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Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights

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LEGAL BARRIERS IN CHILD ABUSE INVESTIGATIONS: STATE POWERS AND INDIVIDUAL RIGHTS*

Mark Hardin**

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I. INTRODUCTION

Child protection agencies¹ face a complex and challenging task in investigating cases of suspected child abuse and neglect. These agencies must make expeditious and accurate determinations about whether children are actually endangered, without needlessly disrupting and traumatizing families.² The burden on child protection agencies has been greatly increased by the recent sharp rise in reports of child maltreatment. Not only have reports of child abuse and neglect soared,³ reaching an estimated 1.146 million reports against

1. The term "child protection agency" is used throughout the article to refer to state and local government entities charged with conducting investigations and taking protective action on behalf of endangered children. For an overview of the duties and responsibilities of child protection agencies, see generally Drews, *Child Protective Services*, in *THE ABUSED AND NEGLECTED CHILD: MULTI-DISCIPLINARY COURT PRACTICE* 87 (1978). See also Davidson & Horowitz, *Protection of Children from Family Mistreatment*, in *LEGAL RIGHTS OF CHILDREN* §§ 7.14-.16 (1984) [hereinafter *Protection of Children*].

2. See generally NATIONAL ASSOCIATION OF CHILD WELFARE ADMINISTRATORS, *GUIDELINES FOR A MODEL SYSTEM OF PROTECTIVE SERVICES FOR ABUSED AND NEGLECTED CHILDREN AND THEIR FAMILIES* (1988).

3. Reports of child abuse rose an estimated 188% from 1976-1985, the most recent year in which statistics have been published. See AMERICAN HUMANE ASSOCIATION, *HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING* 2-12, 23 (1987) [hereinafter *REPORTING HIGHLIGHTS*]. Figures for 1985 were 1.928 million child reports and 1.146 million reports against families. *Id.* In 1986, the number of child reports increased to an estimated total of 2.2 million. Telephone interview with Patricia Shene, Director of the American Humane Association (February 5, 1988). The 1986 figures had not been fully analyzed or published at the time of the interview.

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families in 1985,⁴ but the numbers of substantiated cases seem to have increased correspondingly.⁵

This article addresses the legal dimensions of an important and difficult problem sometimes faced by social workers employed with child protection agencies: noncooperation with investigations. This problem can arise when the child's family denies access to the home or the child, or when others, such as schools and health providers, decline to cooperate with the investigation.⁶

In many states, child protection agencies do not have appropriate investigative tools to deal with noncooperation. If agency workers cannot gather enough information to support a child protection petition in juvenile court,⁷ they may feel forced to choose between dropping the investigation and summarily removing children from their homes.⁸ In states with strict criteria for emergency removal of children from

4. This figure more accurately reflects the total number of reports submitted against families in 1985 than the actual number of families who were the subject of the reports during 1985. Fifty-one out of the 55 states and territories providing data for The American Humane Association study counted reports on children and families in their 1985 totals. REPORTING HIGHLIGHTS, *supra* note 3, at 8.

5. *Id.* at 23. In 1984, 42% were substantiated.

6. The following hypothetical examples illustrate the difficulties social workers sometimes face while investigating child protection cases:

Example 1:

A county child protection agency receives an anonymous letter stating that children located at a certain address are being abused and neglected. The letter states that the writer has heard loud screaming from the house and, when the front door has been left ajar, has noticed that the house is piled with trash. In addition, the writer has observed the children to be "filthy and unkempt."

In response to the letter, the agency dispatches a social worker to visit the address in question. When the worker knocks on the door, a person inside answers without opening it. When the worker explains the purpose of the visit, the worker is instructed to leave. The curtains are drawn, and the worker cannot see inside the residence. When the worker subsequently contacts the children's school, school officials refuse to allow the children to be interviewed without parental permission. A medical clinic treating the children is also contacted, but it declines to talk to or share records with the agency, stating that the information is confidential.

Example 2:

A state child protection agency is visited by an individual who had left a particular religious commune 90 days previously. The former commune member says that the commune's children are being denied medical treatment and are routinely and severely beaten for trivial acts of misbehavior.

When a social worker telephones the commune, the person who answers hangs up. When the worker visits in person, the worker is asked to leave.

7. The term "juvenile court" is used generically in this article to refer to state courts charged with handling child abuse, neglect, or dependency petitions. Every state has a statute that establishes special judicial procedures for adjudicating allegations of child maltreatment. These statutes assign a specific court to handle such proceedings. This court is most commonly known as the juvenile court. See generally D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT § 6.2.3, at xxi (1974).

8. See, e.g., *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987) (assistant state's attorney sued under 42 U.S.C. § 1983 for personally taking child into custody); *Child Beatings: Question of Abuse or*

their homes, agency workers may feel forced to use false threats in order to gain access to the home and the child, or enlist the police to intimidate families into allowing entry into the home.⁹ Because there are no alternate investigative remedies, children may needlessly remain at risk, or families may be unnecessarily separated.

Accordingly, statutory reform is needed to facilitate investigations by child protection agencies. State laws should create remedies that permit social workers to enter a home to observe the child and to investigate the circumstances of the child's care. Social workers should also be permitted to interview and obtain pertinent records from parents, caretakers, schools, physicians, and others with knowledge or information concerning the child and family. In addition, state law should more clearly and completely set forth the obligation of government agencies, private organizations, and members of the public to cooperate with child abuse investigations.

New investigative powers and guidelines can serve several important purposes. Legal reform can ease the job of child welfare investigators by providing improved means for determining whether a child is endangered, and, if so, to gather sufficient proof to support protective action. Explicit, uncomplicated legal guidelines can both protect investigators from criticism¹⁰ and liability,¹¹ and restrain those who would otherwise commit flagrantly improper investigative practices. When policies and procedures are specific and practical, their violation is more inexcusable. Clearer investigative guidelines will promote more effective administrative sanctions against, and civil remedies for, improper child protection investigations. Such sanctions and remedies are critical, because the exclusionary rule probably does not prevent

Discipline, N.Y. Times, July 1, 1984, at 14, col. 1; *Children of Sect Seized in Vermont*, N.Y. Times, June 23, 1984, at 1, col. 5.

9. In off-the-record interviews with the author, many agency investigators and police indicated that they sometimes "bluff" the family into permitting entry into the home. In addition, some believe that a parent's failure to cooperate with the investigation can be sufficient to justify taking temporary custody of the child.

10. Child welfare investigators are presently subject to intense public criticism. See, e.g., Kurtz, *New York Child Died Because System Failed*, Washington Post, Nov. 7, 1987, at A1, col. 1; Shulte & Bergal, *Aid for Tot Came Too Late*, Ft. Lauderdale News/Sun-Sentinel, Oct. 7, 1986, reprinted in Ft. Lauderdale News/Sun-Sentinel, *Suffer the Children: The Killings the State Didn't Stop* (1986); Bergal, Bochi, & Schulte, *Kids Florida Didn't Protect*, Ft. Lauderdale News/Sun-Sentinel, Oct. 5, 1986, reprinted in Ft. Lauderdale News/Sun-Sentinel, *Suffer the Children: The Killings the State Didn't Stop* (1986) (pamphlet printed by Ft. Lauderdale News/Sun-Sentinel); Dold & Gratteau, *Child Abuse Deaths Soar in Illinois*, Chicago Tribune, Sept. 14, 1986, at A1, col. 1.

11. See generally D. BESHAROV, *THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES* 51-107 (1985).

the use of illegally obtained evidence in a noncriminal child protection proceeding.¹²

At the same time, the law needs to accommodate family privacy interests, and to balance those interests against the need to protect the child. Powerful, countervailing considerations are presented: Child abuse investigations often involve devastating invasions of family life, yet can be necessary to protect children from pain, injury, or death. Although the issues are difficult, explicit and clear procedural requirements and protections that respect the constitutional rights of children and families must be identified.

Constitutionally based procedural rules governing child abuse investigations have not yet been firmly established. Although there is an extensive and well-developed body of constitutional procedural requirements for criminal investigations, and although there is a less well-developed set of principles generally applicable to investigations by government administrative agencies, key procedural principles governing child abuse investigations remain unsettled.

This article identifies the constitutionally based procedural requirements that are applicable to child abuse investigations. It then proposes specific legislative reforms consistent with these constitutional requirements. The discussion of procedural requirements for child protection proceedings necessarily considers whether existing criminal and administrative procedures apply to the child welfare context.

The article covers three related areas in child abuse investigations: First, methods for gaining access to the child's residence and to other places where evidence regarding child abuse may be found; second, methods for gaining access to the child for an interview, for observation, or for lay or medical examination; and third, methods for obtaining records or other information relevant to the investigation. The focus of the article is limited to the period of time prior to the drastic step of filing a child abuse petition or placing a child away from home.

12. See *infra* text accompanying notes 418–66.

II. ACCESS TO CHILD'S RESIDENCE OR OTHER PLACES WHERE EVIDENCE OF CHILD ABUSE MAY BE FOUND

A. *Introduction*

There are many circumstances in which a search or inspection of the child's home is necessary to advance a child abuse investigation.¹³ This section of the article considers the various legal bases for gaining access to a child's home or other places where relevant evidence may be found.¹⁴ It considers the practical and constitutional limitations of the most common methods for entering private property in child abuse investigations: consent (Section II.B); the emergency doctrine (Section II.C); state temporary custody statutes (Section II.D); and criminal search warrants (Section II.E).¹⁵ This section of the article also demonstrates the need for a special remedy to permit investigative entries into private property in child protection cases by explaining the limitations of those legal means for entry. Section II.F explores the constitutional requirements for such a special remedy, including the necessary standard of proof, the need for a warrant, and necessary procedures in obtaining and executing a warrant. Section II.G proposes specific statutory reforms permitting entries in child abuse investigations.

Analysis of these issues relies on constitutional precedent from criminal procedure and administrative agency cases, taking into account the similarities and differences between investigative entries in the different contexts. Although there are few cases directly on point, fourth amendment issues in child abuse investigations cannot be

13. For example, it may be necessary to enter a child's home to determine whether conditions there are hazardous to the child, such as dangerous unsanitary conditions, exposed electrical outlets, or excessive cold in winter. Entry into the home may be needed to determine whether the child is receiving minimally acceptable care; empty cupboards or baby bottles containing sour milk, for instance, may indicate that the child is not being properly fed. It may also be necessary to enter the home to verify a parent's explanation of a child's injury, such as whether the bathroom sink and tap configuration are consistent with a claim that a one-year-old turned on a hot water tap and released scalding water, causing second degree burns. Similarly, a search of the home may uncover objects used to abuse the child, such as a belt whose buckle and shape precisely match marks on a child's body. Where the child is a victim of child pornography, photographs and documents may be found describing or depicting maltreatment of the child. Finally, it may be necessary to gain entry to determine whether a child is present.

14. While most of the analysis focuses specifically on gaining entry into the child's home, the same procedures and principles generally apply to gaining entry to other types of private property.

15. Although criminal search warrants are available only to police, child welfare investigators are sometimes able to stimulate a police investigation and use information gained through the resulting police search.

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ignored. It is inconceivable that social workers have unlimited discretion to forcibly enter private homes and other property. However, child protection investigations are conducted for different purposes, in a different manner, and with different results than criminal investigations. A separate constitutional balance must be reached for each.

B. Consent To Enter Residence

Child abuse investigators most frequently gain entry into residences by consent. Thus, a constitutionally valid consent is critical to the legality of these entries.

In general, the requirements for a proper consensual entry are the same where child abuse investigators request entry into a home as where police request entry in a criminal investigation. Consent, by definition, involves a concurrence of wills. This is true regardless of the context. Typical factual differences may bear on the validity of consent in the criminal and child protection contexts, but there is no reason why the basic requisites of consent should vary. The key questions in determining whether a consent is valid are the same: Does the person who gives the consent have authority to do so? Is the consent given voluntarily? Is the scope of the consent broad enough to authorize the entry or search that took place?

1. Who Can Consent

a. Common Authority Rule

The rule governing who has authority to consent to a search of a residence was established by the United States Supreme Court in a criminal case, *United States v. Matlock*.¹⁶ In *Matlock*, a woman who lived with the accused consented to a search of their bedroom. The Court upheld her consent, stating that a valid consent can be given by a third party possessing “common authority” over the premises. Determining whether a person has common authority over an area or item of property does not depend on property law, the Court held, but upon whether the person has, as a practical matter, joint access or control over the area or property in question.¹⁷ Thus, adults who live in and share the area or property in question have “common authority” and therefore can consent to entry and search. Although numerous questions arise concerning who has common authority over a

16. 415 U.S. 164 (1974).

17. *Id.* at 171 n.7.

particular area,¹⁸ essentially one who shares control in practice can consent to a search irrespective of ownership.

b. Child's Ability To Exercise Common Authority

An important question for child abuse investigators is whether children exercise "common authority" over their residence, and can individually consent to entry. Investigators may wish to enter a residence when the parents are not home and to seek the consent of an older child. Although the general rule is that the child does not have common authority over the residence, and therefore cannot validly consent to entry, some authorities state that an older child has authority over limited areas of the home.¹⁹ According to Professor Wayne LaFave, a child's authority to consent to entry should depend upon the age of the child and the particular area of the home in question.²⁰ LaFave argues that teenagers may have authority to grant permission to police to look around generally, but not to make an intrusive search throughout the house.²¹ By contrast, an eight-year-old may only have authority to permit an adult to step into the entry way of the home, because this is often done with regard to visitors or salespersons.²²

2. What Constitutes Voluntary Consent

The seminal Supreme Court case governing voluntary consent is *Schneckloth v. Bustamonte*.²³ Under *Schneckloth*, whether consent was voluntary must be determined according to the coerciveness of the "totality of the circumstances" that existed at the time and place that consent was given.²⁴ This principle is broad enough to govern searches conducted pursuant to child abuse investigations.²⁵

18. See, e.g., W. LAFAVE, SEARCH AND SEIZURE § 8.4, at 728 (1978 & Supp. 1986).

19. See generally Annotation, *Admissibility of Evidence Discovered in Search of Adult Defendant's Property or Residence Authorized by Defendant's Minor Child—State Cases*, 99 A.L.R.3d 598 (1980).

20. W. LAFAVE, *supra* note 18, § 8.4(c), at 737.

21. *Id.*

22. *Id.* at 738.

23. 412 U.S. 218 (1973).

24. *Id.* at 227.

25. Although one federal appeals court case suggests that a different standard of consent might apply in administrative as opposed to criminal searches, *United States v. Thriftmart*, 429 F.2d 1006, 1009-10 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), the case predated *Schneckloth*. Furthermore, the *Thriftmart* rationale stressed the absence of coercive elements in administrative searches. *Id.* at 1010. But this element, like other differences between criminal and child abuse investigations, may be accounted for when applying the "totality of circumstances" test, rather by modifying the test itself. See W. LAFAVE, *supra* note 18, § 10.1, at 203-05. This approach was taken in the context of a child abuse investigation in *Darryl H. v. Coler*, 585 F. Supp. 383, 388 (N.D. Ill. 1984), *aff'd in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

The standard for voluntary consent in a child abuse investigation, however, should not be determined without reference to the vulnerable position of the parents. Parents have a vital stake in the outcome of the investigation, and may experience pressure to cooperate. A parent is not likely to know the precise powers of the state, but might perceive that the state may take the child if the parent is evasive or non-cooperative. A parent thus may feel even less free to refuse entry in a child abuse investigation than a suspect in a typical criminal investigation, even if the parent is confident that the child has not been maltreated.

The inherently coercive nature of child abuse investigations alone should not, of course, invalidate consent to entry. However, courts should be aware of the coercive atmosphere of the investigation when determining whether police and child protection workers have gained entry through undue pressure.

This analysis suggests that there are several preconditions to obtaining voluntary consent in a child abuse investigation. First, and most obvious, there should be no physical threat or intimidation. The presence of a number of policemen displaying weapons can be a coercive factor,²⁶ but the average social worker is not likely to be so intimidating. In *Darryl H. v. Coler*,²⁷ for instance, a district court emphasized that a welfare caseworker who was five feet, two inches tall and eight months pregnant at the time of the investigation was "hardly an intimidating figure."²⁸

Another important factor is whether any false penalties have been threatened. Where the threatened punishment for refusal to consent to entry cannot actually be imposed, such a threat probably vitiates consent.²⁹ Consent is also invalid if obtained as a result of trickery or misleading information, as when authorities falsely claim legal authority to enter the premises.³⁰ It has generally been considered mislead-

On the other hand, a different Illinois federal judge concluded that a different standard for consent did apply in administrative cases. *E.Z. v. Coler*, 603 F. Supp. 1546, 1556-58 (N.D. Ill. 1985), *aff'd on other grounds sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

26. *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) (five officers, two armed with shotguns and the others with pistols drawn, were an "overpowering police presence"); *see also State v. Swank*, 399 So. 2d 510 (Fla. Dist. Ct. App. 1981) (consent valid where no weapons displayed).

27. 585 F. Supp. 383 (N.D. Ill. 1984), *aff'd in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

28. 585 F. Supp. at 388.

29. See cases collected in *W. LAFAVE*, *supra* note 18, § 8.2(a), at 638 & Supp. at 289.

30. *W. LAFAVE*, *supra* note 18, § 8.2(a), at 638.

ing for investigators to state that they *will obtain* a warrant, as opposed to stating that they *plan to seek* a warrant.³¹

Under the foregoing principles, the following caseworker threat would probably vitiate consent: A parent hesitates to admit a child protective service worker into her residence, and the worker admonishes, "If you don't let me in, I can get a court order and have your child removed from your home." Such an admonition should vitiate consent for at least two reasons. The statement arguably implies that parents will lose custody of the child for refusal to cooperate with the investigation, which is not true. Although "removed from the home" might mean temporary removal to conduct an interview or physical examination, it suggests a more long-term deprivation of custody. In fact, failure to cooperate with an investigation is not a sufficient basis for depriving a parent of custody of a child.³² Second, "I can get a court order" suggests that the issuance of the order is inevitable. To the contrary, the judge may decline to grant the order.

The correct form of this type of statement would be: "If I am not permitted to come in, I will request a court order to allow me to enter the house. If it is granted, I expect that a policeman will help me enforce the order." This is a proper statement, since there are no false claims that the worker now has legal authority to enter, that such authority will necessarily be given, or that the child necessarily will be taken into custody should the order be granted.³³ As the examples illustrate, investigators should be circumspect in threatening consequences for denial of consent.

It may be misleading for a child abuse investigator to inform parents that it is in their own interest to allow entry. Whether such a statement is accurate depends upon exactly what is said. An investigator who says that "we will take your cooperation into consideration in deciding how to proceed in the case" may not be misinforming the parents. In child protection cases where the ultimate goal is to safeguard the child, the cooperation of the parent often is a proper consideration in determining the outcome of the case. Where the parents

31. *Id.* § 8.2(b), at 645-49.

32. *See, e.g.,* ILL. ANN. STAT. ch. 23, para. 2055 (Smith-Hurd Supp. 1987) (emergency removal permitted where imminent danger to child's life or health and no time to obtain court order); MONT. CODE ANN. § 41-3-301(1) (1988) (emergency removal permitted where youth is in immediate or apparent danger of harm); TEX. FAM. CODE ANN. §§ 17.02, .03(a)(3) (Vernon 1986 & Supp. 1988) (emergency removal permitted where immediate danger to physical health or safety of the child and no time to obtain court order).

33. *Cf. Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (where police claimed to have a search warrant and thereafter were permitted to enter the residence, but never produced the warrant at trial, consent was held to be invalid).

admit maltreating their child and willingly participate in a plan to eliminate the maltreatment, their cooperation sometimes makes it marginally safer to leave the child at home.³⁴

On the other hand, where the parent simply consents to entry, as opposed to admitting maltreatment and cooperating with a rehabilitation plan, the consent probably should not be a major consideration in making recommendations in the case. It is thus prudent to avoid promises or assurances that consent will benefit the parents in seeking consent to entry.

Finally, it is important to note that while asking for permission to enter a residence, the child protection worker need not affirmatively inform parents of their right to deny consent. This principle was established in *Schneekloth*,³⁵ and has been followed in at least two cases involving child abuse investigations.³⁶

3. *Permissible Scope of Search Incident to Consensual Entry*

Valid consent to enter a residence does not automatically permit a thorough search of the premises. Rather, the scope of the search is limited by the terms of the consent. Consent to enter can be distinguished from consent to conduct a search.³⁷ Further, consent to “look around” does not necessarily connote consent to conduct an intrusive search of personal effects and possessions within the premises.³⁸ The wording of the request by the investigator may be critically important in defining the scope of the consent, although any additional conditions or limitations placed upon the request must be respected. In

34. In borderline cases of child maltreatment, the child may be viewed as being in less danger where the parents agree to cooperate with the agency's plan for family rehabilitation. *See, e.g., S. MAGURA & B.S. MOSES, OUTCOME MEASURES FOR CHILD WELFARE SERVICES: THEORY AND APPLICATIONS* 83–84, 90, 129 (1986) (parental cooperation with agency planning and services is viewed as an important indication of the child's well-being in the family home).

35. *Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 232–33 (1973).

36. *E.Z. v. Coler*, 603 F. Supp. 1546, 1556–57 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986); *Darryl H. v. Coler*, 585 F. Supp. 383, 388 (N.D. Ill. 1984), *aff'd in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

37. *See, e.g., Robbins v. MacKenzie*, 364 F.2d 45 (1st Cir. 1966) (policeman given permission to enter apartment had no permission to search; however, stolen property in plain view could be seized), *cert. denied*, 385 U.S. 413 (1966); *see also J. HALL, JR., SEARCH AND SEIZURE* § 4.23, at 117–18 (1982).

38. *See, e.g., United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971) (consent to search for narcotics did not authorize intensive examination of defendant's private papers).

addition, although there is authority to the contrary,³⁹ consent can probably be rescinded after the search is initiated.⁴⁰

But even where entry is by consent only, items in "plain view" may be seized and admitted into evidence.⁴¹ Such items may also provide the basis for an immediate and expanded search if the items constitute evidence of an immediate risk of harm to the child or suggest that there is danger that evidence is about to be destroyed.⁴²

39. See, e.g., *People v. Kennard*, 175 Colo. 479, 488 P.2d 563 (1971) (once defendant consented to search of his automobile's trunk, he could not thereafter withdraw his consent).

40. See, e.g., *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976) (airplane passenger who consents to preboarding search can revoke consent and choose not to board aircraft), *cert. denied*, 431 U.S. 940 (1977); *People v. Martinez*, 259 Cal. App. 2d 943, 65 Cal. Rptr. 920 (1968) (where, during consent search of vehicle interior, police extended search to trunk after defendant revoked consent, search of trunk was illegal); see also W. LAFAVE, *supra* note 18, § 8.1(c), at 634.

41. See, e.g., *United States v. Griffin*, 530 F.2d 739 (7th Cir. 1976) (where defendant consented to entry of his apartment by police, police could seize stolen mail lying strewn about in plain view on floor); *Alberti v. State*, 495 S.W.2d 236 (Tex. Crim. App. 1973) (where police had consent to enter apartment, piles of marijuana in cellophane bags clearly visible from front of apartment could be seized; see also W. LAFAVE, *supra* note 18, § 8.1(c), at 629.

42. See *infra* text accompanying notes 44-84 (discussing entry and search based upon emergency doctrine). Where there is no imminent danger, but evidence in plain view makes it clear that a further search is likely to yield additional evidence, it is unclear whether the search may go forward immediately or whether the investigator must seek a search warrant authorizing a search going beyond the scope of the consent.

In *Arizona v. Hicks*, 107 S. Ct. 1149 (1987), the Supreme Court addressed the question of whether an emergency search could be extended to seek evidence not needed to protect life or property, but evidence that a crime had been committed. Police officers had lawfully entered a residence during an emergency, and noticed a stereo set that they suspected was stolen. The set was moved to check the serial numbers. The Court held that moving the set was a "search," which required probable cause that it constituted contraband or evidence of a crime, but noted in dictum that if probable cause did exist, the officer was correct in going forward immediately with the search, even though the emergency did not require it. *Id.* at 1152-54.

The Court did not explain why such a search could go forward without a warrant, nor did it address whether the search might go beyond inspection of the item in plain view, should it prove to constitute evidence of a crime. The Court may have reasoned that once an entry is made where there is evidence of crime, it is safe to assume that such evidence will be concealed or destroyed if the search does not go forward immediately.

This reasoning might be applied to a consent entry in a child protection investigation where there is no consent to search, and no imminent danger to the child, but there is sufficient evidence of maltreatment in plain view to justify a further search. Arguably, a search may go forward immediately because the parent has been alerted and, if the search is delayed to obtain a warrant, the parent is likely to conceal or destroy the evidence of maltreatment. Realistically, this may hold true in some but not all entries in child protection cases. For example, if the premises are in extreme disarray, the child is temporarily with a babysitter, and the parent appears intoxicated, there is probably little reason to think that evidence of maltreatment will be destroyed before a warrant is obtained.

As a practical matter, it may not be safe for a child protection worker to extend a search beyond the terms of the consent, unless accompanied by a police officer. The worker should ask for permission to extend the search and, if permission is denied, seek a warrant; or, if there is

4. *Policy Considerations Unique to Consensual Child Protection Entries*

The constitutional principles governing consent to enter a residence in a child abuse investigation discussed above set a minimum standard. However, a legislature considering the problem might still ask whether state law and policy should be more restrictive than the constitutional law governing consent. The answer should depend upon how tightening the criteria for consent would actually affect families and children.

Generally speaking, consensual entry during a child abuse investigation is preferable to forced entry. If rules governing what constitutes legally valid consent are tightened, the child protection agency may be compelled to seek police assistance more often. Although even a consensual entry into a residence can be very upsetting to the child and family, it does tend to be less disruptive and traumatic than a forced entry. In addition, a forced entry may stimulate an unnecessarily antagonistic and adversarial relationship between the agency and the parents being investigated. This can be especially unfortunate where the agency must later work to rehabilitate the family.

Accordingly, law and policy should not prevent consensual entries, inspections, and searches, so long as agency conduct in gaining the consent is not overbearing or dishonest. Rather, statutory and administrative remedies should focus on discouraging entries where the facts do not warrant them. Unnecessary entries can be reduced, for example, by better defining and clarifying what constitutes child maltreatment justifying an investigation.⁴³ Similarly, by improving the screening of child abuse reports, agencies can better distinguish and terminate unwarranted investigations. Although these approaches will not eliminate all unjustifiable consensual entries, they do not exacerbate parent-agency conflicts or increase unnecessary police involvement.

C. *Entry Under Emergency Doctrine*

Another common set of circumstances allowing child abuse investigators to gain entry into residences is where an emergency presenting an immediate danger to the child exists. This means of entry is analogous to the emergency doctrine applied in the criminal context.

reason to suspect that evidence will be destroyed before a warrant can be obtained, seek police assistance.

43. See VT. STAT. ANN. tit. 33, § 682(2)-(4), (6)-(8) (Supp. 1987).

While it is ordinarily not possible to enter a private residence forcibly in a criminal investigation without a warrant,⁴⁴ courts allow warrantless entries in emergency situations.⁴⁵ Under the "exigent circumstances" rule, warrantless searches may be conducted where necessary to prevent the imminent escape of a suspect, to prevent the immediate destruction or removal of evidence,⁴⁶ or to prevent an immediate injury or loss of property.⁴⁷ When the exigent circumstances rule involves an imminent danger to life, health, or property, it is sometimes referred to as the "emergency doctrine."⁴⁸ Where a child is in imminent danger within a residence, the emergency doctrine may justify a warrantless entry and rescue of the child.

Usually, police are involved in such emergency entries. For example, police are often called in by child protection workers where there is a possibility of violence or conflict with the child's caretaker.⁴⁹ At other times, police are directly contacted about endangered children or may discover the existence of an endangered child in the course of investigating a separate crime. Occasionally, however, child protection workers may want to enter a residence by themselves, especially when a child is in such immediate danger that there is no time to call

44. The fourth amendment provides:

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

U.S. CONST. amend. IV. See generally W. LAFAVE, *supra* note 18, § 1.0.

