, *id.* § 31-33-8-7(c).

342. *Camreta* would also be fairly easy under Schulhofer's test, discussed *supra* notes 252-253 and accompanying text. A child protection investigation does not serve the "internal governance objectives" of a public school. Rather, it balances "the individual interest in the security of private activity"—from a parent's perspective, to raise one's children as one sees fit, and, from a child's, to live with one's family—and "the public interest in effective social control," which is prevention of child abuse or neglect and protection of children from such maltreatment; thus, Schulhofer would require a warrant and probable cause. Schulhofer, *supra* note 4, at 118.



every allegation need not be an invasive search of a home and nonconsensual interviews of children. Incredible allegations, or allegations that appear motivated by personal quarrels among adults, need not trigger such invasions (and could not, under a ruling outlined above).<sup>343</sup>

We can imagine two twists of the facts in *Camreta*. First, assume that a child protection investigator visits a school to speak with school staff. A teacher takes the child to the investigator, who explains their job. The child responds, “Can I tell you about what my dad does to me when he drinks?” and the investigator then takes the child to the multidisciplinary center for an interview. If a child voluntarily speaks with state officials, then there should be no Fourth Amendment problem.<sup>344</sup> Although they may not understand the consequences of disclosing abuse to child protection officials, the child appears to consent willingly to an interview of reasonable duration. And if children can voluntarily speak to police when they themselves face law enforcement consequences, it stands to reason that they can also speak to child protection officials when they may face child protection consequences. Because a voluntary conversation is permitted, some very limited contact with children to determine if they will voluntarily talk with investigators should be permitted, but with close scrutiny of the voluntariness of a child’s response.<sup>345</sup>

Second, assume that, following a detailed investigative regimen, a child protection investigator determines that there is reasonable suspicion that a father molested his daughter. Following administrative protocol, he performs as much investigation as possible without revealing the existence of an investigation to the child or her parents by speaking with school staff and others familiar with the family. He then seeks the mother’s consent to take the child to a multidisciplinary center to be interviewed about the alleged abuse by a trained forensic interviewer. This would be the only investigatory interview of the child and it would be recorded in its entirety. The mother refuses to consent, denying any abuse. The investigator then brings the child to the center for an interview and invites the parent to attend. This twist

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343. Cf. *supra* notes 74-78 and accompanying text.

344. Justice Sonia Sotomayor suggested this point in the *Camreta* oral arguments, suggesting that if S.G. had told Camreta, “I wish somebody had asked me before[;] I’m so afraid of my daddy,” then a seizure surely would be acceptable. Transcript of Oral Argument, *supra* note 94, at 37-38.

345. The Supreme Court recently held that a child’s age is a relevant factor in determining whether they were in custody for purposes of obtaining *Miranda* warnings. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

supposes more effective administrative limits on official discretion. The interview itself would be more rigorous and effective than the interview actually performed in *Camreta*. The interviewer would follow more-certain protocols; each interview would necessarily follow its own course, but the methods used would be more standardized than under a regime that permitted each individual investigator to interview children when and how they saw fit. Although a closer case than *Camreta*, I would not apply the special needs doctrine and would require a warrant and probable cause before such a seizure could take place because the immediate and potential consequence to the child is so severe, and, separately, the remaining discretion to the state official is so great, especially the discretion to determine when evidence established that a forensic interview was necessary, that these protections are essential. It must be noted that this result would not necessarily prevent the interview from occurring; probable cause may well exist and indicate that a multidisciplinary center interview would reveal evidence of child abuse.

## V. CONCLUSION

I ended the previous section with a reevaluation of the *Camreta* facts. The questions asked in evaluating those facts, whether the seizure at issue implicated a fundamental constitutional right and whether the seizure followed an administrative protocol that adequately limited state actors' discretion, are more relevant to evaluating a search and seizure than, as the present special needs doctrine requires, simply asking if a law enforcement purpose exists. Reforming the special needs doctrine to focus on its core purposes (protecting individuals when the consequences to them are constitutionally significant and incentivizing all levels of government to avoid the harshest consequences and to use democratic processes to develop meaningful limits on executive discretion) will lead to more logical legal rules and more effective protections for core Fourth Amendment values.