45. See *infra* text accompanying notes 51-56.

46. See generally, W. LAFAVE, *supra* note 18, §§ 6.5(a), (b), at 432-33, 437-39 & Supp. at 185. For an interesting case considering the legality of a warrantless search based upon the possible removal of evidence in the context of a child abuse investigation, see *White v. Pierce County*, 797 F.2d 812, 815-17 (9th Cir. 1986) (where parent refused to admit police to his residence to investigate a child abuse report, became violent and abusive, and instructed his son, who was about to turn around to show policemen his back, to leave the room, police could reasonably conclude that the parent might abuse the child again or flee with him if the police left to get a court order). But see *id.* at 816-17, (Schroeder, J., dissenting) (assertion of constitutional right to deny entry and use of profanity does not justify entry).

47. See generally, W. LAFAVE, *supra* note 18, § 6.6, at 467-75.

48. *Id.* at 468; Fortier, *The Police as Good Samaritan: Constitutional Dimensions of the Emergency Exception to Search and Seizure Doctrine (Part I)*, 3 POLICE L.Q. 22 (1974); Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419 (1972); Note, *The Emergency Doctrine, Civil Search and Seizure and the Fourth Amendment*, 43 FORDHAM L. REV. 571 (1975).

49. See, e.g., *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983) (where anonymous phone call reporting child abuse indicated perpetrator had a violent temper, social worker secured attendance of police officer to accompany her on investigatory visit).

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police. This might occur when a worker observes an infant crawling toward an exposed electrical wire.⁵⁰

The legality of an emergency entry in a child abuse investigation can accurately be measured by reference to criminal procedure precedent. Whether the means of the entry or search are tested in a criminal case or in civil litigation should make no difference. In either case, an entry or search is constitutionally permissible if there is a valid emergency and the entry is protective in nature.

Although the emergency doctrine has been construed and applied in many state and lower federal court cases,⁵¹ it has been discussed only briefly by the United States Supreme Court. In *Warden v. Hayden*,⁵² the Court held for the first time that where an immediate search is necessary to eliminate a danger to a member of the general public, no warrant is required.⁵³ *Warden* firmly established an emergency exception to the warrant requirement, but it did not discuss noncriminal emergency entry situations, nor did it state criteria for determining whether an emergency exists. Other Supreme Court cases recognizing an emergency exception to the warrant requirement also fail to address these questions.⁵⁴

The Court addressed the emergency doctrine in dictum in the case of *Mincey v. Arizona*.⁵⁵ In *Mincey*, the Court declined to approve a blanket rule that would have dispensed with the need to obtain a warrant for the search of a death scene. However, the Court commented:

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the fourth amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.⁵⁶

50. Some state statutes do not authorize child protection workers to take children into custody during emergencies unless police are present. *See, e.g.*, VT. STAT. ANN. tit. 33, § 639 (1981) (law enforcement officer authorized to take child into custody without court order when child is in immediate danger; child protection worker not mentioned). This might be interpreted to prohibit a child protection worker from entering a home to protect a child from imminent harm.

51. For a collection of such cases, see W. LAFAVE, *supra* note 18, § 6.6(a), at 471–72 nn.21–30 & Supp. at 206; *see also* Note, *supra* note 48, at 581–83.

52. 387 U.S. 294 (1967) (entry into a private home by police chasing a robbery suspect who had been seen entering the home was justified in part by the need to protect the home's occupants).

53. *Id.* at 298–99.

54. *See* *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); *Johnson v. United States*, 333 U.S. 10, 14–15 (1947).

55. 437 U.S. 385 (1978).

56. *Id.* at 392 (citations and footnotes omitted).

Lower federal and state court cases, however, clearly recognize that police may make warrantless entries into residences during child abuse investigations when there is an emergency requiring immediate intervention for the protection of a child.⁵⁷ The precise scope of the exception, however, remains unclear. Appellate courts have stated that in

57. Among the cases recognizing that the emergency doctrine may be applied to child abuse investigations are: *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (no exigent circumstances where visual inspection of child took place four months after receipt of child abuse report); *People v. Smith*, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972) (where neighbor had taken in crying child and called police one hour later, no "true emergency" justified warrantless entry into child's home); *People v. Sutton*, 65 Cal. App. 3d 341, 134 Cal. Rptr. 921 (1976) (where police received a report from a citizen informant over the radio concerning an unattended child, and upon approaching the home observed intoxicated woman enter the home and saw in plain view trash and dirty clothing within the apartment, warrantless entry justified); *In re Dawn O.*, 58 Cal. App. 3d 160, 128 Cal. Rptr. 852 (1976) (where five-year-old informed policeman that younger sister was alone in the home, entry into home legally justified); *People v. Draper*, 196 Colo. 450, 586 P.2d 231 (1978) (where babysitter called fire department for emergency assistance concerning infant, but upon arrival the baby had already died, subsequent search not justified); *Wooten v. State*, 398 So. 2d 963 (Fla. Dist. Ct. App. 1981) (when policeman, after receiving report from a passerby of a thirteen-month-old baby being shaken and struck, arrived at the child's residence, and observing the child's lifeless condition, entered the child's apartment to render assistance, entry held justified because of need to protect the child and secure medical attention); *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68 (1982) (where police, while searching for a girl kidnapped from school by sex offender, found books with her name in plain view within car in offender's driveway, emergency existed justifying warrantless entry into offender's home); *Commonwealth v. Kingsbury*, 7 Mass. App. Ct. 51, 385 N.E.2d 1020 (1979), *aff'd in part, rev'd in part*, 378 Mass. 751, 393 N.E.2d 391 (1979) (where police, who were searching for a thirteen-year-old girl, found her clothing along with the photograph of a nude thirteen-year-old boy; and where the manager of the apartment building described men who had broken into the apartment in which the clothing and photograph were found and directed police to the present apartment of the same man; and where police heard moaning in the apartment to which they had been directed, sufficient emergency existed to justify warrantless entry); *Nelson v. State*, 96 Nev. 363, 609 P.2d 717 (1980) (where mother arrested without probable cause, entry for the protection of unattended three-year-old illegal because police created the emergency situation); *J.D. v. State*, 558 P.2d 402 (Okla. Crim. App. 1976) (where true motive of search was not to protect child but to uncover evidence of possible truancy, emergency doctrine inapplicable); *State v. Jones*, 45 Or. App. 617, 608 P.2d 1220 (1980) (when, after receiving anonymous call that infants and small child had been left alone, police observed the children crying and that no adult appeared to be present and the home was in disarray, warrantless entry for the protection of the children upheld); *State v. Frink*, 42 Or. App. 171, 600 P.2d 456 (1979) (where police received anonymous tip that child was being injected with drugs and, upon approaching apartment, observed drugs in plain view, warrantless entry for the protection of the child was proper); *State v. Bittner*, 359 N.W.2d 121 (S.D. 1984) (where defendant was lawfully arrested, police properly looked upstairs based on report of a baby in the home); *In re C.E.*, 283 N.W.2d 554 (S.D. 1979) (where state agency had previously removed children from home for maltreatment, returned them home 11 days prior to receiving report of a disturbance in the home, and upon approaching home to investigate the report discovered parents intoxicated on the porch and child screaming inside, entry into the home for the protection of child was legally justified); *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983) (where anonymous caller provided detailed information suggesting potential emergency situation requiring immediate assistance to abused children, information sufficient to support immediate entry into children's residence).

evaluating whether an emergency doctrine entry was justified, they will view the situation in light of the officer's need to make a prompt decision.⁵⁸ This standard, however, does not explain the quantum of evidence or the degree of imminent danger required to justify an emergency entry.

1. *Evidentiary Standard Under Emergency Doctrine*

The question of what evidence is required to invoke the emergency doctrine for child abuse investigations might be phrased as follows: How likely must it be that a child is about to be harmed before a policeman or child protection worker can make a warrantless, forced entry into a child's residence for the child's protection? The answer to this question may depend upon whether there is a known danger or whether the danger is merely possible.

a. *Emergency Entry Based on a Known Danger*

The classic example of a known hazard occurs when a small child is left unattended. For example, if a six-year-old child is left home alone at night for several hours, a known danger exists. However, it cannot be said that there is a substantial likelihood that the child will be injured without prompt intervention. But because there is a known danger that is serious enough to be unacceptable to the community, intervention is probably justified.⁵⁹ Since the *Mincey* dictum permits warrantless entries by police officers "when they reasonably believe that a person within is in need of immediate aid,"⁶⁰ entry for the protection of unattended children would seem to be permitted. Although there may not be a probability or even a substantial likelihood of immediate injury to the child, the child can be said to be "in need of immediate aid" because of the existence of a known and unacceptable risk. The concept of "in need of immediate aid" implies a combination of degree of risk and severity of threatened harm that would jus-

58. See W. LAFAYE, *supra* note 18, § 6.6(a), at 468 (citing *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963)).

59. See, e.g., *People v. Sutton*, 65 Cal. App. 3d 341, 134 Cal. Rptr. 921 (1976) (citizen reported children unattended and police observed intoxicated woman entering apartment that was in substantial disarray); *In re Dawn O.*, 58 Cal. App. 3d 160, 128 Cal. Rptr. 852 (1976) (where five-year-old child was left alone until 10:00 p.m. and informed police officer that younger sister was in the home, warrantless entry was justified); *State v. Jones*, 45 Or. App. 617, 608 P.2d 1220 (1980) (upon receipt of an anonymous call that infants and small child were left home alone, police officer validly entered home to safeguard the children); *State v. Bittner*, 359 N.W.2d 121 (S.D. 1984) (when defendant was arrested, police properly looked upstairs because of report of baby in the home who might otherwise be left unattended).

60. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978).

tify prompt correction of the situation by a person of reasonable judgment.

b. Emergency Entry Based on a Possible Danger

The following hypothetical involves a situation where there is a possibility of danger rather than a known danger:

An eight-year-old child asks to go home with her teacher, but will not say why she does not wish to return to her own home. The teacher reports this incident to the child protection agency, which dispatches a caseworker to visit the home. A neighbor informs the caseworker that she has just heard the child screaming from inside the home. When the caseworker knocks on the door, the parent declines to discuss the matter and refuses admittance.

In the above hypothetical, the caseworker does not know whether the child has been endangered or maltreated. The child may be unreasonably angry at the parent for withdrawing a privilege, and the neighbor may have heard an emotional outburst by the child. Yet, the child's behavior was sufficiently unusual to prompt the teacher to report the matter. There is a possibility of imminent danger to the child, but such danger is not probable because the fact that a child is screaming does not ordinarily mean that the child is in imminent danger.

Consider again the *Mincey* dictum in light of the hypothetical. The dictum states that law enforcement officers must "reasonably believe that a person within [a dwelling] is in need of immediate aid."⁶¹ How is "reasonably believe" to be construed? Does it mean that there must be probable cause that the child inside is endangered? In *Beck v. Ohio*,⁶² probable cause, in the context of a warrantless arrest, was described as "whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed."⁶³ This is similar to the *Mincey* phrase "reasonably believe that a person within is in need of immediate aid."

On the other hand, a more recent case uses language similar to the "reasonably believe" language of *Mincey* to describe the standard of reasonable suspicion. In *Michigan v. Long*,⁶⁴ the Supreme Court held that a stop and search of a motor vehicle for weapons would be "per-

61. *Id.*

62. 379 U.S. 89 (1964).

63. *Id.* at 96 (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

64. 463 U.S. 1032 (1983).

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missible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."⁶⁵

Under *Beck* and *Long*, an officer must have a reasonable belief that an offense has been committed to establish probable cause for a warrantless arrest. In contrast, for an officer to establish reasonable suspicion to justify a search for weapons during the detention of an automobile, the officer must have a reasonable belief that the suspect is dangerous and may gain immediate control of weapons. Thus, for probable cause under *Beck*, the officer must believe that a specific event has occurred, while under *Long* the officer must believe only that the suspect is dangerous, that there is a possibility that the suspect will attempt to seize weapons or attack the officer. Similarly, in *Terry v. Ohio*, "reasonable suspicion" allowing a stop and frisk is established where the officer reasonably believes that the frisk is appropriate, for example, that the suspect may have a weapon that may be used to attack the officer.⁶⁶

Authority is mixed concerning whether the emergency doctrine requires a probable cause or a reasonable suspicion standard. Professors LaFave and Israel take the position that the probable cause requirement is to be applied,⁶⁷ as have some lower court cases.⁶⁸

65. *Id.* at 1049 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Later discussion in the case makes it clear that the quoted language was not used to describe probable cause, but reasonable suspicion. *Id.* at 1049-50 n.14. This apparently is the level of suspicion identified in *Terry*. The *Terry* Court defined the issue at one point as "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. For discussion of the reasonable suspicion standard, see *supra* text accompanying notes 167-83; W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.8(d), at 302-03 (1984).

66. 392 U.S. 1, 27 (1968).

67. W. LAFAVE & J. ISRAEL, *supra* note 65, § 3.6(f), at 272-73.

68. See, e.g., *People v. Sutton*, 65 Cal. App. 3d 341, 134 Cal. Rptr. 921 (1976) (probable cause satisfied by information from citizen informant concerning unattended child); *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983) (probable cause standard not applied, but method of determining whether probable cause exists with regard to informant's tip deemed relevant in determining whether reasonable person would have believed that there was an immediate need to render aid, as required by *Mincey*).

However, other cases are less clear,⁶⁹ or reject the probable cause standard entirely.⁷⁰

It would be anomalous to allow entry based on a known but slight danger of harm, but to forbid entry where there is a significant possibility that a child will be injured. Accordingly, it makes more practical sense for the emergency doctrine to require a reasonable suspicion that a person within may be injured if the officer does not enter, rather than for the doctrine to require probable cause that a person within is in danger. For example, the hypothetical involving the eight-year-old the neighbor heard screaming may present more danger than a six-year-old left at home alone for several hours. A reasonable suspicion standard would allow entry in either case, at least where no less intrusive approach could protect the child.⁷¹ A "probable cause of danger" standard, on the other hand, would permit entry only in the unattended child situation.

There are several reasons why a different standard should govern emergency doctrine cases than governs cases involving searches under nonemergency circumstances. First, it is reasonable to assume that victims or endangered persons want police to enter and protect them where there is only a reasonable suspicion that the individuals are in peril. Entries for the purpose of rescue are more welcome, and less hostile and intrusive than entries aimed at investigating crime (at least for the victim, if not for a person placing the victim in danger).

Second, a child may not legally be able to consent to entry⁷² or practically be able to protect himself. Thus, there is a particularly strong social cost in establishing a strict evidentiary standard under the emergency doctrine in child abuse investigations.

Third, an emergency doctrine search is not likely to be used to oppress persons disfavored by police. The doctrine is limited to cir-

69. In *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976), the New York Court of Appeals held that to justify an emergency entry, first, there must be reasonable grounds to believe that an emergency exists and that there is an immediate need for police assistance for the protection of life or property; second, the search must not be primarily motivated by an intent to arrest and seize evidence; and third, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. This case is summarized in W. LAFAYE, *supra* note 18, § 6.6, at 469, and is relied upon in several other cases, such as *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, 760, *cert. denied*, 469 U.S. 1066 (1984).

70. See, e.g., *State v. Jones*, 45 Or. App. 617, 608 P.2d 1220 (1980) (unnecessary to consider probable cause).

71. *But see United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (criticizing post hoc evaluations of police conduct where judges identify less intrusive alternative means by which police objectives might have been accomplished).

72. See *supra* notes 19-22 and accompanying text.

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cumstances involving demonstrable imminent danger.⁷³ The entry and search itself may include only those steps necessary to protect individuals from harm.⁷⁴ And as previously indicated, the state must demonstrate that the search was actually motivated by a desire to protect an individual from danger rather than to obtain evidence of criminality.⁷⁵

2. Imminence of Danger Under Emergency Doctrine

In measuring the immediacy of the threat or danger required under the emergency doctrine, *Mincey* and many other cases require that the danger be "imminent" or "immediate."⁷⁶ In the context of warrantless searches in criminal investigations where there is a risk of destruction of evidence, courts have held that the risk must be such that the evidence would likely be destroyed or removed before a warrant could be obtained and served.⁷⁷ This principle seems logical to apply by analogy to emergency doctrine entries. The logical analogy to this

73. See *infra* text accompanying notes 76–81.

74. See, e.g., *United States v. Goldenstein*, 456 F.2d 1006 (8th Cir. 1972) (where police, expecting to find gunshot victim, found only unoccupied room, it was unreasonable for them to search through locked suitcase), *cert. denied*, 416 U.S. 943 (1974); *Condon v. People*, 176 Colo. 212, 489 P.2d 1297 (1971) (where police entered house because smell of decomposing body allegedly came from basement, it was unreasonable for police to search closets and cupboards in upstairs room before searching basement).

75. *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (warrantless search of hotel guest's room upheld where reason for search was to render assistance to missing hotel maid), *cert. denied*, 426 U.S. 953 (1976).

76. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) ("The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid."); *Coker v. State*, 164 Ga. App. 493, 297 S.E.2d 68, 71–72 (1982) (where police searching for thirteen-year-old kidnap victim saw victim's schoolbooks in car parked in driveway, subsequent search of house was justified to find "a person within . . . in need of immediate aid") (quoting *Gilreath v. State*, 247 Ga. 814, 820, 279 S.E.2d 650 (1981)); *State v. Jones*, 45 Or. App. 617, 608 P.2d 1220 (1980) (officer who made warrantless entry into home after being told that children were left unattended and hearing crying noises within, was reasonable in concluding that "immediate action was necessary"); *State v. Bittner*, 359 N.W.2d 121, 127 (S.D. 1984) (where two officers had been stabbed on premises, warrantless emergency search of house for other possible victims in need of "immediate aid" was justified); *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516, 524 (1983) (where child protection worker received detailed information that children had been beaten, warrantless entry into and search of home was justified as "situation requiring immediate need for aid or assistance").

77. See, e.g., *United States v. Smith*, 503 F.2d 1037 (9th Cir. 1974) (where suspected heroin courier was about to board airplane, warrantless body search for evidence upheld), *cert. denied*, 419 U.S. 1124 (1975); *United States v. Rubin*, 474 F.2d 262 (3d Cir.) (where customs agents had probable cause to believe that hashish was on premises, and that one of the defendants might have alerted others to his arrest, warrantless search of premises allowed to avoid destruction of evidence), *cert. denied*, 414 U.S. 833 (1973); *State v. Patterson*, 192 Neb. 308, 220 N.W.2d 235 (1974) (where police overheard occupants of apartment believed to be used for cutting and packaging of heroin preparing for departure, warrantless search justified).

principle in emergency situations would be that the threat to person or property must be so imminent that there is no time to obtain a court order or warrant authorizing entry into the home. As discussed later in this article, however, not all states authorize civil search warrants in child protection cases.⁷⁸

If no criminal or civil warrant is available in emergency situations, the danger may need to be such that no less intrusive means than entry is available to alleviate the danger.⁷⁹ Thus, where a six-year-old child has allegedly been left at home unattended, police and child protection workers might be expected to attempt to locate the child's parents or other caretakers before entering the home for the protection of the child. An entry would be allowed, but only after it is clear that the parents cannot be located, or that it is unsafe to wait any longer.

Where a civil warrant is available and can be obtained quickly, an unattended child will often be safe for the time it takes to obtain a warrant.⁸⁰ In this situation, the police or the child protection agency should be expected to seek the warrant. Alternatively, if the child inside proves to be in enough danger to justify immediate custody under state child protection legislation,⁸¹ the child protection agency can take the child into custody.

3. *Scope of Search Under Emergency Doctrine*

A final issue concerning the emergency doctrine is the permissible scope of a search pursuant to an emergency entry. In brief, an emergency justifies only that entry and search that is necessary to determine whether there is an immediate danger, and then only to protect the child. Police or child protection workers may not, absent probable cause, conduct any actual search not directly related to determining or alleviating the emergency. In the recent case of *Arizona v. Hicks*,⁸² the United States Supreme Court held that even a small movement of an object, such as turning it over to check for serial numbers, can be an unlawful "search" if the intent is to uncover illegality unrelated to the emergency.⁸³

Thus, even when there is an emergency that will justify an entry and limited search, the permissible search may be inadequate for agency

78. See *infra* Appendix.

79. But see *supra* note 71.

80. See *infra* text accompanying note 229 (suggesting issuance of warrant upon application by telephone).

81. See *supra* notes 85-90 and accompanying text.

82. 107 S. Ct. 1149 (1987).

83. *Id.* at 1152-53.

purposes. Unless the emergency entry has itself uncovered sufficient evidence of maltreatment to justify a further search, the emergency doctrine entry is no substitute for a search warrant.⁸⁴ Because the emergency doctrine does not permit a complete search for evidence, and applies only in emergency situations, additional remedies are needed by child protection agencies.

D. Entry While Taking Child into Custody

A third way that police and child protection agency workers may gain entry to a residence during an investigation is in the course of taking emergency custody of a child. Every state has a statute authorizing law enforcement officers or child protection workers to take custody of a child where the child is endangered.⁸⁵ The child may be taken into custody with or without a court order, depending upon the nature of the emergency and the requirements of state law.⁸⁶ These statutes are often interpreted to permit law enforcement officers to enter residences to take a child into custody, particularly when a custody order has been obtained from a court.⁸⁷ Often an emergency situation will justify an entry pursuant to the emergency doctrine *and* pursuant to the emergency custody statute. Under an emergency custody statute, however, the entry must be made for the purpose of taking the child into custody rather than for the purpose of determining the condition of the child. Thus, the initial entry may be made pursuant to the emergency doctrine and the child will subsequently be taken into care pursuant to the emergency custody statute, after it is clear that the child has been abused or neglected.

Taking a child into custody is an important investigative tool where prolonged questioning or examination of the child may be probative of

84. A related question is whether an item in plain view may itself supply independent justification for a more extensive, warrantless search. For a discussion of whether items in plain view during a consensual entry can justify a warrantless search going beyond the scope of the consent, see *supra* note 42.

85. See state statutes collected in 2 STATE STATUTES RELATED TO CHILD ABUSE AND NEGLECT: 1986 643-94 (September 1987) [hereinafter STATE STATUTES].

86. See, e.g., WASH. REV. CODE ANN. § 26.44.050 (West Supp. 1988) which provides in part that:

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order.

87. See, e.g., *id.*; *Brady v. County of Tioga*, 100 A.D.2d 676, 473 N.Y.S.2d 872 (1984) (where social service workers entered home to remove child pursuant to emergency custody provision of social services law, father's suit against agency for trespass, false imprisonment, and civil rights violations was properly dismissed).

alleged maltreatment. However, it is of limited value in terms of inspecting a residence, because law enforcement officers may not enter the residence when the child is not inside or is voluntarily handed over. In addition, as with the emergency doctrine, even if the officers enter in order to take the child into custody, their examination of the premises is logically limited to objects and items in plain view.⁸⁸

Furthermore, the standard for taking a child into custody may not permit investigative entries at times when they are appropriate and needed. While state statutes vary widely in their requirements,⁸⁹ it is appropriate to impose a stricter standard for taking a child into custody for a prolonged period than for making an investigative entry into a home. Moreover, a protective custody order may lead the agency to remove the child even when, upon entry, no emergency appears to exist.⁹⁰

E. Entry Pursuant to Criminal Search Warrant

Child protection agency workers sometimes obtain evidence from inside a residence through execution of a search warrant pursuant to a criminal investigation. However, only police, not child protection agency workers, can seek a criminal search warrant and enter the home pursuant to the warrant. Child protection agency workers can only encourage police to do so and then request access to evidence uncovered in the search.

Moreover, criminal search warrants cannot always be obtained in child maltreatment investigations. The definitions of child maltreatment for child abuse reporting, investigation, and intervention are generally broader than the definitions incorporated into criminal law. In addition, prosecutors are not interested in pursuing all types of cases routinely investigated by child protection agencies. Child neglect cases, for example, are often pursued by child protection agencies but

88. See *supra* text accompanying notes 82–83.

89. Compare TEXAS FAM. CODE ANN. § 17.02 (a) (Vernon Supp. 1988) (“Before any temporary restraining order or attachment of the child is issued . . . the court must be satisfied from a sworn petition or affidavit that: (1) there is an immediate danger to the physical health or safety of the child; and (2) there is no time, consistent with the health or safety of the child, for an adversary hearing.”) with OKLA. STAT. ANN. tit. 10 § 1104(d) (West Supp. 1987) (“If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may immediately issue . . . a warrant authorizing the taking of said child into custody.”).

90. See, e.g., WASH. REV. CODE § 26.44.050 (1987) (law enforcement officer may take child into custody where probable cause to believe that child is abused or neglected and would be injured or could not be taken into custody if it were necessary to first obtain a court order); *id.* § 13.34.060(1) (child taken into custody shall immediately be placed into shelter care).

not by police. Furthermore, it may be difficult to establish probable cause, the standard of proof necessary to obtain a warrant in the course of a criminal investigation.⁹¹

F. Constitutional Limits on Statutes Permitting Child Protection Agency Investigative Entry

The foregoing discussion demonstrates that child protection agency investigators sometimes need to enter private property without consent and in the absence of an emergency, and that using emergency child custody statutes and seeking criminal search warrants are an insufficient means to gain entry and conduct a search in many situations.

The problems encountered in obtaining investigative entry may be solved by means of a special statute authorizing such entry. Before suggesting statutory changes, however, it is necessary to consider possible constitutional limitations on reform. Important and unresolved issues include the quantum of proof that is needed to gain entry, whether a warrant or other court order is required, and the procedures that must be followed to obtain the warrant or court order.

1. Quantum of Proof Required for Nonemergency Entry

It is unclear what quantum of proof is constitutionally required to authorize a nonemergency entry into a home during a child abuse investigation. There are several possibilities: No particularized evidence of child maltreatment may be necessary; particular and objective evidence of child maltreatment, amounting to a "reasonable suspicion," might be sufficient; or probable cause as the term is used in criminal proceedings might be required. Because there are no United States Supreme Court decisions and few lower court cases directly on point, it is difficult to predict how the courts will rule if presented with the issue.

The Supreme Court decisions do indicate, however, that a balancing test weighing the need for the type of search proposed against the intrusiveness of the search will probably determine the quantum of proof required. The most closely analogous Supreme Court cases offer clues, but no clear answers, concerning how a balancing test might be applied. This section of the article examines these cases and then considers how the Supreme Court decisions have been applied in the lower court decisions most closely on point. It then discusses how the

91. However, probable cause may not be required for the issuance of a noncriminal child protection search warrant. *See infra* notes 92-183 and accompanying text.

balancing test *should* be applied. The section concludes that, where the search is initiated and carried out by the child protection agency rather than by the police, the reasonable suspicion standard is the most appropriate.

a. *United States Supreme Court Decisions*

The first in a series of relevant Supreme Court cases was *Camara v. Municipal Court*,⁹² decided in 1967. The *Camara* case involved a routine housing inspection in the city of San Francisco under an ordinance allowing city officials to enter a private residence without permission, without a warrant, and without probable cause that the particular residence violated the city code.⁹³

The Court applied a balancing test to determine what evidentiary standard should apply to housing searches pursuant to the fourth amendment, and concluded that because of the great need for housing inspections, and the relatively limited intrusions involved, mandatory inspections could take place without evidence of a specific violation so long as they occurred pursuant to a systematic inspection scheme.⁹⁴ Where there was a pattern of inspections based upon such objective factors as the "passage of time, the nature of the building . . . or the condition of the entire area," no particularized evidence of an infraction would be required.⁹⁵

In reaching this conclusion, the *Camara* Court did not apply the traditional standard of probable cause. Rather, the Court redefined probable cause in the context of administrative housing inspections, holding that "probable cause" could be satisfied by a reasonable scheme of housing inspection, objectively applied, without any particularized evidence of a violation in the specific residence to be inspected.⁹⁶

The reasoning of the *Camara* case is suggestive, but not definitive, with regard to civil child abuse investigations. The *Camara* Court emphasized that inspections without individualized proof were permissible because housing violations are difficult to detect.⁹⁷ This factor has also been argued to apply in child abuse investigations.⁹⁸ In

92. 387 U.S. 523 (1967).

93. *Id.* at 525-26.

94. *Id.* at 536-37.

95. *Id.* at 538.

96. *Id.*

97. Unlike typical criminal behavior, the Court pointed out, housing code violations tend to be invisible to the public eye. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

98. As Professor LaFave has pointed out, child abuse and neglect generally occur in the privacy of the family home and are often extremely difficult to detect, particularly where

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addition, the Court emphasized that housing inspections were nonintrusive because police were not normally involved.⁹⁹ This is also true of most child protection investigation entries. On the other hand, the *Camara* Court emphasized that the invasion of privacy accompanying a housing inspection was minimal,¹⁰⁰ and that housing inspections would ordinarily be made only after advance warnings.¹⁰¹ Neither is likely to be true in a child abuse investigation.¹⁰² Finally, the Court emphasized the fact that housing inspections were made pursuant to an objective and nondiscretionary pattern,¹⁰³ a factor that generally does not apply to child abuse investigations.¹⁰⁴

The next important Supreme Court case, *Wyman v. James*,¹⁰⁵ was decided in 1971. The question presented in the *Wyman* case was

preschool children are involved. He argues that applying the traditional probable cause standard to child protection cases would cause special hardship for many victimized children. His conclusion is that a relaxed standard of evidence should apply in child abuse and neglect investigations. W. LAFAVE, *supra* note 18, § 10.3(a), at 242; *see also* Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1305 (1971).

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

100. *Id.* at 537.

101. The Court stated:

Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. . . .

Camara, 387 U.S. at 539-40.

102. When the *Camara* balancing test is applied to civil child abuse investigations, an important issue is presented concerning the intrusiveness of the search: Is the involvement of police and the risk of prosecution the critical factor in determining the intrusiveness, or is the actual invasion of privacy more important? *Camara* is of little assistance in answering this question. *See* W. LAFAVE, *supra* note 18, § 10.1, at 188-89. Many civil child abuse and neglect investigations do not have criminal prosecution as an ultimate objective. If this is the key consideration, such investigations should be deemed less intrusive than criminal searches. On the other hand, if the key factor is the degree of the invasion of privacy and the interference with the family, such investigations should be regarded as highly intrusive. Searches without advance warning are highly intrusive, and advance warning is often impractical in child abuse investigations, where evidence may be destroyed or the child may be concealed or removed from the jurisdiction.

103. *Camara*, 387 U.S. at 535-37.

104. The *Camara* Court reasoned that the objective, nondiscretionary pattern of housing inspections reduces the possibility of arbitrary and oppressive decisions by state officials. The objective bases of the housing inspection scheme approved by the Court thus were an important justification for permitting it to occur without applying the undiluted standard of probable cause. In contrast, a decision about whether to search a house in a child abuse investigation will require the exercise of both judgment and discretion. *But see* New Jersey Div. of Youth & Family Servs. v. Wunnenburg, 167 N.J. Super. 578, 408 A.2d 1345 (App. Div. 1979); *infra* note 153. Child protection agency discretion regarding residential entries may be narrowed, as has been done by the state of Illinois. *See infra* text accompanying notes 134-37.

105. 400 U.S. 309 (1971).

whether a recipient of welfare benefits was required to permit a home visit by a welfare caseworker where there was no indication of unlawful or improper activity in the home. The welfare recipient argued that home visits constituted a search under the fourth amendment and could not be required without a warrant and probable cause. The Court disagreed, holding that a routine welfare home visit did not constitute a search and, even if it were considered to be a search, it was not unreasonable.¹⁰⁶

Although not expressly applying a balancing test, the Court discussed a number of factors that demonstrated the substantial need for, and relative nonintrusiveness of, welfare home visits.¹⁰⁷ In concluding that a welfare home visit is not a search, the Court emphasized that such a visit, unlike a search to uncover evidence of a crime, is predominantly rehabilitative.¹⁰⁸ By comparison, an entry in a child protection agency investigation is arguably more focused on uncovering parental misconduct, although less so than is an entry in a criminal investigation.¹⁰⁹

The *Wyman* Court also emphasized that welfare home visits are not made by force.¹¹⁰ By contrast, entry must be made by force in child protection cases when consent is denied.¹¹¹ Other factors relied upon in *Wyman* to support its alternative holding that a welfare home visit is a reasonable search, have doubtful applicability to child abuse investigations.¹¹²

106. *Id.* at 318.

107. *Id.* at 317-24.

108. According to the Supreme Court, the welfare caseworker conducting a routine home visit is there primarily to assist rather than to police the family. *Id.* at 317, 319.

109. The primary concern in a child abuse investigation is whether the child has been maltreated and is in need of immediate protection. While it is true that the ultimate purpose of the child abuse investigation is to rehabilitate the family, the primary initial concern of the investigator is to uncover possible abuse or neglect. See, e.g., T. STEIN & T. RZEPNICKI, DECISION MAKING IN CHILD WELFARE SERVICES 49-73 (1984).

110. Although the recipient could lose benefits for refusing to permit the home visit, the denial of permission was not a criminal offense, and an entry could not be made by force. *Wyman*, 400 U.S. at 317-18.

111. Forced entry in child abuse investigations may occur through threats, demands by police, or the use of physical force by police.

112. Among the factors offered to justify welfare home visits as "reasonable searches" in *Wyman*, but that are not present in child abuse investigations, are the following: First, a welfare home visit, but not a child abuse investigation, is designed to ensure the proper expenditure of public funds; second, there is advance notice of the home welfare visit, as opposed to many entries in child abuse investigations; third, the welfare recipient can decline to cooperate with the search without penalty, but a person being investigated for alleged abuse or neglect cannot; fourth, no force or intrusive snooping is generally involved in the home visit, unlike searches that are part of abuse and neglect investigations; and fifth, while the home visit is a matter of routine

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In sum, *Wyman* is questionable authority for the propositions that a child abuse investigative entry does not constitute a search, and that such an entry is reasonable in the absence of an adequate evidentiary foundation. On the other hand, the Court did strongly emphasize the rehabilitative character of welfare home visits and the need to protect dependent children; this may offer some support for a relaxed evidentiary standard governing searches pursuant to civil child abuse investigations.

In a 1985 decision, *New Jersey v. T.L.O.*,¹¹³ the Court considered the standard of evidence that should apply to searches by school officials directed at high school students while on school premises. Unlike *Camara* and *Wyman*, *T.L.O.* involved a nonroutine search based upon a particularized suspicion of wrongdoing. The search in question occurred after a teacher observed a female student smoking cigarettes in a school lavatory in violation of a school rule. When the student subsequently denied that she had been smoking, the assistant vice principal searched her purse and discovered evidence of the possession and sale of marijuana. The state brought delinquency charges against the student, who moved to suppress the evidence found in her purse.¹¹⁴ The Court held that the fourth amendment does apply to searches conducted by school authorities.¹¹⁵

public welfare administration, the abuse or neglect investigation is based on suspected wrongdoing in the family to be investigated.

On the other hand, one key factor applied by the Court in determining that home visits were reasonable does apply to child abuse investigations: the public interest in protecting the dependent child. Indeed, this is a far greater concern in abuse and neglect investigations than in welfare home visits.

Two other justifications applied in *Wyman* may or may not be present in child abuse and neglect investigations. First, the Court emphasized that welfare home visits were not designed to uncover a crime. A child abuse investigation may or may not be designed to uncover a crime. In some investigations there is no question of criminal prosecution. At most, criminal prosecution is generally secondary to the investigation of neglect by child protection agencies. On the other hand, some child protection agencies do collaborate closely with police in certain types of cases and the criminal and noncriminal aspects of the investigations are intertwined. See *infra* note 446 and accompanying text.

Second, the *Wyman* Court emphasized that there was no police or uniformed authority involved in the welfare home visit. 400 U.S. at 318–25. This may or may not be true in a nonconsensual child protection investigation entry. Where the social worker conducting the visit convinces the family that there is a legal basis for entering the home and that entry will be forced should it be refused, the entry can be said to be nonconsensual, yet no uniformed authority is present. However, if the resident persists in refusing entry, the police may be called and may assist the social worker in entering the home.

113. 469 U.S. 325 (1985).

114. *Id.* at 327–29.

115. *Id.* at 333.

In applying a balancing test to analyze what is reasonable in the context of a school search, the Court weighed the state's interest in maintaining discipline against the student's legitimate expectations of privacy and personal security.¹¹⁶ The Court applied a "reasonableness" standard to hold that searches in a school setting may be conducted without a warrant, and based upon less than probable cause.¹¹⁷ Specifically, the Court held that, under ordinary circumstances, the search of a student by school authorities will be justified when there are reasonable grounds for suspecting that the search will produce evidence that the student has violated or is violating the law or a school rule.¹¹⁸

The Court declined, however, to decide whether individualized suspicion is required in all school searches.¹¹⁹ In a footnote to the opinion, the Court pointed out that the fourth amendment does not invariably require individualized suspicion. However, exceptions to individualized suspicion requirements are generally only appropriate when privacy interests are minimal and the search or seizure is not subject to the discretion of the official in the field.¹²⁰ Because privacy interests are substantial in child abuse investigations and the investigator does exercise discretion, *T.L.O.* does not support a conclusion that searches focusing upon identified suspects may be made in child abuse cases without an individualized suspicion of wrongdoing.

T.L.O. articulates an intermediate evidentiary standard for nonconsensual searches involving individualized suspicion. Strictly speaking, the rationale of *T.L.O.* does not apply to civil child abuse investigations because the relaxed evidentiary standard was based upon the need to preserve order and a proper educational environment in the school setting. However, the Court's willingness to establish an intermediate standard in a situation where there is a need for an individualized suspicion suggests that the same approach might be used in the area of child abuse and neglect investigations. *T.L.O.* was the first United States Supreme Court case applying such an intermediate standard outside the context of a criminal investigation.¹²¹

116. *Id.* at 337-40.

117. *Id.* at 340-43.

118. *Id.* at 325, 341-42.

119. *Id.* at 342 n.8.

120. *Id.*

121. An intermediate evidentiary standard resembling that in *New Jersey v. T.L.O.* has been applied to brief stops of suspects in criminal cases. *See, e.g.,* *United States v. Cortez*, 449 U.S. 411, 421-22 (1981); *Adams v. Williams*, 407 U.S. 143, 145-46 (1972); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

Another recent Supreme Court case, *United States v. Montoya de Hernandez*,¹²² is also relevant in establishing the evidentiary standard governing nonconsensual searches in civil child abuse investigations. The Court emphasized there that where some particularized suspicion of wrongdoing is required to justify a search, "reasonable suspicion" is the only acceptable intermediate evidentiary standard short of probable cause.¹²³ The Court rejected a "clear indication" test as a fourth amendment threshold between reasonable suspicion and probable cause, reasoning that such "subtle verbal gradations may obscure rather than elucidate the meaning" of the standard in question.¹²⁴

Finally, there is the case of *O'Connor v. Ortega*,¹²⁵ the most recent Supreme Court case dealing with fourth amendment requirements in administrative searches. In *O'Connor*, the Court considered the standard of evidence that should apply when government employers and supervisors search the work spaces of public employees. The search in question was directed at the office, desk, and file cabinets of a psychiatrist employed by a public hospital. The search occurred after the doctor had been placed on administrative leave for suspected work-related misconduct.¹²⁶

Holding that the fourth amendment does apply to such searches where the facts indicate that there is a reasonable expectation of privacy, the Court applied a balancing test to determine the quantum of evidence required. The test weighed the privacy expectations of public employees against the government's need for supervision, control, and efficient operation of the work place.¹²⁷ The Court decided that workplace searches are justified when "there are reasonable grounds for

122. 473 U.S. 531 (1985).

123. *Id.* at 540-41.

124. *Id.* at 541. See also LaFave, "Seizures" Typology: *Classifying Detentions of the Person To Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417 (1984) (arguing against a multiplicity of categorizations of seizures). *New Jersey v. T.L.O.* and the most recent cases involving brief police stops all seem to articulate the same reasonable suspicion standard. The reasonable suspicion test was phrased in *United States v. Cortez*, 449 U.S. 411, 417 (1981), as whether officers "have a particularized and objective basis for suspecting the particular person stopped," and in *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975), as whether the officer's observations lead him "reasonably to suspect" that the particular vehicle may contain aliens who are illegally in the country. See also *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) ("at least articulable and reasonable suspicion"). The wording in *New Jersey v. T.L.O.* is "reasonable grounds for suspecting," 469 U.S. 325, 342 (1985). But see *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) (upholding search of probationer's home based on "reasonable grounds" to believe contraband was present, where sole information supporting search was report from police detective to probation officer that there were or might be guns in probationer's apartment).

125. 107 S. Ct. 1492 (1987).

126. *Id.* at 1495-96.

127. *Id.* at 1500-02.

suspecting" that the search will turn up evidence of misconduct, or where it is necessary for a noninvestigative purpose such as retrieval of a needed file.¹²⁸

The Court pointed out that there was individualized suspicion of misconduct by the doctor, but declined to "decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today."¹²⁹ This language casts doubt on any conclusion that searches in child protection investigations may not proceed without individualized suspicion of wrongdoing. However, the *O'Connor* Court followed this statement with a citation to *New Jersey v. T.L.O.* There the Court had stated that exceptions to the requirement of individualized suspicion are generally appropriate only when privacy interests are minimal and not subject to the discretion of a government official in the field.¹³⁰ As explained earlier, neither is likely to be true in child abuse investigations.¹³¹

In summary, recent Supreme Court decisions establish a framework for analysis but do not resolve what quantum of evidence is constitutionally required to support a residential search in a child abuse investigation. On close scrutiny, the cases do not support the proposition that residential entries in child abuse investigations may occur in the absence of particularized evidence of wrongdoing. Although apparently some evidence is required, the Supreme Court cases do not answer the question of whether the reasonable suspicion or an undiluted probable cause standard applies.

b. Lower Court Cases

The few lower court cases on point also do not provide a clear outline of constitutional requirements for residential entries in child protection investigations. Overall, however, they support an intermediate approach, neither requiring probable cause and a warrant nor permitting residential entries without any particularized evidence of maltreatment.

The case providing the most detailed discussion of fourth amendment issues in child abuse investigations is *E.Z. v. Coler*.¹³² That case was brought by eight minor children and their parents who were the subjects of child abuse investigations by the Illinois Department of

128. *Id.* at 1503.

129. *Id.*

130. 469 U.S. 325, 342 n.8 (1985).

131. See *supra* text accompanying notes 100-02.

132. 603 F. Supp. 1546 (N.D. Ill. 1985), *aff'd sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

Children and Family Services (“DCFS”). Plaintiffs alleged a “pattern and practice of routinely searching the bodies of minor children reported to be abused or neglected by their parents and conducting searches at homes in the course of investigating child abuse and neglect reports, without warrants and without probable cause.”¹³³ Because the complaint alleged a pattern of investigative practices in violation of the fourth amendment, DCFS’s written policies governing agency investigations were central to the court’s decision. These written policies included an agency handbook¹³⁴ and a set of written procedures,¹³⁵ governing the commencement of investigations, searches of residences, and the physical examination of alleged child victims.

The handbook and procedures specified that agency case workers were to enter the residence of the child in every child abuse and neglect investigation and were to examine the body of the alleged child victim if needed to verify the report of abuse.¹³⁶ However, an investigation would not be commenced unless, among other things, the child abuse report indicated that the child “had been harmed, or [was] in danger of harm or of a substantial risk of harm,” and, in addition, that the report identified a “specific incident or circumstance [suggesting that] the harm was caused by child abuse or neglect.”¹³⁷

Measuring these procedures against fourth amendment requirements surrounding administrative searches, a federal district court found that residential entries in child abuse investigations are governed by the fourth amendment, but that the searches are reasonable when conducted pursuant to the Illinois handbook and procedures.¹³⁸ The court reasoned that imposing a probable cause standard or requiring a warrant would ignore “the problems resulting from children who are not old enough to speak, children who will not admit to being abused, parents who will not admit to abusing their children, parents who are unaware that their children are being abused.”¹³⁹ The judge apparently rejected the probable cause standard because of the special difficulties in obtaining evidence of abuse and neglect. Instead, the

133. 603 F. Supp. at 1563.

134. ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, CHILD ABUSE AND NEGLECT INVESTIGATION DECISIONS HANDBOOK (1982) [hereinafter HANDBOOK].

135. The procedures and handbook are described in *E.Z. v. Coler*, 603 F. Supp. at 1549.

136. HANDBOOK, *supra* note 134, at 65–66.

137. *E.Z. v. Coler*, 603 F. Supp. at 1549.

138. *Id.* at 1555–58. *E.Z.* also addressed the issue of whether the searches at issue were consensual. *Id.* at 1556–58. *See also supra* note 25.

139. *E.Z.*, 603 F. Supp. at 1560 (citation omitted) (quoting Defendants’ Post-Hearing Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 7).

court seemed to embrace the reasonable suspicion standard articulated in *New Jersey v. T.L.O.*¹⁴⁰

An earlier decision by another judge of the same federal district court also considered fourth amendment requirements for searches in the course of civil child abuse investigations. The court in *Darryl H. v. Coler*¹⁴¹ held that a residential entry and physical examination in the course of such an investigation does not constitute a fourth amendment search, and therefore does not require a warrant or probable cause.¹⁴² In reaching this conclusion, the court relied on *Wyman v. James*¹⁴³ and held that, like the welfare home visit, the state child abuse investigation was conducted for the purpose of insuring the health and welfare of the children rather than criminally prosecuting them.¹⁴⁴

The *Darryl H.* court also applied *Wyman's* alternative holding that even if the examination were a search, it did not violate the fourth amendment because it was reasonable. In support of this analysis, the court emphasized that one of the reasons the Supreme Court offered in upholding the *Wyman* home visits was that they were conducted for the protection of dependent children.¹⁴⁵

On appeal, the two cases were reviewed together. The Seventh Circuit held that visual inspections of children's bodies in child abuse investigations do constitute fourth amendment searches.¹⁴⁶ Although the challenges to the residential entries were not preserved on

140. 469 U.S. 325 (1985). The court in *E.Z.* stated:

It is simply not possible to define a standard which must be met in every case before an investigation can proceed without endangering the lives of innocent children. The current DCFS Procedures, by limiting the home visits and the examination of children's bodies to those necessary to verify the abuse allegations, insure that reasonable cause to investigate exists.

603 F. Supp. at 1560. A footnote to this language notes that:

The most recent recent Supreme Court decision regarding school searches confirms that the traditional probable cause standard may be modified where such a standard would frustrate the governmental purpose behind the search. In *New Jersey v. T.L.O.* . . . , the Court found that school officials need only 'reasonable grounds for suspecting' that a search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

Id. at n.19 (citation omitted).

141. 585 F. Supp. 383 (N.D. Ill. 1984).

142. *Id.* at 388-89; accord *Kohler v. State*, 713 S.W.2d 141 (Tex. Ct. App. 1986) (fourth amendment protections only apply to searches conducted by law enforcement personnel in child abuse investigation).

143. 400 U.S. 309 (1971).

144. *Darryl H.*, 585 F. Supp. at 389-90.

145. *Id.*

146. *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

appeal,¹⁴⁷ it is logical to assume that if a visual inspection of a child's body in a child protection investigation is a fourth amendment search, the entry into and inspection of a residence is also a search. Both involve substantial intrusions into family privacy in the identical context of a child protection investigation.

The Seventh Circuit concluded that probable cause and a warrant are not required for a visual inspection of a child.¹⁴⁸ The court did not, however, articulate an evidentiary standard governing visual examinations, except to express reservations about the criteria set forth in the Illinois handbook.¹⁴⁹ A more complete discussion of the court's criticism of the Illinois policy occurs elsewhere in this article.¹⁵⁰

An earlier New Jersey case, *New Jersey Division of Youth & Family Services v. Wunnenburg*,¹⁵¹ also held that entry into a private home in a civil child abuse investigation is a search,¹⁵² and requires a particularized evidentiary showing of less than probable cause.¹⁵³ Finally, a recent decision of the New Hampshire Supreme Court held, although

147. *Id.* at 896 n.2.

148. *Id.* at 901-02.

149. *Id.* at 904.

150. *See infra* text accompanying notes 309-22.

151. 167 N.J. Super. 578, 408 A.2d 1345 (App. Div. 1979).

152. *See also* State v. Boggess, 115 Wis. 2d 443, 340 N.W.2d 516 (1983) (entry by police officers).

153. The *Wunnenburg* court upheld a court order authorizing entry by caseworkers into the Wunnenburg home for the purpose of determining whether their infant child was receiving proper care. Previously, the Wunnenburgs' parental rights to three other children had been terminated. Upon learning that another child had been born to the same parents, but not having further information concerning the care that the infant was receiving, the agency sought entry into the home for the purpose of investigation.

Relying largely upon *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Appellate Division of the New Jersey Superior Court held that administrative searches need not always be based upon the traditional standard of probable cause. *See infra* text accompanying notes 192-93. The court found the investigative home visit to be analogous to a periodic housing code inspection, because based on the prior finding of maltreatment, periodic visits to the home were needed to assure that the new child was receiving proper care. *Wunnenburg*, 408 A.2d at 1347-48.

While the court did not say what evidentiary standard is required to justify entry into a home in a civil child abuse investigation, it did appear to recognize the need for some particularized information to justify the search. The applicable New Jersey statute authorized court-ordered entry into a residence based upon a finding that "the best interests of the child so require." The court concluded that this was supplied by the previous judicial finding of parental unfitness. It reasoned:

It is not unreasonable to fear for the health and welfare of an infant of a mother who, 22 months previously, had been declared by a trial judge to be 'incapable of caring for children,' to such an extent that the health of two of her other children had in fact been impaired.

Id. at 1349.

not with respect to a residential search, that a reasonable suspicion standard can be applied where child abuse is suspected.¹⁵⁴

c. Policy Considerations: Applying the Balancing Test

Two principal factors argue for a relaxed evidentiary standard for entering private residences in child abuse and neglect investigations. First, because of the severe and long-term potential consequences of child maltreatment, there is a particularly strong public interest in a complete and accurate investigation. Child abuse and neglect tends to continue if left unchecked. Second, as pointed out by Professor LaFave, child abuse and neglect can be particularly difficult to detect, especially where preschool children are involved.¹⁵⁵

Fourth amendment rules have been developed for criminal prosecutions as a whole, while the evidentiary balancing test is applied to civil administrative searches according to the particular category of civil

154. *State v. Parker*, 127 N.H. 525, 503 A.2d 809 (1985). In *Parker*, a police officer looked into the cab of a camper and saw a child's head move rapidly up and down. The officer's suspicions were aroused because he had previously been informed that the driver was traveling alone. The camper was pulled over and the child described an incident of sexual assault. After being convicted for attempted aggravated felonious sexual assault, the defendant appealed, arguing that the initial stop was illegal and therefore the child's statements should have been suppressed. 503 A.2d at 810-11.

The court upheld the conviction, relying upon *United States v. Hensley*, 469 U.S. 221, 229 (1985); *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); and *Terry v. Ohio*, 329 U.S. 1, 22 (1968). These cases permit an investigative stop if it is supported by specific articulable facts that form a reasonable basis for the officer's suspicion of criminal activity. The New Hampshire Supreme Court apparently assumed that, except for the detention of suspected illegal aliens, the reasonable suspicion standard articulated in *Terry* had not been approved by the United States Supreme Court as the standard for the detention of a motor vehicle. See W. LAFAVE & J. ISRAEL, *supra* note 65, §§ 3.8(f), .9(f) (supporting the assumption made by the New Hampshire court). But see *Delaware v. Prouse*, 440 U.S. 648 (1979) (stopping and holding automobile to check the driver's license and automobile registration held to be an unreasonable seizure where there was no articulable and reasonable suspicion that driver was unlicensed, automobile was unregistered, or that the vehicle or an occupant was otherwise subject to seizure for violation of the law).

In approving the detention of the motor vehicle, the court noted the strong public interest in the protection of children and the prevention of child abuse and abduction. This interest, the court held, should be considered at least equivalent to the strong public interest in preventing the entry of illegal aliens. *Parker*, 503 A.2d at 812. The court also pointed out that "facts that will reasonably lead an officer to suspect child abuse or an abduction necessarily include subtler clues than are required for a reasonable suspicion of criminal activity involving adult victims." *Id.* Thus the court suggested not that there be only a relaxed fourth amendment evidentiary standard related to the prevention of child abuse, but also that special considerations are relevant to *applying* the reasonable suspicion standard in child abuse cases. There are, of course, different fourth amendment considerations in detaining an automobile as opposed to entering a residence; however, the basic principle that the fourth amendment standard of proof might be relaxed in child abuse investigations could be applied in either circumstance.

155. W. LAFAVE, *supra* note 18, § 10.3, at 242; see also *Parker*, 503 A.2d at 812.

search.¹⁵⁶ Failure to obtain critical evidence in a criminal investigation may prevent the punishment of the perpetrator, but failure to obtain critical evidence in a child abuse investigation may imminently endanger a known child victim. Arguably, the need to protect the child is more pressing than the need to uncover evidence solely for the purpose of criminal prosecution.

The chief argument for a strict evidentiary standard governing residential entries in child abuse cases is the need to protect family privacy. In general, entry into a private residence receives the greatest fourth amendment protection.¹⁵⁷ Where the search is conducted for the purpose of uncovering information concerning maltreatment of the child, delicate family relationships are especially likely to be disturbed, with potentially traumatic impact on the child and the parents.¹⁵⁸ The Supreme Court has repeatedly recognized the right of families to be free from unwarranted interference, describing this right as an "essential right,"¹⁵⁹ the "basic civil right of man,"¹⁶⁰ or "rights far more precious than property rights."¹⁶¹

The overwhelming intrusiveness of a residential search in a child abuse case makes it inappropriate to permit such an entry based on any suspicion or report of child maltreatment no matter how vague and unspecific. If there is no threshold level of suspicion, damaging forced entries could be made based on unsubstantiated rumors and unsupported impressions. For example, without any required minimum level of suspicion, an entry could be made because an unidentified person called the child protection agency, stated "I hear Mr. X is mean to his children," and then hung up. To permit entries without objective evidence of maltreatment would not only allow a serious intrusion without a concomitant demonstrated need for the entry, but

156. As the Supreme Court noted in *Camara v. Municipal Court*:

Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. . . . It is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards . . . will vary with the municipal program being enforced. . . .

387 U.S. 523, 538 (1967).

157. *W. LAFAVE*, *supra* note 18, § 2.3, at 290.

158. *J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD* 25, 64 (1979); *A.B.A. INST. JUD. ADMIN., JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT* 54-55 (1981).

159. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

160. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

161. *May v. Anderson*, 345 U.S. 528, 533 (1953); *see also Santosky v. Kramer*, 455 U.S. 745 (1982); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977).

would make it too easy to perpetrate entries for malicious and arbitrary purposes. The real question is whether the undiluted probable cause standard or the standard of reasonable suspicion should apply.

Although residential searches in child abuse investigations are highly intrusive upon the privacy of families, the potential consequences of nondetection are grave. Among the possibilities are death,¹⁶² permanent physical disability,¹⁶³ and long-term emotional trauma to the child.¹⁶⁴ If a high quantum of evidence¹⁶⁵ is required for residential investigative entries, there is good reason to believe that many additional children will suffer serious harm. Where there are stricter evidentiary standards governing access to evidence, it must be assumed that there will be more cases in which conclusive evidence of maltreatment will go undiscovered. Furthermore, where an investigation cannot be completed, there may be insufficient evidence to bring successful legal proceedings for the protection of the child.

A recent study demonstrates that child abuse investigators must successfully determine whether or not a child has been maltreated. Where investigators reported that they were unsure whether maltreatment had occurred, the likelihood of further reports of maltreatment was substantially greater than where the investigators concluded that maltreatment had occurred.¹⁶⁶ The most likely explanation for this result is that only when the workers were able to substantiate maltreatment were they able and willing to take effective action to protect the child.

162. See, e.g., D. Daro, Deaths Due to Maltreatment Soar: The Results of the Eighth Semi-Annual Fifty State Survey (1987) (unpublished paper available from the National Center on Child Abuse Prevention Research, National Committee for Prevention of Child Abuse, 332 S. Michigan Avenue, Suite 950, Chicago, IL 60604).

163. See, e.g., *Hearing on the Reauthorization of The Child Abuse Prevention and Treatment Act of 1974 Before the Senate Subcomm. on Children, Families, Drugs, and Alcoholism*, 100th Cong. (unpublished) (testimony by James Hollahan on behalf of the United Cerebral Palsy Associations, Inc., and the Consortium for Developmental Disabilities) (reporting statistical evidence that large numbers of children suffer from cerebral palsy and other developmental disabilities as a result of abuse).

164. See, e.g., D. FINKELHOR, CHILD SEXUAL ABUSE 188-99 (1984).

165. See *infra* notes 170-81 and accompanying text (discussing quantum of evidence necessary for probable cause).

166. S. Wells, Decision-Making in Child Protective Services Intake and Investigation: Final Report 38, 42, 47, 50 (1986); S. Wells, Decision-Making in Child Protective Services Intake and Investigation: Executive Summary 6 (September 1985) (unpublished papers, on file at ABA National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, N.W., Washington, DC 20036).

d. The Practical Difference Between the Probable Cause and Reasonable Suspicion Standards in Child Abuse Investigations

A major problem in determining whether the probable cause or reasonable suspicion standard should apply to searches in child abuse investigations is that it is difficult to assess the practical difference between the two standards. Perhaps the clearest definition of reasonable suspicion was articulated by the United States Supreme Court in *United States v. Cortez*¹⁶⁷ and *United States v. Montoya de Hernandez*.¹⁶⁸ In those cases the Court defined reasonable suspicion as “a particularized and objective basis” for suspecting that a search or investigative stop will yield probative evidence.¹⁶⁹ Thus, a mere subjective belief will not suffice to establish reasonable suspicion; rather, there must be an objective basis for the suspicion.

Although probable cause also rests upon an objective basis for the suspicions giving rise to the search, the Supreme Court has required a more substantial quantum of proof for probable cause than for reasonable suspicion. However, the precise degree of probability required for probable cause is unclear. As the Court stated in *Brinegar v. United States*,¹⁷⁰ “[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”¹⁷¹ And as the Court more recently pointed out in *Illinois v. Gates*,¹⁷² “[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”¹⁷³ Thus, the probable cause standard does not appear definitively to incorporate a “more probable than not” quantum of proof:

Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate’s decision. While an effort to fix some general, numerically precise degree of certainty corresponding to “probable cause” may

167. 449 U.S. 411 (1981).

168. 473 U.S. 531 (1985).

169. *Cortez*, 449 U.S. at 417; *Montoya de Hernandez*, 473 U.S. at 541.

170. 338 U.S. 160 (1949).

171. *Id.* at 175.

172. 462 U.S. 213 (1983).

173. *Id.* at 232.

not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."¹⁷⁴

Professor LaFave suggests that the "more probable than not" test should not be applied to determine whether there is probable cause that a particular individual has perpetrated a crime, but should be applied where it is uncertain whether any crime has occurred, such as where a person is observed engaging in suspicious activity.¹⁷⁵ This distinction, he suggests, is supported by many lower court cases. If, to establish probable cause in a child abuse investigation, it is necessary to show that it is more probable than not that maltreatment has occurred, it is not difficult to visualize the practical difference between that standard and reasonable suspicion. In abuse and neglect cases, it is usually not the identity of the perpetrator that is in question, but rather whether or not maltreatment has in fact occurred. Civil neglect investigations are primarily focused on family and household members responsible for the child.¹⁷⁶

While it is beyond the scope of this article to compare the precedents dealing with the reasonable suspicion as opposed to the probable cause standard, it is safe to say that probable cause is more likely to be established where the credibility of a witness or an informant is clear,¹⁷⁷ where the information provided is relatively specific and detailed,¹⁷⁸ where the information supplied is independently corroborated,¹⁷⁹ and where the information presented is relatively recent.¹⁸⁰ Reducing these factors to practical terms is a matter of conjecture and perhaps assumes an unrealistic level of consistency among judicial opinions.

In spite of the difficulty in clearly distinguishing between reasonable suspicion and probable cause, the following rough rule of thumb may be applied to child abuse and neglect reports. Where the report names or describes the location of the child and the perpetrator and describes either specific maltreatment inflicted upon the child or a specific behavior or condition of the child suggesting maltreatment, it is probably sufficient to constitute a reasonable suspicion. However, if the

174. *Id.* at 235 (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

175. W. LAFAVE & J. ISRAEL, *supra* note 65, § 3.3(b) at 190.

176. The Child Abuse Prevention and Treatment Act, which sets federal requirements for child abuse and neglect reporting and investigation, applies only to "the person who is responsible for the child's welfare." 42 U.S.C. § 5102 (1982).

177. W. LAFAVE, *supra* note 18, § 3.32(e), at 544.

178. *Spinelli v. United States*, 393 U.S. 410 (1969); W. LAFAVE, *supra* note 18, § 3.3(e), at 544.

179. W. LAFAVE, *supra* note 18, § 3.3(f), at 551.

180. *Id.* § 3.7(a), at 681.

report is intrinsically implausible or absurd, or if similar reports by the same reporter have been repeatedly disproved and shown to be based upon malicious intent, a reasonable suspicion would not be established. If this analysis is correct, the Illinois criteria discussed in *E.Z. v. Coler* come very close to satisfying the reasonable suspicion standard.¹⁸¹

For probable cause, on the other hand, it is necessary that the report, together with any additional corroboration, be strong enough to demonstrate a substantial likelihood that abuse has in fact occurred. This would seem to require enough detail to exclude alternative and innocent explanations of what the reporter believes has occurred.

The first example set forth in footnote six of this article illustrates the difference. That hypothetical involved an anonymous report alleging abuse and neglect in a particular home, and stated that the reporter had heard loud screaming, seen piles of trash in the home, and had observed the children to be filthy and unkempt.

This hypothetical would appear to meet both the description of reasonable suspicion and the criteria approved by the federal district court in *E.Z. v. Coler*.¹⁸² Those criteria were that “[t]he child must either have been harmed, or be in danger of harm or of a substantial risk of harm. . . .,” and there must be a “specific incident or circumstance which suggests the harm was caused by child abuse or neglect. . . .”¹⁸³ The screaming suggests the possibility of physical harm, and the piled up trash and filthy state of the children suggest the possibility of a risk to the children’s health. The same factors also suggest that the feared harm may be the result of maltreatment.

The hypothetical may not constitute probable cause for a search, however. It is not difficult to think of an innocent explanation for the report. The screaming may have been part of a child’s tantrum. The piled up trash may be the result of a move, or perhaps the parents are not good housekeepers, but the trash presents no threat to the children’s health. Finally, the filthy and unkempt state of the children may have been the result of their playing in the mud. Although an experienced investigator may conclude from the report that there is a significant possibility that abuse or neglect has taken place, the probable cause standard would require further information to rebut these possible alternative explanations.

181. 603 F. Supp. 1546, 1549–50 (N.D. Ill. 1983), *aff’d sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986); *see supra* text accompanying notes 136–37.

182. 603 F. Supp. 1546; *see supra* text accompanying notes 134–37.

183. *E.Z.*, 603 F. Supp. at 1549.

It may be possible to obtain enough further information to establish probable cause where the person taking an oral report requests and is able to obtain sufficient additional detail concerning the incident observed. But if the report is by letter or if the initial reporter cannot provide substantial additional information, the probable cause standard could not be satisfied.

It may be argued that a stricter standard will impel the employees of child protection agencies to use greater diligence in collecting information from persons reporting child abuse and neglect. Since most reports are oral rather than written, diligence can often make the difference between facts establishing a reasonable suspicion and those establishing probable cause. On the other hand, it may be optimistic to conclude that such persons will be trained to elicit the necessary facts and that reporters will always be able to provide them.

e. Applying the Reasonable Suspicion Standard When Police Participate in the Search

Where police conduct a nonemergency, nonconsensual search for the primary purpose of uncovering a crime, probable cause is required. It is also likely that probable cause is required whenever a nonconsensual search is conducted solely by police in a nonemergency child abuse case. *Camara v. Municipal Court*,¹⁸⁴ *Wyman v. James*,¹⁸⁵ *New Jersey v. T.L.O.*,¹⁸⁶ and *O'Connor v. Ortega*¹⁸⁷ all involved entries by public officials other than police. Although *Camara* presumably permits police to assist in the execution of a warrant, police would not conduct the actual housing inspection. Both *Wyman* and *Camara* strongly emphasized the constitutional significance of police noninvolvement in the search.¹⁸⁸

Accordingly, even if it is possible for a child protection agency to enter a residence based upon less than probable cause, the police may not do so except to the extent necessary to provide immediate protection of the child and to keep the peace. If special standards and procedures are to exist for entries by child protection agencies, then the inspection and search should be conducted by agency employees. This

184. 387 U.S. 523 (1967).

185. 400 U.S. 309 (1971).

186. 469 U.S. 325 (1985).

187. 107 S. Ct. 1492 (1987).

188. See *supra* notes 92-112 and accompanying text. In *T.L.O.*, however, the Court declined to say whether searches by school officials at the behest of police would require probable cause. 469 U.S. at 342 n.7. In *O'Connor*, the Court emphasized the inability of public employers to master the complexities of probable cause as do the police. 107 S. Ct. at 1501-02.

should be sufficient to protect the child and may limit the intrusiveness of the search to some extent. Further, questioning of the family should be conducted by the agency in such a situation.

This does not mean that joint searches by police and child protection agency staff should not or cannot be conducted. Where the family consents, where there is an emergency, or where there is probable cause that a crime has been committed and there is evidence of the crime in the residence, there is no reason why the police and the child protection agency staff should not cooperate in inspecting the premises. But if entry is to be permitted based on a reasonable suspicion that the child may be endangered, police should not directly participate in the inspection or search.¹⁸⁹

This approach is also workable in jurisdictions where child protection agency investigators do not work on a twenty-four-hour basis. If there is an emergency, police should be able to make an emergency doctrine entry based on less than probable cause, as discussed earlier.¹⁹⁰ If there is no emergency, the entry can be made during working hours, assuming that the child protection agency is open during a reasonable portion of the day. In jurisdictions that choose to involve the police in every nonconsensual investigative search, it follows that the probable cause rather than the reasonable suspicion standard would apply.

2. Constitutionally Mandated Procedure To Gain Entry

a. Necessity for a Warrant or Other Prior Approval from an Impartial Official

Because Supreme Court cases offer little guidance concerning what administrative search procedures are constitutional, there are important unresolved procedural issues regarding child protection searches. The most fundamental of these is whether a warrant or its equivalent must be obtained prior to a residential search. If a warrant is not constitutionally required, a state may authorize the police to force entry into a residence in a nonemergency situation based only upon the statement of the child protection agency that the search is a necessary part of its investigation. By contrast, where police investigate a crime, a warrant is required for a residential search unless there are “exigent circumstances” such as the need to prevent an imminent escape,

189. As a practical matter, this means that police could be actively involved in a nonemergency, nonconsensual search only where a criminal search warrant (based on probable cause) rather than a child protection search warrant (based on reasonable suspicion) was issued.

190. See *supra* text accompanying notes 59–75.

destruction or loss of evidence, or to prevent an immediate injury or loss of property.¹⁹¹

*i. Case Law Regarding Warrants in Searches
by Administrative Agencies*

The Court in *Camara v. Municipal Court*¹⁹² held that there must be a warrant, approved by an impartial magistrate, for a nonconsensual housing inspection. A warrant is required even where the inspection is purely routine and not based upon any particularized complaint concerning the residence being inspected. The purpose of the requirement is to protect against arbitrary or oppressive searches.¹⁹³ Under *Camara*, a warrant would seem to be required for a nonconsensual residential search in a child abuse investigation.

Wyman v. James held that warrants are not required for welfare home visits.¹⁹⁴ The holding is inapposite to child abuse investigations, however, because the Court pointed out that warrants would add to the intrusiveness of welfare home visits.¹⁹⁵ If warrants were required, the Court reasoned, they might be executed outside normal working hours and would have to rest on some adverse information concerning the child or family receiving the welfare payments.¹⁹⁶ Requiring a warrant in a child abuse investigation by contrast would not add to the intrusiveness of the search, which already may take place at any time, and already rests upon particularized negative information indicating a need to enter the home. In addition, *Wyman* only permitted relatively nonintrusive visits to be conducted without warrants, such as visits that could not be forced upon the recipients and did not involve police.

In *New Jersey v. T.L.O.*,¹⁹⁷ the Court authorized warrantless searches of minors in a school setting.¹⁹⁸ The decision was based upon the need for informal and swift discipline in the school context, a consideration not applicable in child abuse investigations. Similarly, in *O'Connor v. Ortega*, the Court held that government employers may conduct warrantless searches of their employees' work spaces because a warrant requirement would disrupt the routine conduct of business,

191. See *supra* notes 47-48 and accompanying text.

192. 387 U.S. 523 (1967).

193. *Id.* at 539.

194. 400 U.S. 309, 318, 326 (1971).

195. *Id.* at 323-24.

196. *Id.*

197. 469 U.S. 325 (1985).

198. The Court reserved the question of whether a warrant would be required if the police were involved in the search. *Id.* at 340-41 n.7.

and would be unduly burdensome.¹⁹⁹ Likewise, this rationale does not apply to child abuse investigations.

In *E.Z. v. Coler*, a federal district court held that warrants were not required in civil abuse and neglect investigations because of the special difficulties in obtaining evidence of child maltreatment.²⁰⁰ It is difficult to see, however, what this has to do with the court's decision to dispense with the warrant requirement. Requiring a warrant is logically consistent with permitting a search to be based upon a lesser standard of proof. Indeed, police and child welfare workers may feel more secure making a forced entry pursuant to a warrant, rather than on their own responsibility alone.

ii. Warrants Without Probable Cause

There is a serious difficulty, however, that must be confronted in making a constitutional argument for both a reasonable suspicion evidentiary standard, and a warrant requirement. As the Supreme Court recently stated in *Griffin v. Wisconsin*, "While it is possible to say that Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that 'no Warrants shall issue, but upon probable cause.'"²⁰¹ The *Griffin* Court then concluded that whenever a search upon less than probable cause is permitted the Constitution cannot simultaneously require a judicial warrant.²⁰²

The Court was careful to note a possible exception for administrative warrants, however.²⁰³ As discussed earlier, *Camara v. Municipal Court* requires warrants for housing inspections, while establishing a special diluted type of "probable cause," that does not require particu-

199. 107 S. Ct. 1492, 1500 (1987).

200. 603 F. Supp. 1546 (N.D. Ill. 1985) (visual inspection of child's body by child protection agency permitted without probable cause or warrant), *aff'd sub nom.* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

201. 107 S. Ct. 3164, 3169 (1987). The fourth amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the Place to be searched, and the persons or things to be seized.

202. 107 S. Ct. at 3169-70.

203. The Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause. Although we have arguably come to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts, we have never done so for constitutionally mandated judicial warrants.

Id. (footnotes omitted). The Court then explained in a footnote that while "probable cause" is formally required for administrative searches, that phrase refers to a requirement of reasonable-

larized evidence of housing code violations.²⁰⁴ A similar approach could be taken for civil child abuse investigations, specifying that “probable cause” for this purpose is equivalent to the standard of reasonable suspicion in the context of criminal cases.²⁰⁵ In any case, assuming that a warrant would provide a meaningful protection against arbitrary or oppressive state action, it would be anomalous to dispense with the warrant requirement simply because a search may be made based upon a reasonable suspicion.

Alternatively, if an administrative warrant, albeit based on less than the traditional standard of probable cause, is required by the Constitution, the Constitution does not require that the warrant be issued by a court. The Court in *Griffin v. Wisconsin* held that although a “constitutionally mandated judicial warrant” must invariably be based upon the traditional standard of probable cause, a warrant that may be issued by a nonjudicial “neutral magistrate” or “neutral officer” in the context of an administrative search might be based on less.²⁰⁶ Accordingly, if we assume that a reasonable suspicion is required for a residential entry by a child protection agency investigation, there may also be a constitutional warrant requirement, but the state can opt for an impartial administrative official rather than a judge to review and issue the warrant.

iii. Policy Arguments for Requiring Warrants in Child Protection Investigations

The principal argument in favor of a warrant requirement for residential entries in child protection investigations is that the warrant ensures adherence to other legal and constitutional requirements. Notably, whatever quantum of evidence is required, the warrant requirement ensures that an impartial person will screen the evidence to determine whether the standard of evidence has been satisfied in the individual case.

Furthermore, the process of applying for a warrant, or the knowledge that a warrant must be applied for, may help discipline the child protection agency to carefully consider and document its decisions to

ness rather than to a strict quantum of evidence to be distinguished from the lesser quantum of “reasonable suspicion.” *Id.* at 3170 n.4.

In other words, probable cause is required if a judicial warrant is constitutionally required. But if the constitution does not require a judicial warrant, a judicial (as opposed to an administrative) warrant might be permitted supported by less than probable cause.

204. 387 U.S. 523 (1967); see *supra* text accompanying notes 92–104.

205. *Cf.* *State v. Parker*, 127 N.H. 525, 503 A.2d 809 (1985) (elusiveness of evidence in child abuse cases justifies a relaxed application of the reasonable suspicion standard).

206. 107 S. Ct. 3164, 3169–70, 3170 n.5 (1987).

make forced entries and searches. Without a warrant requirement, the legal rules governing compelled entries may be neither well understood nor followed by the agency.

Perhaps the most compelling practical argument *against* imposing a warrant requirement is that unless the exclusionary rule applies in child protection proceedings, the warrant will not serve as a meaningful screening device for agency searches. That is, judges (or other impartial officials) may not be motivated to carefully screen warrant applications if the validity of the warrant will not affect the outcome of the case. But if an improperly granted warrant may affect the outcome of a possible criminal case, the warrant application may be seriously reviewed, even if the exclusionary rule does not apply to the civil child protection proceeding.²⁰⁷

Furthermore, a judge or hearing officer may carefully screen warrant applications in order to protect the family from unnecessary invasions of privacy and, perhaps, to suggest less intrusive means to gather needed information. The judge or administrative official may wish to protect the state from public condemnation and possible liability by blocking improper entries and searches. It is important to remember that the mere issuance of a warrant does not necessarily shield a public agency from liability.

A final argument in favor of providing for a warrant in child protection investigations is that it can be a practical means of obtaining police assistance in securing a nonemergency, nonconsensual entry. Without a warrant or other order binding upon the police, police have no legal basis to assist in such circumstances. Although some other mechanism might be created to secure police assistance,²⁰⁸ a warrant does provide protection from arbitrary entries and can be required without imposing an unacceptable administrative burden.²⁰⁹

b. Necessary Procedure for Obtaining a Warrant

Assuming that there must be advance screening by an impartial officer of any decision to force entry into a residence pursuant to a child abuse investigation, several other important constitutional ques-

207. See *infra* text accompanying notes 418–66.

208. For example, if a warrant is not constitutionally required, a statute might require the police to assist the child protection agency to make a nonconsensual entry into a child's home whenever police are requested to do so by an official of the child protection agency, based on the agency's determination that there is a legal basis for entry.

209. For example, if a warrant were not required, a statute could direct police to assist the child protection agency to enter a home upon its request. At the opposite extreme, the statute could authorize the police to assist the agency to enter only after the issuance of an order following a contested hearing.

tions remain. First, may the warrant or order be issued based upon the ex parte representations of the child protection agency? Second, must the warrant or court order contain a particularized description of the objects of the search and the items to be seized? Third, if so, must there be a written affidavit to support the warrant as in the case of searches pursuant to criminal investigations?

i. Issuance of Warrants Based on Ex Parte Representations

A warrant or court order may constitutionally be granted based upon an ex parte statement in a criminal investigation. This ex parte procedure is allowed because of the possibility of escape or the concealment or destruction of evidence. Similarly, in child abuse and neglect situations, it is not unlikely that the child will be concealed from investigators or that evidence may be destroyed where there is advance warning of the search. Although advance warning was required by the Court in *Camara v. Municipal Court*, there the danger from not promptly correcting the housing code violation was considered slight.²¹⁰

ii. Particularized Description of Objects of Search and Items To Be Seized

The fourth amendment requires that no warrant shall issue unless "particularly describing the place to be searched, and the persons or things to be seized."²¹¹ Particularized descriptions of the objects of a search are possible in some but not all child abuse and neglect investigations. For example, where a parent claims that a child was injured by accidentally turning on a hot water tap, a warrant may provide for examination of the hot water tap. On the other hand, where there is a report of dangerous and unsanitary household conditions, or of excessive corporal punishment, it may not be possible to specify in advance the specific items to be examined and seized. The problem is that child abuse and neglect often involve a complex pattern of behavior occurring over a substantial period of time. The evidence needed is often more extensive, varied, and difficult to predict, than that needed to investigate a crime alleged to have taken place at a specific place and time. Strictly requiring particularized descriptions of the objects of the search would seriously interfere with child abuse and neglect investigations.

210. 387 U.S. 523, 532-33, 540 (1967). Furthermore, there is little harm in allowing property owners to correct housing code violations prior to the issuance of a housing inspection warrant.

211. U.S. CONST. amend. IV.

On the other hand, searches in child abuse investigations should be permitted only to the extent necessary to uncover evidence related to actual allegations of child maltreatment. A description of the nature of the suspected maltreatment and the kinds of evidence being sought may constitute a sufficiently particularized statement for constitutional purposes.

In *Andresen v. Maryland*²¹² the warrant authorized a search and seizure of a long list of documents, and culminated with the phrase “together with other fruits, instrumentalities and evidence of crime at this [time] unknown.”²¹³ The Court construed the phrase to apply only to the crime referred to in other parts of the warrant and held that the description, while general, was adequate on the facts of the case.²¹⁴ Emphasizing the nature of the particular crime involved, the Court stated that “[t]he complexity of an illegal scheme may not be used as a shield to avoid detection. . . .”²¹⁵ This same reasoning should apply to child abuse and neglect investigations where agencies have described the objectives and scope of the search and made their best efforts under the circumstances to describe the actual objects to be inspected or seized.

iii. Affidavit or Oath in Support of Warrant

The information that must be submitted in support of the warrant in a criminal case must comply with the constitutional command that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”²¹⁶ However, the oath or affirmation need not be made in the presence of the official designated to issue the warrant. One example of an apparently valid oral oath is as follows: The affiant gives the sworn statement to the judge via telephone and, if the warrant is approved, the judge instructs that an original warrant will be prepared and orally authorizes the preparation of a duplicate for use and execution.²¹⁷

212. 427 U.S. 463 (1976).

213. *Id.* at 479.

214. *Id.* at 480–81.

215. *Id.* at 480 n.10 (defendant charged with crime of false pretences, involving a complex scheme of real estate fraud).

216. U.S. CONST. amend. IV.

217. *United States v. Turner*, 558 F.2d 46 (2d Cir. 1977); FED. R. CRIM. P. 41(c)(2)(A).

*G. Proposed Statutory Provisions Governing Child Abuse
Investigative Entries*

Only fifteen states have statutes explicitly and specifically authorizing civil investigative searches in child abuse investigations.²¹⁸ Of those, all are incomplete or seriously flawed.

1. Entry for All Necessary Purposes

Existing state statutes are particularly limiting concerning entries and searches of property. All authorize issuance of an order permitting entry into a child's residence, but not always for the full range of circumstances in which a search may be needed in the investigation. For example, some permit entry only for the purpose of locating or interviewing the child,²¹⁹ while others permit entry for broader investigative purposes.²²⁰ Some statutes address entry into the child's residence, but do not provide for entry into other locations where evidence concerning child abuse or neglect may be found.²²¹ Statutes should authorize entry whenever and wherever necessary to obtain evidence regarding child maltreatment.

218. ALA. CODE § 26-14-7(c) (1986); ARK. STAT. ANN. § 42-813(e) (Supp. 1985); CAL. CIV. PROC. CODE § 1822.52 (West 1982); COLO. REV. STAT. § 19-2-104(1) (1986); IND. CODE ANN. § 35-33-5-1(a)(6) (Burns 1985); KY. REV. STAT. ANN. § 199.335(4) (Baldwin 1985); LA. REV. STAT. ANN. § 14:403(G)(5) (West Supp. 1988); NEB. REV. STAT. § 29-831 (1985); N.J. STAT. ANN. § 9:6-8. (West 1976); N.C. GEN. STAT. § 15-27.2 (1987); N.D. CENT. CODE §§ 29-29.1-02 (1974); S.C. CODE ANN. § 20-7-650(c) (Law. Co-op. 1985); TEX. CRIM. PROC. CODE ANN. § 18.021 (Vernon Supp. 1988); UTAH CODE ANN. § 78-3a-50 (1987); WYO. STAT. § 14-6-218 (1986).

219. See COLO. REV. STAT. § 19-2-104(1) (1986) ("A search warrant may be issued by the juvenile court to search any place for the recovery of any child within the jurisdiction of the court. . . ."); KY. REV. STAT. ANN. § 199-335(4) (Baldwin 1985) ("A search warrant shall be issued upon a showing of probable cause that a child is being abused or neglected. If, pursuant to a search under a warrant a child is discovered and appears to be in imminent danger, the child may be removed. . . ."); TEX. CRIM. PROC. CODE ANN. § 18.021(a) (Vernon Supp. 1988) ("A search warrant may be issued to search for and photograph a child. . . ."); UTAH CODE ANN. § 78-3a-50 (1987) ("If it appears . . . that there is probable cause to believe that a child is being . . . ill treated . . . the court may issue a warrant authorizing a peace officer to search for the child.").

220. See IND. CODE ANN. § 35-33-5-1(a)(6) (Burns 1985) ("A court may issue warrants only upon probable cause . . . to search any place for . . . [e]vidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children."); S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985) ("[T]he agency investigator may petition the Family Court . . . for a warrant to inspect the premises and condition of the child subject of the report.").

221. See S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985) ("[I]f the facts so warrant the agency investigator may petition the Family Court . . . for a warrant to inspect the premises and condition of the child subject of the report.").

2. *Residences Where More Than One Child Is Subject to Common Danger*

Child protection agencies sometimes receive reports alleging abuse or neglect of a child who lives in a household with other children. It is important that the agency be authorized to investigate potential danger to siblings or other children living in the same residence and to other children subject to the same alleged danger or harm. If the investigation is permitted to extend to other children in the same environment or who are subject to similar dangers, the scope of the search may be broadened, and a search for evidence may be possible if the child is no longer present in the particular location.

This does not mean, of course, that every search should automatically be broadened to encompass the potential maltreatment of all siblings or other children in a household. For example, where a sixteen-year-old girl is alleged to have been molested, there may or may not be indications of a similar danger or harm to her four-year-old brother. If not, there should be no basis for a search to uncover evidence of abuse of the brother. The determination whether there is a risk to siblings or other children in the household should take into account such factors as the type of maltreatment of the child, the past history of maltreatment of other children in the household, whether maltreatment was connected to parental misuse of alcohol or drugs, and, especially in the case of alleged sexual abuse, the gender and age of the children. The decision whether other children in the household are subject to the same danger or harm must be made on a case-by-case basis.

The second example set forth in footnote six of this article presented a special situation where children in a common environment are subject to similar danger or harm. In the example, a religious commune was accused of following a systematic pattern of child abuse. If the statute authorizing child abuse investigations authorizes entries to determine whether other children are subject to the same danger or harm alleged in a child abuse report, then a search of the religious commune may be possible, assuming, of course, that there is enough evidence to justify the search.

Again, it does not follow that because one child residing in a religious commune has been maltreated an investigative search of the entire commune is necessarily justified. For example, to demonstrate that other children in the commune are subject to the same danger or harm from excessive punishment, it might be shown that disciplinary authority over children in the commune has been turned over to cer-

tain commune leaders pursuant to commune beliefs, and that they have a pattern and practice of abusive disciplinary practices. Statutes need not set special guidelines governing searches of communal or institutional settings, but agency regulations and manuals should address the issue. It is enough that the statute authorize investigative entries related to the same danger or harm. As with siblings in the same household, the decision whether other children in the institutional or communal setting are subject to the same danger or harm must be made on a case-by-case basis.

3. *Standard of Proof To Gain Entry*

State statutes must specify what standard of proof will be required to permit child protection agency workers to gain entry. As discussed previously, probable cause is clearly a valid constitutional basis to gain entry, and entry may also be permissible based on a reasonable suspicion.²²² Several states, however, articulate no standard of proof or only a nebulous standard such as "good cause." The recommended statutory approach is to require a reasonable suspicion of wrongdoing to justify entries and searches conducted by the child protection agency, but to include a severability clause to reduce the risk of having the entire statute declared unconstitutional.²²³ The standard of reasonable suspicion probably will be upheld by the courts, but since the issue remains unresolved, it is prudent to avoid the risk of wholesale invalidation of the statute.

The standard of reasonable suspicion governing entry might be stated as whether the investigator possesses a "reasonable suspicion, based on specific and articulable facts, that the child has been [maltreated as defined by state law] and that there is evidence of [maltreatment] in the premises to be inspected or searched."²²⁴ An appropriate severability clause might state that if the standard of reasonable suspicion is ruled unconstitutional, the constitutionally mandated standard

222. *See supra* text accompanying notes 92-198.

223. A severability clause is a clause in an act declaring that if one part of the act is unconstitutional or invalid, the validity of other parts shall not be affected. Judicial attitudes toward such clauses vary. The clause is sometimes held merely to state the principle that statutes may be separable. On the other hand, severability clauses are sometimes treated as binding to the extent that the valid remainder of an act can serve as operative law. 2 N. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 44.08 (4th ed. 1986).

224. *See supra* text accompanying notes 167-81. Alternatively, the standard of reasonable suspicion might be stated as whether the investigator has a "reasonable belief that the child may have been [maltreated as defined by state law] and that there may be evidence of [maltreatment] in the premises to be inspected or searched." *See supra* text accompanying notes 211-15.

of proof will be applied and the remainder of the statute will remain in effect.

4. *Warrant Requirement*

Even if the courts decide that a warrant is not constitutionally required as a precondition of forced, nonemergency residential entries in child protection investigations, a warrant requirement should be statutorily imposed as a matter of sound policy. Nothing need be added here to the earlier discussion concerning the pros and cons of the warrant requirement,²²⁵ except to point out that a warrant or its equivalent may also be politically necessary. Members of the public and their legislators may be understandably unwilling to empower a child protection agency to forcibly enter homes based on a suspicion of child abuse without a screening process by a judge or other independent hearing officer.

Legislators should seriously consider whether warrants should be issued by judicial or nonjudicial officers. If, based upon a frank assessment of the workload and expertise of the courts responsible for juvenile matters in the particular state, the legislature concludes that child protection warrant applications are unlikely to be carefully reviewed, the legislature should specify that a designated independent hearing officer or other similar administrative official will review and approve warrant applications.²²⁶ States lacking specialized judges or juvenile officers handling juvenile matters should provide for an administrative warrant procedure.

5. *Ex Parte Approval of Warrants*

In many circumstances, investigative entries need to be made without advance notice. This is necessary in order to avoid the concealment or destruction of evidence prior to the search. For this reason, criminal search warrants are issued on an ex parte basis without advance warning to the party to be searched. Most of the statutes authorizing searches in civil child abuse investigations provide for the issuance of a warrant, which may presumably be done on an ex parte basis. However, some states with statutes authorizing court ordered investigative entries do not use the term "warrant," and do not specify the procedure for obtaining the court order. In *New Jersey Division of Youth & Family Services v. Wunnenburg*, such a statute was upheld as

225. See *supra* text accompanying notes 207–09.

226. See *supra* text accompanying note 206.

constitutionally equivalent to a warrant procedure.²²⁷ Under the terms of the statute the child protection agency had to apply for the court order in advance of the entry, and the court held a contested hearing prior to issuance of the order.²²⁸ Such statutes should be amended to explicitly allow for *ex parte* orders authorizing entry.

6. *Application for Warrant*

Two important procedural issues concerning application for a warrant are not generally dealt with by the state statutes authorizing in child abuse investigations. First, the laws do not satisfactorily outline the content of the affidavit or statement to be made to the judge in support of the court order or warrant authorizing entry. State law should provide that the sworn statement may be made by telephone and later confirmed in writing, that it must outline the objectives and scope of the search, and that it must specify the items or category of items to be searched for or examined.

Second, the law should provide that the judicial or administrative officer qualified to authorize the search be available on a twenty-four-hour basis. If the search is authorized, this individual should issue an order stating the object of the search and either the items to be seized or the area to be inspected.²²⁹

A chart capsulizing statutory law in the fifty states concerning investigative entries appears in the Appendix.

III. GAINING ACCESS TO THE CHILD

A. *Introduction*

In most child abuse investigations, interviewing, observing, or examining the child is essential to determining whether or not the child has been maltreated. Where the child is old enough to communicate, where the alleged maltreatment may be evidenced by physical signs or symptoms, or where the child's behavior may shed light on the allegations, the child protection agency will need to gain access to the child to complete the investigation.

Gaining access to the child raises different legal and practical issues than gaining access to the child's residence. Entry into the family residence may not even be necessary, since the child might be interviewed or examined at school or in a day care center. Whatever the physical

227. 167 N.J. Super. 578, 408 A.2d 1345, 1347 (App. Div. 1979).

228. *Id.*

229. *See supra* notes 211-15 and accompanying text.

circumstances, however, interviewing or examining the child may intrude on family privacy and, where conducted against the parents' will, may interfere with parental control. In addition, the examination or questioning may prove highly stressful to the child, especially where repeated, prolonged, or especially invasive.

Because access to a child may be denied by parents or caretakers, agencies need clear legal authority to interview and examine the child. Where there is no clear proof that the child is in immediate danger, legal remedies available should allow child protection workers to examine the child without unnecessarily depriving the parents of custody or control.

This section of the article considers the various legal bases for child protection agencies to secure access to the child for the purposes of interviews and examinations. The section begins by addressing the legal means most frequently relied upon by child protection investigators, and discusses their practical and constitutional limitations. Investigators typically gain access to children for interviews or examination by obtaining consent or through the use of temporary custody statutes.

The limitations of consent and temporary custody statutes for gaining access to children for interviews and examinations are discussed, and the constitutional requirements for an appropriate statute permitting access under broader circumstances are explored. Special emphasis is placed on due process rights to family privacy and integrity, and on fourth amendment protections against intrusive searches and examinations.

As with residential entries and searches, family and personal privacy interests affected by interviews and examinations must be balanced against the need to protect endangered children. Child protection workers should not have unlimited discretion to interview and examine children. However, when there is an objective basis to suspect abuse and access to the child is necessary to confirm or rebut the suspicion, practical means to complete the investigation effectively are needed.

B. Consent To Interview or Examine Child

Children are usually interviewed and examined by child protection workers with the consent of parents or caretakers. Accordingly, what constitutes legally valid consent to interview or examine a child is an important practical question. Key issues regarding the validity of con-

sent are whether it is voluntary, and whether the person giving the consent has the authority to do so.²³⁰

1. *Voluntariness of Consent*

Where the child's parents give consent for the interview or examination, the only question presented is whether the consent was voluntary. Voluntariness of consent to interview or examine a child should be evaluated by applying the same "totality of circumstances" test employed in evaluating whether consent to enter a home is voluntary.²³¹ Although the test is conceptually the same, there may be special factual questions raised by its application to interviewing or examining a child. For example, assume that a social worker wants to visually examine the bodies of two small children to determine whether bruises are present. If the mother protests, but helps to disrobe the children, has she consented to the examination? A federal district court held that a mother had given consent under such circumstances,²³² but the Seventh Circuit drew an opposite conclusion on appeal.²³³ The Seventh Circuit concluded that the mother may have involuntarily participated in disrobing the children as a way to alleviate their apprehension.²³⁴

2. *Authority To Consent*

The issue of who has authority to consent to an interview or examination of a child is factually different from the issue of who can consent to the search of a residence. Who can consent to a residential search depends on who is deemed to have "common authority" over

230. See *supra* notes 16-36 and accompanying text. Issues relating to the scope of consent may also sometimes be present. For example, permission might be granted to interview only about a specific topic or to conduct only a limited physical inspection or examination. As with consent to searches, the scope of consent presumably limits the scope of the interview or examination, unless there is another independent legal basis to proceed. For a discussion of the scope of consent in the context of entries and searches, see *supra* text accompanying notes 37-42.

231. See *supra* notes 23-25 and accompanying text.

232. *Darryl H. v. Coler*, 585 F. Supp. 383, 388-89 (N.D. Ill. 1984), *aff'd in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

233. *Darryl H. v. Coler*, 801 F.2d 893, 906-07 (7th Cir. 1986). The Seventh Circuit also indicated that where, in a companion case, social workers stated that they would obtain a court order depriving parents of custody of their children if they did not permit the social worker to enter the home and examine the children, the court had "serious doubts" that consent was voluntary. *Id.* at 897 n.5. For the district court opinion in this companion case, see *E.Z. v. Coler*, 603 F. Supp. 1546, 1557 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

234. *Darryl H. v. Coler*, 801 F.2d at 907 (overturning district court determination on summary judgment that inspection was conducted with consent).

the area in question.²³⁵ A person with control or joint access over a residence, however, does not necessarily have joint control over a child who lives there. Nevertheless, as a general concept, “common authority” logically applies to whether a person has authority to consent to a child protection agency interview or examination of a child.

a. Consent to Physical Examination by Individual Caretaker

Where an infant is left in the care of a neighbor, it is probably understood that the neighbor can change the infant’s diaper in the presence of a visitor. The neighbor necessarily has temporary access to and control over the child’s body, and this simple act of baby care does not involve any privacy element that would prevent it from being carried out in the presence of a third party. The neighbor in this situation may be said to have “common authority” with the parents over the baby’s body. A resident of a house may consent to an entry by a police officer because he has such “common authority” as to permit him to admit a stranger. By analogy, a babysitter who can allow a stranger to observe the baby’s body may arguably allow a child protection worker to do so. If the same babysitter is caring for a twelve-year-old of the opposite sex, however, he has no access to the child’s body incident to his caretaking function, and thus cannot consent to a physical examination of the child by a child protection worker.

b. Consent to Interview by Day Care Center

The common authority principle may also be applied to whether a day care center owner can permit a child to talk to a child protection worker. Day care providers are allowed to let children talk to anyone present at the day care facility, and so arguably should be empowered to consent to interviews by child protection workers so long as the children are not removed from the place where the parents have left them. On the other hand, it might be argued that permitting a child to be questioned concerning possible maltreatment is well outside the scope of the normal conversation that is anticipated by a parent who places a child in a day care center. Realistically, however, a parent placing a preschool child in a day care center should expect that the child may talk about anything. Therefore, just as authority to admit strangers to a residence gives authority to admit police, authority to allow a child to talk to strangers should grant authority to allow the child to be interviewed by child protection workers.

235. See *supra* notes 16–22 and accompanying text. In this context, “common authority” means joint access or control over the area of property in question.

c. *Consent to Interview or Examination by Child's School*

i. *Interviews*

A school's authority to consent to interviews of children depends both upon parental delegation, and upon state law conferring authority on the school to supervise, educate, protect, and discipline children while at school. Public education is compulsory,²³⁶ and school personnel are free to speak to children with or without parental permission concerning matters relevant to their education. Those empowered to talk to children about these matters presumably include visiting educational and psychological specialists in addition to the school's own staff. Because abuse or neglect has a bearing on a child's school performance and adjustment, schools may already have the power to permit child protection workers to interview children on this subject. However, it is prudent to address it legislatively.²³⁷

ii. *Physical Examinations*

A public school's power to conduct physical examinations of children and therefore to consent to examinations by others, depends largely on state laws and regulations concerning public education. For example, state law may permit public health or school nurses to examine or treat children in certain circumstances. If so, examinations by child protection workers are arguably allowable, under the analysis set out above. In some states, the child protection agency may have authority to conduct an examination of the child without the consent of the school.²³⁸

3. *Child's Authority To Consent*

a. *Interviews*

Child abuse reporting acts authorize *any* person to report child maltreatment, including child victims. These statutes therefore empower a child to report and discuss any alleged maltreatment with the agency.²³⁹ But where the report originates with someone else, it may

236. See generally Oberman, *Education Rights*, in LEGAL RIGHTS OF CHILDREN § 12.02 (1984).

237. See *infra* text accompanying note 346.

238. Relevant constitutional and statutory issues are discussed in detail elsewhere in this article. See *infra* notes 290-339, 345-47 and accompanying text.

239. See, e.g., ARK. STAT. ANN. § 42-808 (1977) (any person may make a report if such person has reasonable cause to suspect that a child has been abused or neglected); CAL. PENAL CODE § 11166(d) (West Supp. 1988) (any person who has knowledge of or observes someone whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance); MICH. COMP. LAWS ANN. § 722.624 (West Supp. 1986) (any

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be uncertain whether the child has sufficient control over his person to independently authorize an interview. If parents are not present, and the child has passed the age where he or she is forbidden to talk to strangers, the answer should be yes, either if the principle of "common authority" is applied in this context, or if the law recognizes children as having the right to speak for themselves.

b. Physical Examinations

Children do not usually have authority to consent to a physical examination. As a matter of both law and practice, parents generally retain control over the routine examination and treatment of their young children by medical professionals.²⁴⁰ A "mature adolescent," however, may be able to consent to such an examination without parental approval. The consent of an older adolescent may even be required in order to allow a physical examination without a court order. Supreme Court decisions approving the right of a minor to consent to an abortion and to purchase contraceptives establish a privacy right that arguably creates a right in a "mature adolescent" to exercise control concerning such a bodily examination.²⁴¹

On the other hand, the Supreme Court held in *Parham v. J.R.* that parents may commit their minor children to a public mental hospital without their consent and without a civil commitment hearing to review the decision.²⁴² If a parent can commit a child to a mental institution without judicial review, it would seem that the parent would have the right to prevent or override a child's consent to a physical examination. If the privacy interest articulated in *Planned Parenthood v. Danforth*²⁴³ is strictly limited to issues surrounding procreation, the parent arguably has such a right. Alternatively, however, the conflict might be reconciled to permit either the mature adolescent or the parent to authorize the exam over the objection of the other.

person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter), reprinted in STATE STATUTES, *supra* note 85, at 403.

240. See generally Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 286-92 (1976).

241. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); see also *Carey v. Population Servs. Int'l*, 431 U.S. 671 (1977), discussed in Dodson, *Legal Rights of Adolescents: Restrictions on Liberty, Emancipation, and Status Offenses*, in LEGAL RIGHTS OF CHILDREN §§ 4.16-.17 (1984).

242. 442 U.S. 584 (1979). The Court held that inquiry should be made by a neutral fact finder to determine whether statutory admissions criteria are met and that the continued need for commitment must be reviewed periodically, but that the decision maker need not be law-trained. *Id.* at 607-11.

243. 428 U.S. 52 (1976).

The federal Constitution arguably allows the state to determine whether or not the adolescent or parent may consent to a physical examination pursuant to an allegation of child abuse. The *Parham* case only upheld, and did not mandate, the state civil commitment scheme. Given that state²⁴⁴law governs the age of majority, which controls the exercise of many important constitutional rights, states probably are free to define when children are permitted to consent to medical examination in this and other contexts without parental consent.²⁴⁵

C. *Gaining Access to the Child Through Temporary Custody*

In addition to obtaining consent, child protection agencies may conduct interviews and arrange for physical examinations in the course of taking emergency custody of a child. State laws authorize law enforcement officials or child protection agency employees to take children into custody under specified circumstances prior to filing a child abuse or neglect petition.²⁴⁶

The criteria for taking a child into temporary custody vary among the states. In states where the criteria for gaining an *ex parte* order or taking the child into custody without a court order are relatively lax, this approach is frequently used to gain access to the child in the face of parental opposition. For example, an Oklahoma statute provides that "if it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may immediately issue a . . . warrant authorizing the taking of said child into custody."²⁴⁷ Under this statute, the court is arguably authorized to take the child into custody for the purpose of investigative interviewing or observation.

There are several problems, however, with gaining access to a child through temporary custody statutes. First, such statutes may not authorize medical examinations. Second, in some jurisdictions the state agency taking the child into custody must place the child in fos-

244. *See, e.g.*, *Nelson v. Browning*, 391 S.W.2d 873, 880 (Mo. 1965) ("The status of minority or majority of all persons within a state is exclusively a matter for that state to determine itself.")

245. *See, e.g.*, ALA. CODE § 22-8-4 (1984) (providing that minors 14 years of age or older are emancipated for purposes of consenting to medical, dental, health, or mental health services); MISS. CODE ANN. § 41-41-3(h) (Supp. 1987) (providing that unemancipated minors of "sufficient intelligence to understand and appreciate the consequences" may consent to medical or surgical treatment); OR. REV. STAT. § 109.640 (1987) (providing that minors 15 years of age or older may consent to hospital care or medical treatment). *See generally* Bennett, *supra* note 240, at 293.

246. *See supra* text accompanying notes 85-87.

247. OKLA. STAT. ANN. tit. 10, § 1104(d) (West 1987).

ter care even if prompt return of the child seems safe.²⁴⁸ Third, where the statute gives blanket authority to take the child into custody, the agency may routinely hold the child for an unnecessarily prolonged period.²⁴⁹

In addition, many state statutes apply relatively strict criteria for custody orders, making it difficult to gain access to the child for investigative purposes. For example, a Texas statute allows an ex parte temporary custody order only when there is an affidavit or sworn petition that “(1) there is an immediate danger to the physical health or safety of the child; and (2) there is no time, consistent with the physical health or safety of the child, for an adversary hearing.”²⁵⁰

D. Constitutional Limits on Gaining Access to Child

When child protection investigators do not receive consent to interview or examine a child, the state’s emergency child custody statutes may not provide any workable means to pursue an investigation. A few states have enacted special legislation authorizing access to the child for investigative purposes,²⁵¹ but this legislation is not well thought out. New legislation is needed, but any statutory reform must account for possible constitutional limitations on interviews and examinations.

1. Constitutional Issues in Interviewing Children

Statutes permitting child protection agencies to interview and examine children in child abuse investigations must satisfy both the substantive and procedural due process requirements of the fourteenth amendment. Such statutes must also address the issues of whether gaining access to the child for an interview or examination constitutes a “seizure” under the fourth amendment and, if so, what level of suspicion is required and whether a warrant is necessary.

a. Due Process: The Right to Family Integrity

A due process analysis of the powers of child protection agencies to interview children in child abuse investigations should begin with rec-

248. See, e.g., WASH. REV. CODE § 26.44.050 (1987) (law enforcement officer may take child into custody where probable cause to believe that child is abused or neglected and would be injured or could not be taken into custody if it were necessary to first obtain a court order); *id.* § 13.34.060(1) (child taken into custody shall immediately be placed into shelter care).

249. For suggested changes to these statutes, see *infra* notes 347–48 and accompanying text.

250. TEX. FAM. CODE ANN. § 17.02(a) (Vernon Supp. 1988).

251. See *infra* note 341 and accompanying text.

ognition of the fundamental rights to exercise parental autonomy,²⁵² and to be free from unwarranted governmental intrusion into family privacy.²⁵³ As the court stated in *Stanley v. Illinois*, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."²⁵⁴ The integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, and the Ninth Amendment. This right to family integrity is recognized as a form of liberty guaranteed by the due process clause of the fourteenth amendment.²⁵⁵

The right to family integrity is not absolute. States can adopt necessary policies to protect the health, safety, and welfare of children.²⁵⁶ Where a parent has maltreated a child, the state may intervene to protect the child, including, when necessary, separating the child from the parents²⁵⁷ or even permanently terminating the parent-child relationship.²⁵⁸ When the state seeks to intervene to protect the child, however, parents clearly are entitled to procedural due process.²⁵⁹ The scope of procedural protections provided must be commensurate with the degree of infringement of parental rights that is sought by the state.²⁶⁰

252. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parental right to decide the religious training of children outweighs the state's interest in public high school education); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents entitled to arrange for the education of their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents may arrange to have their children taught a foreign language).

253. *Stanley v. Georgia*, 394 U.S. 557 (1969) (statutes regulating obscenity may not reach into the privacy of one's own home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of family privacy includes use of contraceptives).

254. 405 U.S. 645, 651 (1972) (citations omitted).

255. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

256. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

257. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977) (removal of children requires showing of parental unfitness); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) (removal of children requires showing of parental unfitness); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) ("We do not question . . . that neglectful parents may be separated from their children.").

258. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

259. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (procedural due process afforded to foster parents held less than those afforded to biological families prior to removal of children).

260. *Doe v. Staples*, 706 F.2d 985, 989-90 (6th Cir. 1983), *cert. denied*, 465 U.S. 1033 (1984).

Legal Barriers in Child Abuse Investigations

The specific procedural protections required where the state seeks to compel access to a child during a child protection investigation are determined by applying the balancing test articulated in *Matthews v. Eldridge*.²⁶¹ The test employs three factors: First, the private interest affected by the state action in question; second, the risk of erroneous deprivation of the private interests resulting from the state procedure; and third, the countervailing financial and administrative state interests supporting use of the procedure in question.²⁶² This approach has been applied by the United States Supreme Court in evaluating procedural protections in termination of parental rights proceedings.²⁶³

Applying the *Matthews v. Eldridge* factors is much like applying the fourth amendment balancing test set forth in *Camara v. Municipal Court*.²⁶⁴ While the *Camara* approach balances the need for a search against its intrusiveness, the *Matthews v. Eldridge* approach weighs the interests of the state against the "private interest" with which the state interferes. Both approaches balance the public need against the degree of interference with private rights. Both tests also take into account the practical effect of whatever procedural protections are at issue.

Interviewing a child without parental permission during a child abuse investigation can represent a significant interference with parental rights. Parental autonomy in child rearing is diminished by the temporary dilution of parental authority over the child. More significantly, the interview delves into child rearing practices and may imply parental failures, and expose intimate details of family life.²⁶⁵ The questions are sensitive and private, and can be highly upsetting to both parent and child.²⁶⁶ This effect is exacerbated when questioning is prolonged or when multiple interviews are conducted.

On the other hand, children typically talk to many people on a wide range of subjects, including personal details of their daily lives. These conversations go on in schools, doctors' offices, and day care centers. So long as questioning by child protection workers is moderate in tone

261. 424 U.S. 319 (1976).

262. *Id.* at 335.

263. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27-34 (1981).

264. 387 U.S. 523 (1967); see *supra* notes 92-104 and accompanying text; see also *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986) (fourth and fourteenth amendment rights in child abuse investigations "closely related").

265. *Cf. Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973) (school program designed to detect and combat drug abuse which would have used questionnaires inquiring into family relationships and child rearing practices violated students' and parents' rights to privacy).

266. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 158, at 25.

and duration, it is not nearly as intrusive as taking a child into custody or forcing entry into a family home.

The state's interest in conducting interviews of children in child abuse investigations is compelling. Interviewing children is an essential aspect of child abuse investigations and is vital to protecting a child's life and health.²⁶⁷ Without the interview, there may be insufficient evidence of maltreatment to justify protective action, and the child may be placed at risk of further injury or death. Interviews are often highly probative and are less intrusive than almost any other possible means of conducting an investigation. The two most common alternatives, interviewing friends and neighbors of the family or forcibly entering the home are likely to be more stigmatizing, more upsetting, or both.²⁶⁸

b. Procedures Protecting Family Privacy Rights

Family privacy rights likely to be disrupted by interviewing children without parental consent should be safeguarded through appropriate procedures. These procedures should establish some defined quantum of suspicion that neglect has occurred before intrusive investigation methods can be employed, and must address the issue of whether a warrant ought to be required.

The evidentiary standard required to support investigatory measures should not be too demanding. Law enforcement officers and other public officials who conduct investigations may question potential witnesses whenever a valid investigation is being conducted.²⁶⁹ Thus, a child protection agency is free to question neighbors and other members of the public without *any* prior evidence so long as it does not misstate or improperly divulge facts concerning the family. Because the child protection agency is free to question other witnesses, the practical result of erecting a stringent barrier to interviewing children might be to compel the agency to question friends and neighbors instead. This could be stigmatizing as well as counterproductive. A probable cause standard²⁷⁰ is therefore inadvisable.

267. See, e.g., *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986).

268. See *E.Z. v. Coler*, 603 F. Supp. 1546, 1561 (N.D. Ill. 1985), *aff'd sub nom.* *Darryl H. v. Coler*, 801 F.2d 893, 903 (7th Cir. 1986). These cases recognize the stigma that can be caused by interviewing neighbors and teachers. *A fortiori*, procedural obstacles should not be created compelling agencies to interview friends and neighbors in preference to interviewing the child.

269. See generally *W. LAFAVE & J. ISRAEL*, *supra* note 65, ch. 6. Prohibitions of police questioning without an arrest involve only the use of improper means to extract confessions.

270. See *supra* text accompanying notes 170-80.

Requiring a reasonable suspicion²⁷¹ of maltreatment as a precondition for an interview, however, should not present a difficult barrier. An agency should not launch a full-scale investigation of a specific family in any case without at least a reasonable suspicion. Therefore, it is logical to permit child protection agencies to interview children without parental permission where there is a reasonable suspicion of maltreatment. Requiring a warrant, however, would impose an added administrative burden on the agency. The invasion of parental rights is limited, and the interview is critically important. It is unlikely that, and it would be undesirable for, a warrant or prior court approval to be a constitutional prerequisite for an interview.

c. Manner of Questioning

Conditions for interviewing children should be more strict than for interviewing adults: Children are vulnerable, and family relationships delicate. Oppressive, hostile, or outrageous questioning may unconstitutionally infringe the child's or the family's rights.

This does not mean that courts ordinarily should be involved in articulating detailed ground rules for interviewing children. Such guidelines are best established by agency policy makers and administrators.²⁷² Although judges are obligated to review guidelines challenged as unconstitutional, they should be especially careful not to hinder the constructive efforts of states to comprehensively address the issue. Where reasonable guidelines exist and where investigators are trained to implement them, courts should redress only glaring misbehavior of police or agency personnel. If agencies have failed to establish guidelines, however, and glaring violations repeatedly occur, courts may be forced to impose guidelines for interviews.

d. Forcible Separation of Parent and Child for Questioning or Forcible Interview When Parent Is Present

This article has argued that the Constitution does not prohibit child protection agency workers from interviewing children without consent and without a warrant where there is a reasonable suspicion that the children have been maltreated. It does not necessarily follow, however, that the child can be interviewed on the same basis where the parent is present at the interview and objects. Forcibly separating par-

271. See *supra* text accompanying notes 167–68.

272. The Seventh Circuit commented in *Darryl H. v. Coler*: “Nor do we suggest, of course, that it is the duty or the prerogative of this court or the district court to direct the specific contents of the [agency handbook on investigations].” 801 F.2d 893, 904 (7th Cir. 1986).

ent and child for an interview, or conducting an interview over the objection of a parent who is present, is potentially far more disruptive than a simple interview of a child when a parent is absent. Such an interview interferes with parental rights in a way that is similar to the interference that occurs where the agency takes temporary protective custody of a child during child abuse proceedings. In both cases, custody and control of the child are temporarily lost. Accordingly, cases involving due process challenges to temporary custody procedures are relevant to agency procedures for such interviews. Courts have held that where a child is taken into temporary protective custody, there must be a preremoval hearing unless an emergency presenting an immediate danger to the child exists.²⁷³ Courts have also held that the child may not be taken into custody without probable cause,²⁷⁴ and that where a child is taken into custody under emergency conditions, an adversary hearing must be provided within a short period of time.²⁷⁵

When a child is merely interviewed or observed without a prolonged separation from the parent, however, there is far less interference with family autonomy than when a child is placed in temporary protective custody. While temporary protective custody may continue for days, an interview is typically limited to an hour or two and does not require placing the child overnight in a separate residence. Just as it is possible to remove a child from home based on a lesser standard of proof than is required to permanently terminate parental rights,²⁷⁶ even

273. See *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983) (notice before removal of a child required unless exigent circumstances shown; statute authorizing summary seizure of a child when necessary for his welfare or in the interests of public safety not unconstitutionally vague), *cert. denied*, 465 U.S. 1033 (1984); *Siereveld v. Conn.*, 557 F. Supp. 1178, 1182 (E.D. Ky. 1983) (removal of children without prior written notice and opportunity for a hearing not permitted absent an emergency); *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1192 (S.D. Tex. 1977) (removal of child prior to adversary proceeding permitted only if immediate threat to safety of child), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979); *Roe v. Conn.*, 417 F. Supp. 769, 777, 780 (M.D. Ala. 1976) (statute authorizing summary seizure of a child "if it appears that . . . the child is in such condition that his welfare requires" is unconstitutionally vague); *In re Juvenile Appeal* (83-CD), 455 A.2d 1313 (Conn. 1983) (ex parte removal order not permitted unless serious physical illness, serious physical injury, or immediate physical danger to the child and immediate removal necessary to ensure child safety).

274. *In re Juvenile Appeal*, 455 A.2d at 1323.

275. *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1193 (S.D. Tex. 1977) (adversary hearing required within 10 days after removal), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979); *Roe v. Conn.*, 417 F. Supp. 769, 778 (M.D. Ala. 1976) (six-week delay between date of removal and hearing not permitted); *Newton v. Burgin*, 363 F. Supp. 782 (W.D. N.C. 1973) (five-day delay between removal and hearing permitted), *aff'd*, 414 U.S. 1139 (1974).

276. Compare *Santosky v. Kramer*, 455 U.S. 745 (1982) (clear and convincing evidence required to terminate parental rights) with *In re Juvenile Appeal* (83-CD), 455 A.2d 1313 (Conn.

more relaxed procedural protections should be permitted where the child is questioned only briefly. Of course, where an interview indicates that the child has been maltreated, it may be extended and lead to the removal of the child. In this situation, the interview results provide the degree of suspicion or proof needed to justify greater interference with the family unit.

Where parent and child are temporarily separated for an interview, or where a parent objects during the interview, the infringement on parental authority is perhaps roughly comparable to the infringement of rights during a nonconsensual entry into the family home. This suggests that the same procedural protections should be employed.²⁷⁷ It would be complicated and difficult to establish the agency's right to enter the premises by one evidentiary standard and set of procedures, and to establish its right to interview the child by another. This would be especially true where the agency seeks to interview the child at home, the most common situation in which parents are present or need to be separated from the child during the interview.²⁷⁸ If courts apply a single evidentiary standard and procedure to both gaining residential entry and to forced interviewing, an agency seeking a court order authorizing entry into a home could seek and obtain a court order authorizing the child to be interviewed in connection with the entry.

Where an interview may directly interfere with parental supervision and control over a child, procedural protections should include the issuance of a warrant, as was recommended earlier for residential entries.²⁷⁹ Because detaining a child for an interview when parents are present but do not consent is highly disruptive, advance impartial screening is necessary.

As with residential entries, such interviews should be permitted where there is a reasonable suspicion that the child has been maltreated. A warrant authorizing a child protection agency investigation could be issued without probable cause as defined in criminal proceed-

1983) (preponderance of evidence sufficient as standard of proof in contested temporary custody hearing).

277. See *supra* notes 91–208 and accompanying text. This would require a warrant or equivalent order in nonemergency circumstances and some particularized proof short of probable cause, such as that of a reasonable suspicion that the child has been maltreated.

278. As a general rule, interviews take place outside the presence of parents so that parents may not register approval or disapproval of the child's answer or subtly pressure the child to give false responses. Parents are most often present prior to the interview where the interview takes place in a home setting as opposed to at school or at a day care center.

279. See *supra* text accompanying notes 207–09.

ings.²⁸⁰ However, strict protections are imposed before a child may be taken into protective custody.²⁸¹ There must be some clear distinction between what constitutes an interview and what constitutes protective custody. One practical way to make this distinction would be to set a strict time limit of one or two hours for interviews. The interview itself should be permitted upon a reasonable suspicion of abuse or neglect. However, any prolonged custody of the child requires a stricter standard of proof indicating maltreatment has occurred and immediate custody is needed.²⁸²

e. Fourth Amendment Issues Where Parent and Child Are Forcibly Separated for Questioning

Questioning children without parental permission in the course of a child protection investigation raises fourth as well as fourteenth amendment issues. Whether the child is temporarily taken from the parents for questioning, or questioned in their presence without their permission, there is arguably a fourth amendment "seizure."²⁸³ To determine if forced questioning is a "seizure," and, if so, what procedural protections are required, at least three issues must be considered: First, whether the interference with personal liberty is severe enough to constitute a fourth amendment seizure; second, whether holding the child for questioning represents a seizure as against the parents; and third, whether the questioning is "rehabilitative" under *Wyman v. James*,²⁸⁴ thus ensuring that detaining a child for questioning is not a seizure.

i. Detention for Questioning as a Fourth Amendment Seizure

The brief detention of an individual for questioning may constitute a "seizure" even if such detention falls short of an arrest.²⁸⁵ If briefly restraining a person on the street may constitute a seizure,²⁸⁶ so may holding an individual for questioning for a longer time.

280. See *supra* text accompanying notes 200-06.

281. See *supra* notes 273-75 and accompanying text.

282. See *supra* notes 273-74 and accompanying text.

283. The fourth amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." U.S. CONST. amend. IV.

284. 400 U.S. 309 (1971); see *supra* notes 105-12 and accompanying text.

285. See *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968); W. LAFAYE, *supra* note 18, § 9.1, at 10.

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

ii. *Forced Questioning as a Seizure Against the Parents*

Questioning a child when the parents are present probably does represent a “seizure” of the child from the parents. When present, the parent, rather than the child, has ultimate control over the child’s activities. Questioning the child over the parent’s objections thus interferes with parental rights concerning the child. It is well established that depriving a parent of control and supervision of a child is a severe deprivation of personal liberty.²⁸⁷ Because the interest of a parent in the control and supervision of a child transcends property rights,²⁸⁸ the holding of a child for questioning should constitute a seizure protected by the fourth amendment, at least as much as a temporary taking of personal property.²⁸⁹ However, there are no cases directly on point.

iii. *Forced Questioning as “Rehabilitative”*

Some commentators have concluded, based upon the United States Supreme Court’s holding in *Wyman v. James*,²⁹⁰ that residence entries in the course of civil child protection investigations are not “searches” governed by the fourth amendment.²⁹¹ In *Wyman*, the Supreme Court held that welfare home visits were not searches because they were “rehabilitative” in nature. The Court reasoned that such visits were not accomplished by force, and that the denial of permission to enter was not a criminal offense.²⁹² Following *Wyman*, at least one court has held that residential entries in child protection investigations are not searches because of the rehabilitative character of the investigation.²⁹³ Similarly, it might be argued that detaining children for questioning without parental permission during a child abuse investigation is rehabilitative and, therefore, is not a “seizure” governed by the fourth amendment.

Most of the lower courts have held, however, that residential entries in child abuse investigations are primarily investigative rather than rehabilitative, and, where nonconsensual, constitute fourth amend-

287. See *supra* notes 159–61, 252–55 and accompanying text.

288. *May v. Anderson*, 345 U.S. 528, 533 (1953).

289. Cf. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (state statute authorizing prejudgment garnishment of wages unconstitutional).

290. 400 U.S. 309 (1971).

291. See, e.g., D. BESHAROV, *supra* note 7, at 142.

292. See *supra* notes 105–12 and accompanying text.

293. *Darryl H. v. Coler*, 585 F. Supp. 383, 389 (N.D. Ill. 1984), *aff’d in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986). The Seventh Circuit reached an opposite conclusion on appeal of the case, however. 801 F.2d 893, 899–900 (7th Cir. 1986).

ment searches.²⁹⁴ These authorities represent the better reasoned view.²⁹⁵ Because children or adults detained for questioning in the course of civil child abuse investigations are held for the purpose of determining whether children have been maltreated, the detention probably constitutes a fourth amendment "seizure."

iv. Procedural Protections

Assuming that temporarily depriving a parent of immediate control of a child for the purpose of questioning constitutes a fourth amendment seizure, a balancing test then must be applied to determine what procedural protections are required.²⁹⁶ The fourth amendment test articulated in *Camara v. Municipal Court*²⁹⁷ balances the need for the search against its intrusiveness, and is essentially similar to the fourteenth amendment balancing test. The procedural protections mandated by the fourteenth amendment also adequately address the fourth amendment issues at stake.²⁹⁸

2. Constitutional Issues in Conducting Physical Examinations of Children

The right to enter a residence or detain a child for interviews does not necessarily carry with it the right to compel the child to disrobe or to submit to a physical examination. Physical examination involves a greater intrusion into the child's personal privacy than does detaining the child for the purpose of interviews. Accordingly, a separate analysis of constitutional issues related to physical examinations of children in child abuse investigations is required.

It seems obvious that the examination must be relevant in light of the nature of the accusation and the preliminary evidence. Among the issues raised are: Whether a stricter level of suspicion must be satisfied to permit a nonconsensual physical examination than is required for an interview; whether the Constitution limits the method of the examination; whether the Constitution places limits upon who may conduct the examination; and whether a warrant or its equivalent is required before the child may be examined.²⁹⁹

294. See *supra* notes 132-53 and accompanying text.

295. See *supra* notes 108-09 and accompanying text.

296. See *supra* notes 252-64 and accompanying text.

297. 387 U.S. 523 (1967).

298. See *supra* text accompanying notes 273-82.

299. A fifth issue, whether the child may independently consent to the examination, is discussed elsewhere. See *supra* notes 240-45 and accompanying text.

Legal Barriers in Child Abuse Investigations

a. *Quantum of Suspicion Required*

It is unclear whether case law requires a physical examination of a child in a child abuse investigation to be supported by probable cause or by some lesser quantum of suspicion. Some cases suggest that a stricter standard should apply to physical examinations than to other searches in the child protection context. The better view, however, is that the standard of reasonable suspicion should apply to both, but that the Constitution places limits on the permissible methods of examination. Whichever standard is ultimately applied, courts should show restraint in creating their own criteria for physical examinations.

i. *Probable Cause or Reasonable Suspicion*

As with other cases involving searches and seizures by administrative agencies, the level of suspicion and procedural protections mandated by the fourth amendment for physical examinations of children are determined by applying a balancing test. Specifically, the extreme intrusiveness of the examination must be balanced against the need to determine whether abuse has occurred. The highly probative nature of the examination must also be taken into account.

Some analogous cases suggest that the intrusiveness of at least some physical examinations requires a stricter standard of proof; such cases are not convincing in the context of child protection investigations, however. One such analogous case is *Schmerber v. California*,³⁰⁰ where a doctor extracted a blood sample over the objection of a man who had been arrested. The Supreme Court held that the extraction did not violate the man's fourth amendment rights. The Court held that the extraction was permissible because there was a "clear indication" that the extraction would produce evidence of a crime, namely that the man had driven under the influence of intoxicating liquor.³⁰¹ A more recent case, *United States v. Montoya de Hernandez*,³⁰² held that an intrusive alimentary canal search during a border crossing required a "reasonable suspicion" that the search would produce evidence of drug smuggling.³⁰³

Both *Schmerber* and *Montoya de Hernandez* required a stricter evidentiary standard to justify an unusual bodily intrusion than would have been required to justify a more routine search under the same

300. 384 U.S. 757 (1966).

301. *Id.* at 770.

302. 473 U.S. 531 (1985).

303. *Id.* at 541. The case also held that the "clear indication" requirement is equivalent to the requirement of reasonable suspicion. *Id.* at 540-41.

circumstances. Routine border searches and searches of prisoners after arrest may be conducted without any particularized suspicion.³⁰⁴ Thus, these cases arguably provide some support for applying a stricter evidentiary standard for cases involving particularly intrusive examinations, such as examinations where a child is compelled to disrobe. There is further authority from the lower courts, where especially restrictive evidentiary standards were applied to strip searches of adults.³⁰⁵

A physical examination of a child in a child abuse investigation is not necessarily as intrusive as a physical examination in a criminal investigation. The purpose of the examination is to protect the child, not to uncover evidence of the child's criminal behavior. A lesser degree of suspicion better protects the child's interest in being free of abuse. Under the circumstances, a better means of protecting the child's privacy interests would be by regulating who may conduct examinations and what methods may be employed.

*New Jersey v. T.L.O.*³⁰⁶ seems to follow this approach. *T.L.O.* bars unduly intrusive searches rather than varying the quantum of evidence according to the nature of the search. The court in *T.L.O.* held that searches of students in schools must be based upon reasonable suspicion, but that the method of the search must be necessary, and that the intrusion must not be out of proportion to the need for the search.³⁰⁷

The *T.L.O.* approach might be applied by analogy to physical examinations in child protection investigations. Because *T.L.O.* involves a search of a child by an administrative agency in a noncriminal context, it is logical to apply the same basic approach to a child abuse investigation.³⁰⁸

304. W. LAFAVE, *supra* note 18, § 10.5, at 303.

305. See, e.g., *United States v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977), *cert. denied*, 434 U.S. 902 (1977); J. HALL, JR., *supra* note 37, § 17.11 (citing *Hunt v. Polk County*, 551 F. Supp. 339, 342-44 (S.D. Iowa 1982)); W. LAFAVE & J. ISRAEL, *supra* note 65, § 10.5(b) (citing *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967)).

306. 469 U.S. 325 (1985).

307. *Id.* at 341. The Court held that there are two requirements for a search protected by the fourth amendment to be deemed reasonable. First, the search must be "justified at its inception." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Where students in public schools are searched, this means that there must be a reasonable suspicion that the search will turn up evidence that the student has violated a law or a school rule. *Id.* at 341-42. Second, the search must be reasonably related in scope to the circumstances which justified it. *Id.* at 342. This requirement is met when the "measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

308. First, the examination must be "justified at its inception" by a showing that there is a reasonable suspicion that the examination will yield evidence that the child has been maltreated. Second, the examination must be "reasonably related in scope to the circumstances that justified

ii. *Reviewing Agency Criteria for Physical Examinations of Children*

Where child protection agencies have adopted policies containing criteria governing physical examinations of children, it may be necessary to determine whether the criteria satisfy the requisite level of suspicion. However, as illustrated by the following discussion of recent federal litigation from Illinois, courts should exercise caution in revising the criteria.

In *Darryl H. v. Coler*,³⁰⁹ a federal district court considered a constitutional challenge to a state policy governing the physical examination of children in child protection investigations. Applying not only the three factors articulated in *Matthews v. Eldridge*,³¹⁰ but also a fourth amendment balancing test, the court upheld the Illinois policy authorizing examinations of children whenever the agency received a report of child abuse or neglect meeting the following “hotline criteria”:

1. The child must be less than 18 years of age;
2. The child must either have been harmed, or be in danger of harm, or of a substantial risk of harm;
3. A specific incident or circumstances which suggest the harm was caused by child abuse or neglect has been identified;
4. A parent or caretaker must be the alleged perpetrator of neglect; [and]
5. A parent or other caretaker, an adult family member, an adult individual residing in the same home as the child, or the parent’s paramour must be the alleged perpetrator of abuse.³¹¹

Measuring the Illinois procedures against the *Matthews* test, the court held that while a family’s right to privacy and the parent’s right to autonomous decision-making regarding their children are legitimate constitutional rights, the state’s interest in preventing child abuse and neglect is great, and the Illinois procedures employed did not unduly risk erroneous deprivation of family rights.³¹²

The district court decision was appealed to the Seventh Circuit together with a companion case, *E.Z. v. Coler*.³¹³ In each, the above

it” in that the particular examination is necessary to determine whether the maltreatment has occurred, and that the suspected maltreatment is sufficiently serious to justify a physical examination.

309. 585 F. Supp. 383 (N.D. Ill. 1984), *aff’d in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

310. 424 U.S. 319 (1976); *see supra* text accompanying notes 261–62.

311. *Darryl H.*, 585 F. Supp. at 386, 391–92; *see supra* text accompanying notes 134–37.

312. 585 F. Supp. at 388–92.

313. 603 F. Supp. 1546 (N.D. Ill. 1985), *aff’d sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). *E.Z.* was an appeal from the decision of another judge in the same district.

procedures had been upheld. On appeal, the Seventh Circuit agreed with the district court that neither probable cause nor a warrant was required to conduct physical examinations of children in child abuse investigations.³¹⁴ However, the Seventh Circuit expressed doubt that the above criteria are always sufficient justification to conduct a visual inspection of a child's body.³¹⁵

The Seventh Circuit concluded that insufficient evidence had been presented at the trial court level to permit the court to apply the constitutional balancing test fully and to determine the constitutional requirements for the physical examination of children in child abuse investigations. Beyond determining that probable cause and a warrant are not required, the court declined to determine precisely what factual showing would be required and under what circumstances.³¹⁶

The court did express a number of specific reservations concerning Illinois policy, however, and concluded that there was a serious possibility that the present policy might be constitutionally insufficient. While emphasizing that it must be careful not to interfere with the efforts of the child protection agency to formulate policy in a new and difficult area,³¹⁷ the court expressed concern about the hotline criteria and accompanying policy.

314. *Darryl H. v. Coler*, 801 F.2d 893, 899 (7th Cir. 1986).

315. *Id.* at 902. In order to understand the Seventh Circuit's unwillingness to definitively rule on the criteria, it is necessary to keep in mind the procedural posture of each of the companion cases. Both cases were appeals of interlocutory orders for which a full factual record had not been developed at the district court level. *Darryl H. v. Coler* was an appeal of the district court's summary judgment order in favor of the defendant agency. *Id.* at 905. *E.Z. v. Coler* (renamed *B.D. by C.D. v. Coler* on appeal) was an appeal of the district court's denial of a motion for a preliminary injunction by the plaintiff children and parents. *Id.* at 897. In both cases, the Seventh Circuit emphasized that certain of its conclusions might be revised in a case presenting a more complete factual record.

In *Darryl H. v. Coler*, the Seventh Circuit found that insufficient facts were presented to judge whether or not the notice criteria violated the Constitution, but affirmed the summary judgment on behalf of defendants on other grounds. *Id.* at 893. The court upheld a denial of retrospective damages against the agency for the acts of defendant state officials based on the eleventh amendment, and disallowed damages against the individual defendants based on the doctrine of qualified immunity. *Id.* at 906-08.

E.Z. v. Coler, where the district court had denied the plaintiff's motion for a preliminary injunction, was a class action challenging, among other things, the Illinois child protection agency's practice of conducting visual examinations of children solely based upon the hotline criteria. On appeal, the Seventh Circuit emphasized the limited scope of review applicable to denial of a preliminary injunction ("abuse of discretion") as well as the limited factual record before the trial court. *Id.* at 897-99. In evaluating the preliminary injunction, the court concluded that while the ultimate outcome of the case was difficult to predict on the record before it, the potential risk to Illinois children from an erroneous granting of the injunction outweighed the potential harm to children from improper investigations. *Id.* at 904-05.

316. *Id.* at 902.

317. *Id.* at 904.

What disturbed the court most about the Illinois policy was that a child protection worker receiving a child abuse report meeting the hotline criteria *must* arrange a physical examination whenever the examination was relevant to the investigation. The court expressed skepticism that a more complete inquiry should not sometimes be undertaken before deciding whether to make a visual inspection or physical examination of the child.³¹⁸ Among other things, the court stated, the agency might sometimes make an effort to verify reports received from minors, anonymous callers, or sources whose reliability might be reasonably suspect. Although third party verification can be counterproductive under many circumstances, the record before the court did not show that such verification is inevitably inadvisable.³¹⁹ Based on its concern that a visual inspection or physical examination should not always be made when hotline criteria are satisfied, the court stated: “[I]n further litigation, one of the principal issues will be whether the hotline criteria are sufficiently precise to achieve the legitimate ends of the [agency] without amounting to a needless intrusion into the privacy of the child and his family.”³²⁰

It is difficult to fault the court’s view that an agency investigator should not be locked into conducting a visual examination of a child’s body every time the hotline criteria are met and the examination is relevant to the investigation. There surely are some cases in which alternative, less intrusive and reliable means of verification are appropriate. For example, where the report is based on hearsay and, when contacted, the original source of the information fully satisfies the investigator that there is no reason to suspect maltreatment, an examination of the child would be improper.³²¹

What is disturbing about the court’s opinion is not its suggestion that a visual inspection or physical examination may not always be necessary when hotline criteria are satisfied, but rather its suggestion that it might revise or expand the hotline criteria. The court might have simply held that, until the agency revises its policy concerning

318. *Id.* at 903.

319. *Id.*

320. *Id.*

321. Consider the following example:

A teacher makes a child abuse report suggesting that a child may have been physically abused. Upon close questioning, the teacher states that most of the information upon which her report was based came from another teacher, not from direct observation or conversations with the child. When the investigator questions the second teacher, it turns out that there was a miscommunication between the teachers and, while the child described some intense but typical parent-child conflicts, there is no basis to suspect parental maltreatment. Physical examination of the child is an unnecessary, unjustifiable intrusion.

mandatory physical examinations, investigators must not be required to conduct examinations of children's bodies when they or their supervisors determine it unnecessary to the investigation. Instead, the court implied that a more detailed, court-imposed set of criteria should be created, as if, after hearing more evidence, the court would be able to establish precise and detailed criteria where the agency had failed to do so. This overrates the ability of the court to create workable investigation guidelines in the complex area of child maltreatment.

When the Seventh Circuit in *Darryl H. v. Coler* suggested a possible refinement of the hotline criteria, it may have been referring only to further steps that might need to be taken by investigators prior to conducting a visual inspection or physical examination. It is possible, however, that the Seventh Circuit meant that courts might need to articulate more detailed criteria concerning what proof must be presented before an inspection or examination is to be conducted. Beyond articulating a quantum of suspicion needed to justify a type of search, however, a court, which lacks expertise and experience in child abuse investigations, is ill-suited to develop comprehensive guidelines for what proof is required to justify a search. Rather, the proper role of a court in determining what proof is sufficient to justify an inspection or examination is to state a general principle concerning the required proof, and test any guidelines that might be presented to it against this general principle. Refining and revising comprehensive guidelines for inspections or examinations requires subject matter expertise; identifying the correct standard of proof requires Constitutional expertise. The former is the province of an administrative agency, and the latter that of the courts.

Deciding which standard should apply requires a fundamental value judgment: A relaxed standard of proof will allow a greater number of unnecessary examinations, while a strict standard of proof will avoid unnecessary examinations but inevitably lead to a certain number of situations where abuse is permitted to continue because the investigation has been frustrated by the evidentiary requirement. Moreover, it is impossible to determine the precise statistical impact of the different standards of evidence because, among other things, they must be applied by a variety of judges and agency employees on a case-by-case basis. Determining an evidentiary standard at most can be based upon a rough assessment of its practical impact together with a value judgment concerning the risks and interests on either side.

Another objection raised by the Seventh Circuit to the hotline criteria illustrates the limited role that courts should play in evaluating agency criteria for inspections and examinations. The court expressed

concern that “[agency policy] does not differentiate between the search of the very young child and the search of a child with the maturity and ability to communicate.”³²² By this, the court apparently meant that an inspection or search might not be necessary if a child could verbally satisfy the investigator that the suspicion is unfounded. It is not difficult to imagine circumstances in which a child can satisfactorily explain circumstances that have created a suspicion of maltreatment. On the other hand, it is not unusual for children to deny maltreatment that has actually occurred. While it is proper for the court to invalidate a policy which requires the agency to invariably inspect or examine the child no matter what the child says, the court should hesitate to articulate detailed criteria for determining when the statements of the child make the examination unnecessary.

b. Permissible Methods of Examination

For the examination of a child to be constitutionally permissible, it should be conducted in a manner respecting the dignity of the child and with minimal violation of the child’s privacy.

The *Schmerber v. California*³²³ case lends support to the proposition that an examination should be conducted by a medical professional. One of the key factors cited in the case as justifying the taking of a blood sample from a person arrested for driving while intoxicated was that the blood was taken by a physician in a hospital environment according to “accepted medical practices.”³²⁴ Some lower court decisions also require physical inspections and examinations to be conducted by medical professionals.³²⁵ This requirement should be applied to the physical examination of children in child abuse investigations.

The procedures approved by the federal district courts in *E.Z. v. Coler*³²⁶ and *Darryl H. v. Coler*³²⁷ concerning examination of the

322. *Darryl H. v. Coler*, 801 F.2d 893, 903 (7th Cir. 1986).

323. 384 U.S. 757 (1966).

324. *Id.* at 771.

325. *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193 (E.D. Wis. 1974) (where defendant, seven months pregnant, was twice forced to submit to vaginal searches, and searches were not done in a hospital or medical environment nor performed by persons with either medical training or medical equipment, searches violated defendant’s due process rights); *see also State v. Gammill*, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978) (warrantless seizure of pubic hair that was “plucked” from defendant’s body held to be in error where provision could have been made for physician to obtain sample under circumstances that preserved defendant’s dignity).

326. 603 F. Supp. 1546 (N.D. Ill. 1985), *aff’d sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

327. 585 F. Supp. 383 (N.D. Ill. 1984), *aff’d in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986).

child's body for evidence of physical abuse support the preference for examinations by medical professionals. Under the Illinois procedures, the caseworker is to offer the parent the following three options:

1. The parent can take the child to a physician or hospital emergency room for a physical examination.
2. The child protection worker can take the child to a physician or hospital emergency room for a physical examination.
3. The caretaker and the child protection worker can jointly disrobe the child and conduct a cursory physical examination.³²⁸

If the child is in school, the worker is to contact the caretaker and present the above three options plus a fourth one, which is that a physical examination may be made by the school nurse.³²⁹ In the event that sexual abuse is alleged, however, only the first two options apply: the examination must in all cases be conducted by a physician or other outside medical personnel.³³⁰

This procedure would appear to be sufficient, as least as far as small children are concerned. However, because the examination of an adolescent is potentially embarrassing, he or she should have the choice of being examined by medical personnel, rather than being disrobed in the presence of a child protection worker.³³¹ Otherwise, state law probably precludes, and should preclude, consent except by parents, guardians, or others with specific legal authority to arrange medical care for the child.³³²

A final note about the Seventh Circuit opinion in *Darryl H. v. Coler* is that it erroneously describes the Illinois policy concerning whether there is to be a visual examination of a child's body by an agency investigator or a physical examination by a medical professional. The opinion states that agency policy provides no guidelines for resolving disputes concerning which option is selected for the method of examination³³³ and suggests that existing policy leaves the choice to the caseworker.³³⁴ In fact, both the district court opinions³³⁵ and the agency handbook itself clearly state that parents can decide who con-

328. HANDBOOK, *supra* note 134, at 66.

329. *Id.*

330. *Id.*

331. *See supra* notes 240-45 and accompanying text.

332. However, medical examinations and care can be provided without consent in certain life-threatening situations. *See, e.g., Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25, 29 (1956).

333. *Darryl H. v. Coler*, 801 F.2d 893, 896 (7th Cir. 1986).

334. *Id.* at 901.

335. *E.Z. v. Coler*, 603 F. Supp. 1546, 1549-50 (N.D. Ill. 1985); *Darryl H. v. Coler*, 585 F. Supp. 383, 386-87 (N.D. Ill. 1984).

ducts the examination.³³⁶ Parents may veto a visual inspection of the child's body by an agency investigator.

This error casts some doubt on the rationale of the Seventh Circuit opinion, which emphasizes the intrusiveness of "nude searches" and bodily inspections by government officials.³³⁷ Had the court realized that it was reviewing a policy allowing only medical professionals to conduct examinations without parental permission, the court might have expressed fewer reservations about the criteria for allowing such examinations.

c. Warrant Requirement

The Seventh Circuit held in *Darryl H. v. Coler* that no warrant is required for the physical examination of a child during a child abuse investigation.³³⁸ However, the better view is that a warrant or its equivalent should be required, at least where a nude examination of an older child or extraction of blood or other substances is involved. A warrant or other equivalent screening device is needed to protect against errors where inspections or examinations are highly invasive. Requiring a warrant would not be an unreasonable burden in non-emergency circumstances, particularly where telephonic warrants are permissible.³³⁹ Further, a single warrant could be issued authorizing entry into the home, as well as physical examinations of a child.

E. Proposed Statutory Provisions Authorizing Interviews and Examinations of Children Prior to the Initiation of Child Abuse Proceedings

Every state has enacted a statute authorizing the investigation of child abuse and neglect.³⁴⁰ These statutes at least implicitly authorize interviews and examinations of children because these are obviously necessary to such investigations. However, few states have enacted statutes that set forth the powers of the agency when the child's parents, school, or other caretakers deny access to the child. Further, only fifteen states provide explicit statutory remedies to enable agen-

336. HANDBOOK, *supra* note 134, at 65–66.

337. *Darryl H. v. Coler*, 801 F.2d 893, 899–901 (7th Cir. 1986).

338. *Id.* at 904.

339. See *supra* text accompanying note 229. Requiring a warrant probably would not also impose the traditional standard of probable cause. See *supra* notes 202–08 and accompanying text.

340. STATE STATUTES, *supra* note 85, at 17–36, 254–74.

cies to gain access to a child during an investigation.³⁴¹ Accordingly, current laws need to be expanded and revised.

There are several key statutory issues concerning access to children in child abuse investigations that need to be addressed in most states. First, there is the social worker's explicit authority to interview and examine the child. The law should authorize the social worker to interview the child and to arrange for the examination of children based upon a reasonable suspicion of child abuse, but provide that agency regulations shall set procedures and conditions for examinations. The Illinois procedures are, for the most part, a good example of what such regulations might look like.³⁴² Statutes should also authorize the social worker to take photographs of the child in the course of the investigation.³⁴³ Finally, the statute should permit the child protection worker to record the child's statement either by sound or audio visual recording.³⁴⁴

Second, medical professionals conducting physical examinations in the ordinary course of medical practice who become suspicious that a child is being maltreated should be empowered to conduct additional examinations over the objections of parents when necessary to reach a more conclusive determination. This should include X-rays and photographs where necessary,³⁴⁵ as well as other methods of examination not inflicting substantial pain or endangering the child. By conducting an examination, medical professionals not only may validate their suspicions of maltreatment but also may determine that their suspicions are groundless, thus eliminating the necessity to report the maltreatment. Filing a report would compel the child protection agency to conduct its own investigation. In addition, medical professionals

341. ALA. CODE § 26-14-7(c) (1986); ARK. STAT. ANN. § 42-813(c) (Supp. 1985); COLO. REV. STAT. § 19-10-109(3) (1986); FLA. STAT. ANN. § 415.505(1)(d) (West 1986); ILL. ANN. STAT. ch. 23, para. 2057.5, § 7.5 (Smith-Hurd Supp. 1987); IND. CODE ANN. §§ 31-6-7-12, 31-6-11-11(e)(6) (Burns 1987); IOWA CODE ANN. § 232.71(3) (West Supp. 1988); LA. REV. STAT. ANN. § 14:403(G)(5) (West 1986); N.Y. FAM. CT. ACT § 1034(2) (McKinney 1983); R.I. GEN. LAWS § 40-11-7 (Supp. 1987); S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1985); TENN. CODE ANN. § 37-1-406(e) (Supp. 1987); TEX. FAM. CODE ANN. § 34.05(c) (Vernon Supp. 1988); UTAH CODE ANN. § 78-3a-50 (1987); WYO. STAT. § 14-6-218 (1986).

342. See *supra* text accompanying notes 311, 328-32.

343. See, e.g., FLA. STAT. ANN. § 415.507(1) (West Supp. 1988); ILL. ANN. STAT. ch. 23, para. 2056, § 6 (Smith-Hurd Supp. 1987); VT. STAT. ANN. tit. 33, § 685(d) (Supp. 1987).

344. See, e.g., TENN. CODE ANN. § 37-1-609 (Supp. 1987). A list of statutes authorizing videotaping of interviews appears in R. EATMAN & J. BULKLEY, *PROTECTING CHILD VICTIM/WITNESS* 47 (1986).

345. See, e.g., ALASKA STAT. § 47.17.064 (Supp. 1984); IND. CODE ANN. § 31-6-11-6 (Burns 1987); MICH. STAT. ANN., § 25.248(6) (Callaghan Supp. 1988); V.I. CODE ANN. tit. 5, § 2535 (Supp. 1987).

should be excused from liability for such an examination conducted in good faith.

Third, state statutes should explicitly require schools and other temporary caretakers to cooperate in granting the child protection agency access to the child for the purpose of interviews, observation, or examination. Because some schools, day care providers and others are reluctant to permit access to the child for fear of being sued, they should also be explicitly excused from liability for cooperating.

Statutes should provide that advance notice to the parent or guardian is not required prior to interviewing the child. State law should also provide that an authorized employee of the child welfare agency be empowered to determine who is and is not to be present during such interviews or examinations. Although school and day care officials sometimes wish to be present during interviews and observations of the child, it is the child protection agency that has the ultimate responsibility for the investigation. This and similar issues are dealt with in many states through interagency agreements between, for example, schools and child welfare agencies.³⁴⁶ However, it is easier to resolve the issue by statutory mandate. In addition, school districts are not always willing to enter into such agreements.

Fourth, statutes should provide child protection agencies with the means to compel cooperation by parents or others who deny access to children.³⁴⁷ An enforcement remedy is needed to ensure compliance in the event of noncooperation or conflict, even when the law requires cooperation with the investigation. Statutes should permit the child protection agency to obtain a court order, where needed; to compel noncooperative parents, schools, or other caretakers to permit the agency to interview or observe the child. Where an examination by a medical professional is required in order to determine whether or not abuse or neglect has taken place, there should be a remedy to obtain such an examination.

Because interviewing or examining a child without parental permission represents a lesser intrusion than taking the child into custody for a period of days, and because lesser procedural protections are appro-

346. See Interagency Agreement Between North Carolina Department of Public Instruction and Department of Human Resources, Jan. 1, 1986, § II(E) (providing for full cooperation between school personnel and child protective services workers and specifically providing for a "private" interview between worker and child "without the presence of local school personnel"); Working Agreement Regarding Suspected Child Abuse/Neglect and Child and Family Services Between M.S.A.D. #54 School System and the Department of Human Services, 1985, Skowhegan, Maine, § C(6) (permitting caseworker/child interviews at school by prior arrangement with school officials).

347. See *supra* Section II.A.

priate both to permit and encourage this less intrusive approach, there should be different statutory standards for brief access to the child. Specifically, for brief questioning where parents are present and object, or for a physical examination requiring the disrobing of an older child or the infliction of pain, the following should be provided under state law: A requirement of a reasonable suspicion that the child has been abused and neglected as defined by state law; a limit on the questioning or examination for a fixed time such as one hour for questioning and two hours for an examination; and an *ex parte* remedy to provide access to the child for the purpose of an interview or examination. The law also might provide that, following the interview or examination, a child could be taken into custody pursuant to other existing remedies under state law.

Where the statutory criteria for emergency custody are already strict, creating a complementary remedy to allow investigative interviews and examinations should be sufficient. Where this is not the case, the temporary custody statute should be tightened at the same time that investigative remedies are provided. The main purpose of authorizing short-term interviews and examinations is to permit protective action short of temporary custody, thus discouraging the unnecessary separation of families. Temporary custody of the child should be permitted only upon probable cause that the child is seriously endangered and can be protected only by immediate state custody. If brief questioning or an examination cannot produce probable cause of maltreatment, it is unlikely that there will be evidence to sustain a temporary custody petition. To acquire immediate temporary custody, the agency should be required to show that the child is in imminent danger of further harm, or that there is an imminent danger that the child will be removed from the jurisdiction, or be coerced by the abuser into recanting statements concerning maltreatment. Temporary custody should be followed by an adversary hearing within a few days, as is presently required in most states.³⁴⁸ At the hearing, parents should be able to try to regain custody of the child pending further proceedings.

The above recommendations modify some of the Standards Relating to Abuse and Neglect proposed by the Juvenile Justice Standards Pro-

348. See, e.g., ALA. CODE § 26-14-6 (1986); ALASKA STAT. § 47-10-142(d) (Supp. 1984); D.C. CODE ANN. § 16-2312 (1981); GUAM GOV'T CODE § 9120.25(c) (1978), reprinted in STATE STATUTES, *supra* note 85, at 221; IDAHO CODE § 16-1612 (Supp. 1987); R.I. GEN. LAWS § 40-11-5(a) (Supp. 1987); TENN. CODE ANN. § 37-1-128(b) (Supp. 1987); UTAH CODE ANN. § 78-3a-30(2) (1987).

ject.³⁴⁹ The proposed standards provide that emergency removal may occur only where there is probable cause that removal is necessary to prevent the child's imminent death or serious bodily injury. Instead, a brief interview and examination of the child should be permitted based upon a reasonable suspicion that the child may have been abused or neglected, as defined by state law. Temporary custody, without prior notice and the opportunity for a hearing, should require that there be probable cause that the child has been neglected or abused and that the child is in imminent danger of serious harm, of being removed from the jurisdiction, or of being pressured to recant statements made to investigators. Temporary custody should include the power to arrange for a medical examination of the child. Finally, state law should explicitly empower adolescents to consent to interviews and examinations without parental permission.³⁵⁰

IV. ACCESS TO THIRD PARTY RECORDS AND INFORMATION CONCERNING CHILD ABUSE

A. Introduction

Ordinarily, child protection agencies obtain records and statements from witnesses on a voluntary basis. Part B of this section discusses how witnesses may be questioned, including whether *Miranda* warnings should be given in child protection investigations, and what limits should be imposed on coercive or deceptive questioning.

When witnesses refuse to volunteer information, the agency may file a petition alleging maltreatment of the child and seek the information during discovery or at trial. Sometimes, however, it may be necessary to compel oral and written information before a formal child protection proceeding can or should be initiated. Part C of this section deals with legal issues related to compelling disclosure of information during the investigation stage.

B. Limits on Witness Questioning in Child Abuse and Neglect Investigations

In *Miranda v. Arizona*,³⁵¹ the United States Supreme Court held that an individual's statements while in police custody may not be used against him in a criminal prosecution unless it can be shown that

349. INSTITUTE OF JUDICIAL ADMIN./AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT 91-95 (1981). The proposed standards have not been approved as official policy of the American Bar Association.

350. See *supra* notes 240-45 and accompanying text.

351. 384 U.S. 436 (1966).

the individual was warned about the possible consequences of testifying.³⁵²

As a general principle, *Miranda* warnings are not required in civil child abuse and neglect investigations. However, where both police and child protection agency employees are involved in the questioning of persons suspected of child maltreatment, special *Miranda* issues occasionally emerge.

Miranda warnings are required only when an individual is in police custody. Where the individual is free to leave or to break off questioning, the warnings need not be given.³⁵³ Thus *Miranda* warnings are not required where social workers conduct questioning without the police being present,³⁵⁴ or where police conduct the questioning but do not detain the individual or deprive the individual of freedom of action in any significant way.³⁵⁵

There is no precise test to determine whether an individual is in police custody. Essentially, the rule is that a person is in custody where he or she is deprived of freedom of action in any significant way.³⁵⁶ Whether a person is "in custody" thus depends upon the facts and circumstances of the specific situation.³⁵⁷ For example, where a police officer is voluntarily permitted to enter a home and then questions a parent concerning alleged child abuse while standing in the doorway to a room, and the person being questioned makes no attempt to leave the room or to ask the police officer to leave, one probably would not conclude that the person being questioned is "in custody." Accordingly, the *Miranda* warnings should not be required. On the other hand, if the police officer entered the house pursuant to a warrant, stood in the same doorway and did not move when the individual being questioned approached the police officer and indicated a

352. The person being interrogated must be informed that he has the right to remain silent, that anything said can and will be used against him in court, that he has the right to consult with an attorney and have the attorney with him during interrogation, and that if he cannot afford an attorney, an attorney will be appointed to represent him. *Id.* at 444.

353. *Beckwith v. United States*, 425 U.S. 341 (1976).

354. *State v. Hathorn*, 395 So. 2d 783, 785 (La. 1981) (statements made by defendant to child protection center caseworker in hospital emergency room were admissible despite lack of *Miranda* warnings).

355. *See, e.g., State v. Brown*, 19 Or. App. 427, 528 P.2d 569 (1974) (statements made by defendant juvenile, who voluntarily accompanied officers to crime scene and who was free to leave at any time, were admissible despite absence of *Miranda* warnings), *cert. denied*, 421 U.S. 1003 (1975).

356. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); W. LAFAYE & J. ISRAEL, *supra* note 65, § 6.6(e), at 496.

357. *See* W. LAFAYE & J. ISRAEL, *supra* note 65, § 6.6(c), at 496-97.

Legal Barriers in Child Abuse Investigations

desire to leave, the individual would probably be considered to be “in custody.”³⁵⁸ In that case, the *Miranda* warnings should be given.

Where an individual is “in custody,” *Miranda* warnings may be required although the questioning is being conducted by someone other than the police. This is especially likely where the questioner is under an obligation, or is otherwise likely, to share information with the police.³⁵⁹ Although some courts have held that *Miranda* warnings are not required when questioning is conducted by government agents not primarily charged with enforcement of the criminal law,³⁶⁰ these cases have involved situations where the defendant was not in police custody. If the government official doing the questioning will share evidence of law violations with police, and the individual being questioned is under heavy pressure to cooperate, it is likely that *Miranda* warnings must be given.³⁶¹

In the case of child abuse and neglect investigations, it is not unusual for social workers to question persons suspected of child abuse while police are present.³⁶² In that case, where the perpetrator of abuse is “in custody” as discussed above, *Miranda* warnings are probably required before questioning begins. For example, *Miranda* warn-

358. See, e.g., *United States v. Nash*, 563 F.2d 1166 (5th Cir. 1977) (where investigation by the Federal Bureau of Investigation (“FBI”) occurred in security office with doors closed behind defendant, and agent was unsure door was locked, there was intention on part of agent that interrogation be custodial); *United States v. Bekowies*, 432 F.2d 8 (9th Cir. 1970) (where FBI agents had warrant for arrest of fugitive when they entered defendant’s apartment, agents requested defendant to accompany them to several areas within apartment, and agents questioned defendant closely and persistently, defendant was not unreasonable in believing he was in custody).

359. See *Estelle v. Smith*, 451 U.S. 454, 467 (1981) (where defendant in a criminal proceeding was ordered by the judge to be questioned by a psychiatrist, *Miranda* warnings were held to be required); *Mathis v. United States*, 391 U.S. 1 (1968) (Internal Revenue Service (“IRS”) investigator questioning individual in jail required to give *Miranda* warnings where investigation was primarily civil but investigator had duty to report criminal violations).

360. See, e.g., *United States v. Dreske*, 536 F.2d 188 (7th Cir. 1976) (taxpayer interviewed by IRS agent did not have to be advised of his constitutional rights against self-incrimination before being questioned); *United States v. Harmon*, 486 F.2d 363 (10th Cir. 1973) (where defendant answered local inquiry from Selective Service Board and acknowledged failure to register, defendant’s statement was admissible without prior *Miranda* warnings because defendant had not been in custody), *cert. denied*, 415 U.S. 979 (1974); *United States v. Irion*, 482 F.2d 1240 (9th Cir. 1973) (brief questioning of defendant at his motel room by Customs officers who learned defendant had been on sailboat which landed without clearing customs did not constitute an “in custody” interrogation), *cert. denied*, 414 U.S. 1026 (1973).

361. See *W. LAFAVE & J. ISRAEL*, *supra* note 65, § 6.10, at 542–44.

362. See, e.g., Agreement for Joint Investigative Procedures of Child Physical and Sexual Abuse Between Charles County Dep’t of Social Servs., Charles County Sheriff’s Dep’t, Maryland State Police, and the State’s Attorney for Charles County, 1985, Maryland State Attorney’s Office, Charles County.

ings should be given if a social worker intends to question a suspect after the suspect has been placed under arrest.

If the above hypothetical involving the police officer blocking the doorway is modified slightly, a more subtle situation requiring *Miranda* warnings is presented. That is, where the police officer blocks the doorway or otherwise creates the impression that the individual is not free to leave, and questioning is conducted by an employee of the child protection agency, *Miranda* warnings probably are required.³⁶³

While it is clear how a failure to give required *Miranda* warnings will affect a criminal prosecution, the effects on civil child protection proceedings are less clear. Where *Miranda* warnings are not given in a criminal proceeding, both the statement to the police and any "fruits" of the statement, including causally related subsequent searches and statements, will be suppressed in later hearings.³⁶⁴

In civil child protection proceedings, the consequences of not giving *Miranda* warnings are uncertain, because it has not been settled whether illegally obtained evidence must be excluded in such proceedings. However, the exclusionary rule should not and probably does not apply in such proceedings.³⁶⁵ Therefore, failure to give *Miranda* warnings before a custodial interrogation by a child protection agency employee means that the statement and any fruits thereof can be suppressed in a subsequent criminal prosecution.

When the *Miranda* rule does not apply, there may be other constraints upon the questioning of witnesses in child protection investigations. Confessions obtained through deception, trickery, or coercion are not admissible in criminal proceedings, even in noncustodial interrogations or other circumstances not requiring *Miranda* warnings.³⁶⁶ Analogously, the use of coercion or trickery in questioning in child abuse investigations is arguably actionable, especially if a parent is tricked into a false confession.³⁶⁷

Nevertheless, questioning that is misleading and improperly coercive in a criminal investigation may not be so in the context of a child

363. See W. LAFAYE & J. ISRAEL, *supra* note 65, § 6.6(c), at 491-94 (courts divided concerning whether a subjective or objective test should be applied in determining whether a person is in custody, i.e., whether he is deprived of his freedom of action).

364. See *id.* § 9.5, at 760-63 (detailed discussion of how "fruit of the poisonous tree" doctrine applies in the case of confessions obtained in violation of the *Miranda* rule).

365. See *infra* text accompanying notes 415-66.

366. See W. LAFAYE & J. ISRAEL, *supra* note 65, § 6.2(c), at 446-49; see also, *Lynumn v. Illinois*, 372 U.S. 528 (1963) (confession coerced when defendant was informed that she could lose welfare benefits and custody of her children if she did not cooperate).

367. See generally D. BESHAROV, *supra* note 11, at 78-86.

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protection case. Whether or not a parent cooperates in a child abuse case sometimes does affect the ultimate outcome of the case. It therefore may be proper to inform the parent of that fact. Where a parent admits maltreating a child, it becomes possible to develop a rehabilitative plan for the parent, and sometimes to leave the child at home with proper safeguards rather than to place the child in foster care. Therefore, it is not necessarily incorrect or improper to inform a person suspected of child abuse that the agency's recommendations to the court may be affected by the cooperation of the suspect in the investigation. On the other hand, such advice easily can be misconstrued or wrongly presented as a threat, where not meticulously and correctly explained. A safe approach is for investigators to avoid such statements.

C. Compelling Access to Records and Third Party Information

The power to compel access to information and records pertinent to a child abuse investigation may be necessary in a variety of circumstances. For instance, a school or medical clinic may refuse to provide information and records regarding a child. Or, the members of a religious commune may refuse to answer any of the questions of an agency employee. In these circumstances, the agency may need the information to determine whether reports of child abuse are well-founded and whether to initiate formal child abuse proceedings.³⁶⁸

Part C discusses constitutional and statutory issues relevant to gaining access to such records and information. It examines laws obligating third parties to provide records and information relative to child abuse investigations, briefly discusses legal barriers such as confidentiality and fear of litigation, and suggests legal remedies through which parties may be compelled to provide records and information.

One approach an agency might use is to seek the needed information through grand jury proceedings. Grand juries are, of course, free to subpoena witnesses and records in the course of an investigation of possible criminal activity.³⁶⁹ Child abuse and neglect are often, but not always, a violation of criminal law.

Grand jury proceedings, however, are not always a practical means of investigation for the child protection agency. No criminal proceedings may be contemplated, and therefore the prosecutor may not be willing to assist the child protection agency in its investigation. Where criminal charges are pending, there may be unacceptable delays before

368. For two, more detailed, examples, see *supra* note 6.

369. See, e.g., *Project: Criminal Procedure*, 73 GEO. L.J. 403, 440 (1984).

the convening of the grand jury, the procedure may be cumbersome, and the prosecutor may be unable or unwilling to share information with the child protection agency.³⁷⁰

Where testimony or records are needed but are not practicably obtainable through grand jury proceedings, the agency must have an effective means to compel production. Few child protection agencies currently have clear statutory authority to compel testimony and records without first initiating a formal child protection proceeding. Remedies can and should be created, consistent with state and federal constitutions.

1. *Constitutional Issues*

The principal that government agencies can require the disclosure of information through purely investigatory proceedings has been firmly established for forty years.³⁷¹ An administrative agency's investigatory powers are comparable to those of a grand jury.³⁷² "Fishing expeditions" for evidence are permitted,³⁷³ and the agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."³⁷⁴ Probable cause is not required to compel persons to provide information to the agency because there is no "search or seizure" for the purposes of the fourth amendment.³⁷⁵

Constitutional requirements for compelling testimony and records as part of an administrative agency investigation are relatively modest. The investigatory demand must be for a lawful purpose,³⁷⁶ validly authorized by the legislature,³⁷⁷ and must not be arbitrary or unreasonable.³⁷⁸

370. *Id.* at 431-32, 447-48. *But cf.* *United States v. Doe*, 107 S. Ct. 1656 (1987) (Federal Rules of Criminal Procedure allow attorney who handled criminal prosecution to make use of grand jury materials in related civil proceeding and, based upon showing of "particularized need," to share the materials with other government lawyers involved in the civil proceedings).

371. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). On the constitutional dimensions of agency investigatory powers, see K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4:6 (2d ed. 1978); B.J. MEZINES, J.A. STEIN & J. GRUFF, *ADMINISTRATIVE LAW* § 19.02 (1987); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 3.10 (1984).

372. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *Oklahoma Press*, 327 U.S. at 216.

373. *Morton Salt*, 338 U.S. at 642-43; *Oklahoma Press*, 327 U.S. at 195.

374. *Morton Salt*, 338 U.S. at 642-43.

375. *Oklahoma Press*, 327 U.S. at 215.

376. *Id.* at 209.

377. *Id.*

378. *Morton Salt*, 338 U.S. at 652-53; *Oklahoma Press*, 327 U.S. at 209, 216. Professor Schwartz points out that while the literal language of the fourth amendment has no application to administrative subpoena power, the "right to be let alone" is implicated by the amendment

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An administrative subpoena duces tecum may be extremely broad in scope so long as it is not unreasonably burdensome.³⁷⁹ However, the documents demanded should be "particularly described."³⁸⁰

Under the federal Constitution, agencies but not courts may issue investigatory subpoenas and demands for the production of documents. Article III, section 2 of the United States Constitution limits the power of the federal courts to cases and controversies. An investigation does not constitute a case or controversy, and therefore investigative subpoenas may not be issued by federal courts.³⁸¹ Whether this is true under state constitutions depends upon whether they have analogous provisions.³⁸²

Investigative subpoenas can be enforced through the courts, however.³⁸³ An agency seeking to enforce an administrative subpoena must seek a court order requiring compliance with the subpoena. At this proceeding, a person opposing the subpoena may appear and challenge its validity. Only after the court order has been issued may the agency bring a contempt proceeding for violation.³⁸⁴

State legislation may, however, establish penalties for failure to obey an agency's investigatory subpoena.³⁸⁵ There is a division of authority, however, concerning whether the agency itself can both issue a subpoena and assess a penalty for its violation. While it is clear that federal agencies may not do so,³⁸⁶ there is some authority to the effect that state agencies may do so under some state constitutions.³⁸⁷

and requires that the purpose and scope of the subpoena be reasonable. B. SCHWARTZ, *supra* note 371, § 3.15, at 124.

379. *Oklahoma Press*, 327 U.S. at 208; B. SCHWARTZ, *supra* note 371, § 3.15, at 124.

380. *Oklahoma Press*, 327 U.S. at 208.

381. *Morton Salt*, 338 U.S. at 641-42.

382. *Compare, e.g., ARIZ. CONST.* art. VI, § 14 (jurisdiction of superior court extends to cases and proceedings in which jurisdiction is not vested in another court) *with* N.M. CONST. art. VI, § 13 (jurisdiction of district court extends to all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law).

383. *Oklahoma Press*, 327 U.S. at 200; *NLRB v. Williams*, 396 F.2d 247, 249 (7th Cir. 1968).

384. *See, e.g., Reisman v. Caplin*, 375 U.S. 440 (1964) (describing the procedure of the IRS for the enforcement of investigatory subpoenas); B. SCHWARTZ, *supra* note 371, § 3.10, at 113-14.

385. For the proposition that legislation may create penalties for ignoring an administrative subpoena, see *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U.S. 375 (1938); *United States v. Clyde S.S. Co.*, 36 F.2d 691 (2d Cir. 1929); *Sabre v. Rutland R.R.*, 86 Vt. 347, 85 A. 693 (1913).

386. *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894).

387. *See* K. DAVIS, *supra* note 371, § 4:6; B. SCHWARTZ, *supra* note 371, § 3.10, at 114. (arguing against assessment of penalties by administrative agencies for violations of their own subpoenas); cases collected in Note, *The Power of Administrative Agencies To Commit for Contempt*, 35 COLUM. L. REV. 578 (1935); *see also In re Groban*, 352 U.S. 330 (1957). The *Groban* case involved a challenge to an Ohio statute permitting the Fire Marshal to enforce a

Investigatory proceedings are nonadversarial and may be less formal than trial-type proceedings.³⁸⁸ Even if the collateral consequences of the investigatory proceeding include possible prosecution or the loss of a job, due process does not require that procedural rights be granted that are ordinarily associated with criminal proceedings or even administrative adjudications.³⁸⁹ The investigatory proceeding may be private, and there need be no rights to specific notice, confrontation, or cross-examination.³⁹⁰

If criminal proceedings are contemplated, parties should be notified of the possibility of criminal prosecution when investigatory subpoenas and demands for documents are issued.³⁹¹ The privilege against self-incrimination does apply in administrative investigatory proceedings,³⁹² and providing notice of contemplated criminal proceedings provides the opportunity for exercising that privilege.³⁹³ Notice is presumably also necessary with regard to child protection investigations where both subsequent juvenile court proceedings and subsequent criminal charges are expected.

Where parties are called upon to testify in administrative proceedings, including investigatory proceedings, several conditions must be present for the privilege against self-incrimination to apply. First, the danger of prosecution must be real and demonstrable.³⁹⁴ Second, while it is ordinarily not necessary to warn a witness of the potentially incriminating effects of required testimony,³⁹⁵ this is not a universal rule, and failure to provide a warning may create an unnecessary risk

penalty against an individual who failed to respond to a subpoena and was not provided with counsel at the investigatory hearing. The summary punishment authority of the Fire Marshal was not challenged, but rather the denial of counsel at the investigatory hearing. The court suggested that while counsel would not be required during the course of the investigatory hearing, counsel might be required prior to the assessment of a penalty.

388. *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

389. *Hannah v. Larche*, 363 U.S. 420, 441-43 (1960).

390. *Id.* at 446; B. MEZINES, J. STEIN & J. GRUFF, *supra* note 371, § 19.04, at 19-56.

391. *United States v. Kordel*, 397 U.S. 1, 11-12, *cert. denied*, 400 U.S. 821 (1970).

392. *In re Groban*, 352 U.S. 330, 333 (1957); L. TAYLOR, WITNESS IMMUNITY 107 (1983); J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 787, 789 (2d ed. 1974).

393. *See, e.g., Capitol Prod. Corp. v. Hernon*, 457 F.2d 541, 543 (8th Cir. 1972) (holding that fifth amendment privilege was improperly raised where there was no pending criminal investigation or proceeding of defendant, and where defendant had been given no notice of such); *United States v. Lipshitz*, 132 F. Supp. 519, 523 (E.D.N.Y. 1955) (failure of government to notify defendant during civil tax audit that criminal case was also contemplated was instrumental in defendant's failure to raise a fifth amendment objection to his questioning).

394. *See Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).

395. L. TAYLOR, *supra* note 392, at 24-25.

in later proceedings.³⁹⁶ Third, any statement invoking the privilege is generally sufficient.³⁹⁷

When, after demonstrating that there is a real danger of prosecution, a witness refuses to testify in an investigatory hearing based on the privilege against self-incrimination, the witness nevertheless can be compelled to testify if granted immunity from any prosecution that may result from the testimony.³⁹⁸ The immunity granted must be at least coextensive with the privilege against self-incrimination, so that the witness will be in no additional danger of prosecution as a result of the grant of immunity.³⁹⁹ In order to compel testimony after the privilege has been asserted, the immunity granted must protect the witness from use of the testimony in subsequent criminal proceedings, even where subsequent proceedings are based on information derived from additional investigation conducted as a result of the testimony. This is referred to as "use and derivative use immunity."⁴⁰⁰ While total and unconditional immunity from any prosecution, known as "transactional immunity," is sometimes granted, only use and derivative use immunity is required as a precondition of compelling testimony.⁴⁰¹

A grant of immunity may not be valid unless there is express statutory authority for it.⁴⁰² Grants of immunity by prosecutors in the absence of statutory authority may or may not be upheld even when they are approved by a judge.⁴⁰³ Generally, prosecutorial immunity has been upheld in the absence of explicit legislative authority only where the prosecutor has been held to have an implied constitutional or statutory power to grant immunity.⁴⁰⁴ *A fortiori*, a valid grant of immunity from another government official requires explicit statutory authorization.

396. See, e.g., *In re P.N.*, 533 P.2d 13 (Alaska 1975) (failure to advise father accused of child molestation of his privilege of self-incrimination was reversible error in dependency case).

397. L. TAYLOR, *supra* note 392, at 24-26.

398. *Id.* at 29-31; J. VARON, *supra* note 392, at 732-33.

399. J. VARON, *supra* note 392, at 748.

400. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 475 (1972); *Kastigar v. United States*, 406 U.S. 441, 443 (1972); L. TAYLOR, *supra* note 392, at 47-48, 79-86; J. VARON, *supra* note 392, at 738.

401. *Zicarelli*, 406 U.S. at 475-76.

402. See Annotation, *Prosecutor's Grant of Immunity to Witness*, 4 A.L.R.4th 1221, § 2 (1981).

403. *Id.* §§ 4[a], [b], 5[a], [b].

404. *Id.* § 2; J. VARON, *supra* note 392, at 746-47.

2. *Proposed Statutory Provisions Authorizing Access to Records and Information*

Based on the principles discussed above, there are several elements that should be included in any statute authorizing child protection agencies to compel testimony and the production of records prior to initiating child protection proceedings.

First, the statute should require persons working with children to provide information relevant to the investigation. This is already accomplished, in part, by existing child abuse reporting acts. These laws, in effect in every state, require certain professional persons and others working with children to report any instances in which a child appears to have been abused or neglected.⁴⁰⁵ In addition to requiring that there be reports of child abuse or neglect, these statutes make reporters immune from liability so long as the reports are made in good faith.⁴⁰⁶

Child abuse reporting laws generally do not require, however, that the reporter provide information or records beyond those included in the original report. Nor do they require persons not reporting child abuse or neglect to cooperate with the investigation.⁴⁰⁷ Accordingly, state laws should be amended to require both persons obligated to report, and the agencies and institutions for which they work, to provide any information that may be relevant or helpful to an investigation of child abuse or neglect. Where child abuse is reported by an individual who has no legal obligation to do so, the law should require the reporter to provide such relevant follow-up information as is requested by the agency. Confidentiality laws should be abrogated where necessary to accomplish these purposes, and persons or entities meeting these statutory obligations in good faith should also be exempted from liability. The same statutory penalties that presently apply to willful failures to report child abuse and neglect should be extended to failures to provide obligatory follow-up information.

Second, the statute should grant explicit authority to the agency to subpoena witnesses and require the production of documents and

405. Excerpts of relevant statutory provisions for all United States jurisdictions are collected in *STATE STATUTES*, *supra* note 85, at 777-94.

406. *See, e.g.*, TEX. FAM. CODE ANN. § 34.03 (Vernon 1986) (any person reporting immune from liability, civil or criminal, except those reporting in bad faith); *see also* *STATE STATUTES*, *supra* note 85, at 475-89.

407. For a discussion of extending child abuse acts to require mandatory reporters to cooperate with investigations, *see generally* Weisberg & Wald, *Confidentiality Laws and State Efforts To Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 *FAM. L.Q.* 143 (1984).

other materials pertinent to an investigation. Subpoenas may be necessary to obtain information from persons not covered by the reporting act, where there is a dispute concerning confidentiality or privilege, and where persons legally obligated to provide information are recalcitrant. Although agency investigatory powers can be implied to some extent,⁴⁰⁸ statutory amendment is necessary because courts may be unwilling to recognize extensive investigatory powers in the absence of express statutory language.⁴⁰⁹ Among other things, it is probably necessary to have explicit statutory authority to issue an investigatory subpoena.⁴¹⁰

One approach might be to enact a statute authorizing the agency to establish regulations governing procedures for compelling testimony and the production of records in the course of a preliminary child abuse investigation.⁴¹¹ At present, only Maine and Utah authorize investigative subpoenas in child abuse cases.⁴¹²

In most states, the statute should provide that the agency itself, acting through its attorney, issue the subpoena or the demand for production, as opposed to the court. This is required in states where separation of powers doctrines make it unconstitutional for courts to issue a summons or demand for production where no child abuse petition has been filed.⁴¹³ On the other hand, if the state constitution permits courts to issue investigative subpoenas, that procedure would be preferable. Court-issued subpoenas would provide for immediate judicial oversight and would eliminate the necessity of a second enforcement proceeding through the courts.⁴¹⁴

Third, the statute should encourage compliance with the subpoena. Where administrative subpoenas must be agency-issued, the statute should provide a penalty for failure to obey the subpoena; without

408. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 210 (1946); *see also* *United States v. Euge*, 444 U.S. 707 (1980) (statute authorizing the agency to compel the production of books and records held to imply authority to compel witness to produce handwriting exemplar); *Jones v. Unknown Agents of Fed. Elec. Comm'n*, 613 F.2d 864 (D.C. Cir. 1979) (statute authorizing investigation held to imply right to conduct field interviews), *cert. denied*, 444 U.S. 1074 (1980); B. MEZINES, G. STEIN & J. GRUFF, *supra* note 371, § 19.03, at 19-53 to -54.

409. *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950).

410. *See, e.g., In re Di Brizzi*, 303 N.Y. 206, 101 N.E.2d 464 (1951); *Commonwealth v. Orsini*, 368 Pa. 259, 81 A.2d 891 (1951); B. SCHWARTZ, *supra* note 392, § 3.8, at 109.

411. *See* B. MEZINES, J. STEIN & J. GRUFF, *supra* note 371, § 20.02, at 20-28 to -30.

412. *See* ME. REV. STAT. ANN. tit. 22, § 4021(1)(A) (Supp. 1987) (department may issue subpoenas requiring persons to disclose information necessary in an abuse or neglect investigation); UTAH CODE ANN. § 78-3a-50 (1987) (juvenile court may issue investigative subpoenas in neglect proceedings, but must follow the procedures set forth in the code of criminal procedure).

413. *See supra* notes 381-82 and accompanying text.

414. *See supra* notes 383-84 and accompanying text.

such penalties the subpoena may be ignored without risk.⁴¹⁵ In addition, the law should permit the agency to enforce the subpoena through the courts. Persons responding to the subpoena should be excused from liability for doing so.

Fourth, the state statute should expressly authorize a grant of immunity to the witness, should the witness claim the fifth amendment or be demonstrably likely to do so.⁴¹⁶ The statute should explicitly permit use and derivative use immunity when necessary to comply with constitutional requirements.

An attorney representing the agency in child protection proceedings should be authorized to grant immunity with the approval of the court. The attorney for the agency, rather than the administrative head of the agency, should have this authority because granting immunity is a litigation strategy decision. Such decisions are generally made by the attorney rather than the client.⁴¹⁷

If the attorney representing the child protection agency is not the prosecutor in criminal proceedings, the agency attorney should be required to consult with the prosecutor prior to granting immunity. The agency attorney, rather than the prosecutor, should decide whether to grant immunity because protecting the child should have priority over exacting a criminal penalty. The prosecutor should be consulted because of the importance of criminal prosecution and because of its direct and powerful impact upon the child. The statute should set forth a clear and simple process for granting immunity and, where necessary, compelling testimony.

V. APPLICATION OF THE EXCLUSIONARY RULE IN CASES INVOLVING CHILD ABUSE OR NEGLECT

This section discusses the application of the exclusionary rule in cases involving child abuse and neglect. It considers first, whether the exclusionary rule applies in civil child protection cases, and second, whether the rule applies in criminal proceedings where evidence has been illegally obtained by social workers employed by child protection agencies.

415. B. SCHWARTZ, *supra* note 392, § 3.10, at 113-16.

416. *Cf. In re Vance A.*, 105 Misc. 2d 254, 432 N.Y.S.2d 137 (Fam. Ct. 1980) (New York statute authorizing Family Court judge to grant immunity can be used to compel a party to testify in dependency proceeding; civil proceeding need not be adjourned pending the criminal proceeding, because of the importance of avoiding delay in child protection proceedings).

417. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:301-310 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

Court decisions do not offer a clear answer concerning whether the exclusionary rule applies in child abuse cases. In general, case law is divided concerning the applicability of the exclusionary rule in non-criminal proceedings,⁴¹⁸ and it is difficult to draw clear rules or even consistent threads of analysis from the cases for application in child abuse cases. Only a few reported cases have ruled on the application of the exclusionary rule to civil child protection cases, and each has involved the introduction of evidence obtained by the police. In three cases, the courts held that the exclusionary rule does not apply in civil child protection cases,⁴¹⁹ while one case stated that the rule does apply.⁴²⁰ Because the cases directly on point are inconclusive, it is necessary to consider United States Supreme Court cases on the exclusionary rule that are analogous to the issues under discussion. Further, since recent United States Supreme Court cases apply a balancing test to determine whether the exclusionary rule applies in noncriminal proceedings, it is necessary both to describe the factors that have been emphasized in analogous cases and to consider whether different factors apply in child protection investigations.

The principal purpose of the exclusionary rule, as stated by the Supreme Court, is to deter law enforcement officers from obtaining evidence through unconstitutional means.⁴²¹ By denying law enforcement officers the use of such evidence in criminal proceedings, the rule helps eliminate their motivation for misconduct. Since the case of

418. See generally W. LAFAVE, *supra* note 18, § 1.5, at 83–102; W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 3.6(c) (2d ed. 1987).

419. *In re Christopher B.*, 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978); *In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976), *appeal dismissed sub nom. Potter v. Department of Social Servs.*, 431 U.S. 911 (1977); *In re Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881 (1985), *appeal dismissed*, 67 N.Y.2d 918, 492 N.E.2d 1235, 501 N.Y.S.2d 1027 (1986); *cf. Baxter v. Texas Dep't of Human Resources*, 678 S.W.2d 265, 267 (Tex. Ct. App. 1984) (exclusionary rule codified in the Texas Criminal Procedure Code does not apply in termination of parental rights cases, and also does not apply where evidence was acquired by an individual not acting as an agent of the state).

420. *In re Melinda I.*, 110 A.D.2d 991, 488 N.Y.S.2d 279 (1985) (stating that evidence illegally obtained by police is not admissible but holding that evidence in question had been legally obtained); see also *In re T.L.S.*, 139 Vt. 197, 425 A.2d 96 (1981) (where juvenile court unlawfully ordered the mother of an allegedly maltreated child to submit to a psychiatric examination, testimony regarding the results of examination excluded).

421. Other justifications that have been suggested for the rule include judicial integrity (preventing judges from being tainted by reliance upon illegally obtained evidence), *Elkins v. United States*, 364 U.S. 206 (1960), and upholding public confidence in the criminal justice system, *United States v. Calandra*, 414 U.S. 338, 356 (1974) (Brennan, J., dissenting).

*Mapp v. Ohio*⁴²² in 1961, the rule has been applied in criminal proceedings brought in state as well as federal courts.⁴²³

Following *Mapp*, there have been several decisions by the Court dealing with the applicability of the exclusionary rule in noncriminal proceedings. In the case of *One 1958 Plymouth Sedan v. Pennsylvania*,⁴²⁴ the exclusionary rule was applied to a forfeiture proceeding in state court. Pennsylvania had sought ownership of an automobile that had been used in the illegal transportation of liquor and had been seized in an unlawful search. The Court held that the state could not keep the automobile because its case rested on illegally obtained evidence. The exclusionary rule should apply, it reasoned, because the procedure for forfeiture of the automobile was "quasi-criminal in character."⁴²⁵ This was because the proceeding was brought "to penalize for the commission of an offense against the law."⁴²⁶

Eleven years after *One 1958 Plymouth Sedan*, the Supreme Court ruled on the application of the exclusionary rule in proceedings that were clearly civil in character. In *United States v. Janis*,⁴²⁷ the question was whether evidence illegally seized by Los Angeles police would be admissible in a civil tax enforcement action.⁴²⁸ The evidence in question consisted of cash and wagering records of a professional bookie that had been obtained as the result of a defective warrant.⁴²⁹ The arresting officer had notified the Internal Revenue Service ("IRS") of the arrest and provided assistance in estimating the illegal income from the gambling operation.⁴³⁰ After the IRS made an

422. 367 U.S. 643 (1961).

423. The exclusionary rule had been applied much earlier to federal criminal cases involving illegal searches. *Weeks v. United States*, 232 U.S. 383 (1914). It did not follow, however, that the exclusionary rule and all other protections related to the Bill of Rights were applicable to the states. In *Hurtado v. California*, 110 U.S. 516 (1884), the Court had held that only "fundamental rights" guaranteed by the Bill of Rights were applicable to the states through the fourteenth amendment. And in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that there was no fundamental right requiring application of the exclusionary rule to state cases involving illegal searches and seizures. Several years later, however, the Court ruled in *Rochin v. California*, 342 U.S. 165 (1952), that the fourteenth amendment did require the exclusion of evidence from state court proceedings resulting from extreme violations of fourth amendment rights by the police. The *Mapp* case overruled *Wolf v. Colorado* and held that the exclusionary rule did apply to criminal proceedings brought in state courts involving all types of fourth amendment violations.

424. 380 U.S. 693 (1965).

425. *Id.* at 700.

426. *Id.*

427. 428 U.S. 433 (1976).

428. *Id.* at 434.

429. *Id.* at 436.

430. *Id.*

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assessment against monies seized in the search, the bookie filed a tax refund suit, arguing that the evidence used by the IRS in making its assessment had been illegally obtained and therefore should be suppressed.⁴³¹

Noting that it had never applied the exclusionary rule “to exclude evidence from a civil proceeding,”⁴³² the Court held that evidence illegally seized by the police could be admitted in the civil tax proceeding.⁴³³ The Court reasoned that the exclusionary rule need not be applied because its deterrent effect upon police misconduct was too “attenuated” under the circumstances of the case.⁴³⁴ That is, making illegally seized evidence inadmissible in a federal civil tax proceeding would not deter state police from conducting illegal searches. This was true both because two sovereigns were involved, the state of California and the federal government, and because the tax proceeding was civil in nature. As the Court phrased it, the tax proceeding fell “outside the offending officer’s zone of primary interest,” and excluding the evidence in the tax proceeding therefore would not have substantial deterrent value.⁴³⁵

The *Janis* Court distinguished an earlier case, *Elkins v. United States*,⁴³⁶ which held that evidence illegally obtained by state police could not be admitted into evidence in a federal criminal proceeding. In *Elkins*, the Court reasoned that state and federal law enforcement officers do work closely together, and the rule prevents collusion between state police and federal officers.⁴³⁷ But because the *Janis* case involved use of the evidence in the civil proceeding of another sovereign, the *Janis* Court held that the deterrent effect of the exclusionary rule was too “attenuated” to justify its application.⁴³⁸ Furthermore, the police officers would be sufficiently “punished” by the application of the exclusionary rule in the state and federal criminal proceedings, as required by *Mapp* and *Elkins*.⁴³⁹

431. *Id.* at 438.

432. *Id.* at 447.

433. *Id.* at 459–60.

434. *Id.* at 458.

435. *Id.*

436. 364 U.S. 206 (1960).

437. *Id.* at 221–22. *Elkins* overruled the former “silver platter doctrine,” *Lustig v. United States*, 338 U.S. 74 (1949), that had permitted state police to turn over illegally obtained evidence to federal officers, who then could use the evidence in federal criminal proceedings.

438. *United States v. Janis*, 428 U.S. 433, 458 (1976).

439. *Id.*

A 1984 decision of the United States Supreme Court, *INS v. Lopez-Mendoza*,⁴⁴⁰ held that the exclusionary rule is inapplicable in a civil deportation hearing. At issue was whether two aliens who had been illegally arrested by officials of the Immigration and Naturalization Service could be legally deported as a consequence of the arrests. The Court held that the exclusionary rule did not apply, based in part on special factors that limited the deterrent value of the exclusionary rule in deportation proceedings.⁴⁴¹ Among other things, the Court emphasized that applying the exclusionary rule to civil deportation cases could force public officials to tolerate a continuing violation of the law.⁴⁴² Deportation cases thus differ from criminal proceedings, where the exclusionary rule only serves to bar prosecution for past crimes. Were the exclusionary rule to apply in a deportation case, it might later be argued that it could be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump.⁴⁴³ This reasoning, incidentally, is consistent with dictum in *One 1958 Plymouth Sedan v. Pennsylvania*⁴⁴⁴ that the exclusionary rule should not be applied if to do so would compel the return of illegal contraband to its owner.

Because the Court has not followed a consistent method of analysis in the above cases, it is difficult to apply the rationale of its decisions to child abuse cases. Nevertheless, the cases shed some light on the issue and certainly suggest how arguments must be framed in child protection cases. *One 1958 Plymouth Sedan* suggests that the exclusionary rule does not apply in civil cases that are not quasi-criminal, and *Janis* emphasizes the distinction between civil and criminal proceedings.⁴⁴⁵

440. 468 U.S. 1032 (1984).

441. The following four factors were cited: First, regardless of how an arrest of an illegal alien is effected, "deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation," *id.*; second, Immigration and Naturalization Service ("INS") agents are aware that it is highly unlikely that any particular arrestee will challenge the lawfulness of his arrest in a deportation hearing; third, the INS has an effective and comprehensive scheme for deterring fourth amendment violations by its agents; fourth, the deterrent value of applying the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies. *Id.* at 1043-45. For a critique of these arguments, see W. LAFAYE, *supra* note 18, § 1.5, at Supp. 69-71.

442. 468 U.S. at 1046. Where evidence is excluded in deportation proceedings, the continued illegal presence of the aliens must be tolerated if there is insufficient legally obtained evidence to sustain the deportation.

443. *Id.*

444. 380 U.S. 693 (1965).

445. At least one leading commentator concludes that whether a civil proceeding is quasi-criminal is critical to whether the exclusionary rule applies. J. HALL, JR., *supra* note 37, § 25:3.

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Civil child protection cases should not be considered quasi-criminal for several reasons.⁴⁴⁶ First, civil child protection proceedings are not an adjunct to a criminal proceeding. Child protection proceedings may be accompanied by criminal proceedings, but those are brought independently, and the police typically play a minor role in the presentation of the evidence in the civil proceeding.⁴⁴⁷

Second, although child protection proceedings incorporate a number of special procedural protections,⁴⁴⁸ they neither apply most criminal procedural protections nor rules of civil procedure.⁴⁴⁹ Third, although child protection proceedings sometimes result in the loss of parental rights, they do not ordinarily assess the kinds of penalties applied in criminal proceedings. Child protection proceedings do not culminate in jail sentences, fines, or forfeitures of property as do criminal proceedings.⁴⁵⁰ While the loss of a child is certainly onerous, this may also happen in such indisputably civil matters as custody disputes and adoption proceedings.

Finally and most importantly, a child protection proceeding is not brought for the purpose of penalizing parental misconduct, but rather to safeguard the child. This fact is clear from the statements of purpose in many state child protection statutes.⁴⁵¹ Indeed, parental rights may be maintained where it is best for the child, in spite of reprehensi-

446. See, e.g., *In re J.R.*, 147 Vt. 7, 508 A.2d 719 (1986); *In re Neglected Child*, 130 Vt. 525, 296 A.2d 250 (1972).

447. D. BESHAROV, *JUVENILE JUSTICE ADVOCACY* 133-34 (1974).

448. For example, laws in nearly every state require that a guardian ad litem or counsel be appointed for the child in child protection proceedings. Davidson & Horowitz, *Protection of Children from Family Maltreatment* in LEGAL RIGHTS OF CHILDREN § 7.17 (1984) [hereinafter *Protection of Children*]; see, e.g., LA. REV. STAT. ANN. § 13:1602(C) (West 1983); MINN. STAT. ANN. § 260.155(2), (4)(A) (West Supp. 1988); TEX. FAM. CODE ANN. § 11.10(a), (c) (Vernon 1986).

449. See *Protection of Children*, supra note 448, § 7.16, at 295-96 (while proof beyond a reasonable doubt is required in criminal proceedings, either a preponderance of the evidence or clear and convincing evidence is required in child protection proceedings). *Id.* § 7.20, at 303-04 (describing procedure at disposition). For a discussion of applying the rules of civil procedure to child protection proceedings, see Hardin & Bulkley, *The Rights of Foster Parents to Challenge Removal and Seek Adoption of Their Foster Children* in FOSTER CHILDREN IN THE COURTS 309-10 (M. Hardin ed. 1983).

450. See Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381 (1976).

451. See, e.g., COLO. REV. STAT. § 19-10-102 (1986) ("in enacting this article it is the intent of the general assembly to protect the best interests of children of this state and to offer protective services in order to prevent any further harm to a child suffering from abuse"); KAN. STAT. ANN. § 38-1501-1502 (1986) ("[T]he Kansas code for care of children . . . shall be liberally construed, to the end that each child within its provisions shall receive the care, custody, [and] guidance . . . as will best serve the child's welfare and the best interests of the state.").

ble parental misconduct.⁴⁵² Where there has been child abuse, but there is no ongoing threat to the child, civil child protection proceedings should not be brought.⁴⁵³

After the *Janis* decision, the exclusionary rule has continued to apply in both criminal and quasi-criminal proceedings, but classifying a case as noncriminal no longer automatically makes the exclusionary rule inapplicable. Although the *Janis* Court mentioned that it had never applied the exclusionary rule in a civil case, it did not rely on this in reaching a decision. Rather, the Court determined that given the circumstances of the case, applying the exclusionary rule would do little to actually deter the unlawful conduct of the police.⁴⁵⁴

Janis emphasized that the civil proceeding was outside the "zone of primary interest" of the officer who illegally obtained the evidence.⁴⁵⁵ This suggests that the inquiry in a civil child protection proceeding should be whether the proceeding falls within the "zone of primary interest" of a police officer who illegally obtains the evidence of child abuse. *Janis* suggests that we should ask a practical question: Would applying the exclusionary rule in civil child protection proceedings actually deter unlawful searches by police in child abuse cases?

If the police have a strong interest in obtaining admissible evidence for civil child protection proceedings, the exclusionary rule might have a strong deterrent function. If the police do not have a strong interest in the use of the evidence in civil child abuse proceedings, the deterrent effect of the exclusionary rule is arguably insufficient to support its application in such cases. In most areas, police play a significant role in civil child protection cases, but view their principal role as gathering evidence for criminal prosecutions. The degree to which this is true, of course, varies depending on the locality. Whether this takes the civil proceeding outside the police officer's "zone of primary interest" is difficult to say.

It should be noted that the deterrence issue presented in *Janis* is not strictly analogous to the civil child protection case, because *Janis* not only involved the use of evidence collected by police officers in a civil

452. See *Painter v. Barkley*, 157 Ga. App. 69, 276 S.E.2d 850 (1981) (trial court's refusal to terminate parental rights of father who had been convicted of murder in the death of child's mother upheld on appeal); *Vermilyea v. Department of Human Resources*, 155 Ga. App. 746, 272 S.E.2d 588, 591 (1980) (in proceeding to terminate parental rights, "[t]he question is not that the parents must be punished by termination . . . because of their misconduct, . . . but whether the children were without proper parental care or control.").

453. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 923 (1975).

454. *United States v. Janis*, 428 U.S. 433, 457-58 (1976).

455. *Id.* at 458.

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proceeding, but also involved two sovereigns—evidence gathered by state police was being used in a federal proceeding. Ordinarily, only one sovereign is involved in a civil child protection case. Thus, the possibility of close cooperation and collusion is heightened, making it more likely that police have an interest in the outcome of the civil proceeding.

A similar issue emerges where evidence illegally obtained by child welfare agency employees is introduced in a criminal prosecution for child abuse. One might ask whether the use of evidence obtained by child protection agency employees in criminal proceedings falls within their “zone of primary interest.” And again, the close working relationship between police and child welfare agency employees in some jurisdictions must be noted.⁴⁵⁶ Just as police might be interested in the outcome of child protection proceedings as an alternative to prosecution, child protection workers may be interested in prosecution as a means to force cooperation, or to reinforce agency decisions to separate parents and children.

Although the impact of the *Janis* deterrence analysis on child abuse cases is unclear, the concern of the Court in *Lopez-Mendoza* with the costs of applying the exclusionary rule more clearly applies to child abuse cases. *Lopez-Mendoza* and *One 1958 Plymouth Sedan* indicate that the exclusionary rule should not be applied where the result would be to force public officials to tolerate ongoing illegal acts.

Just as applying the exclusionary rule in a civil deportation proceeding or in a forfeiture proceeding involving illegal contraband may condone ongoing illegal conduct, so may applying the rule in a civil child abuse proceeding.⁴⁵⁷ There is usually a substantial likelihood of

456. See, e.g., COLO. REV. STAT. § 19-10-109 (1986) (permitting law enforcement agencies to investigate reports of abuse provided that all investigatory documents and data be shared with county social services); ILL. ANN. STAT. ch. 23, para. 2057.1(a), (b) (Smith-Hurd 1987) (providing for extensive cooperation between law enforcement and child services, including joint consultation, case management, and case handling); KAN. STAT. ANN. § 38-1523(b) (1986) (providing for joint investigations between law enforcement and social services when reports indicate serious physical injury). The Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–07 (1982), and its implementing regulations, 45 C.F.R. §§ 1340.1–.14 (1986), require cooperation between child protection and law enforcement agencies, as well as for criminal proceedings to be brought as a means of protecting the child.

457. Consider the following hypothetical:

Police and child protection agency employees gain illegal entry into a home in the course of a child abuse investigation. As a result, they seize implements that the parent had used to physically abuse the child and also obtain the confession of the abusive parent. The parent confesses that he was the one who beat the child, that he had done it many times in the past, and that he sometimes lost his temper. In the subsequent civil child protection proceeding, both the implements and the confession are suppressed. The civil petition is denied and the child remains in the unsupervised custody of the abusive parent.

repeated abuse if protective action is not taken. Furthermore, leaving the child with the abuser may be harmful in itself. For example, as the result of past abuse, a child may be profoundly terrified and withdrawn while in the custody of the abuser and may need to be removed for his or her emotional well-being regardless of whether similar acts of abuse are likely to recur.

It is important to reemphasize that both the "zone of primary interest" analysis of *Janis* and the "ongoing legality" focus of *Lopez-Mendoza* are only applications of the balancing test, which is employed to determine whether the exclusionary rule might apply to a particular category of civil case. The balancing test weighs the deterrent value of the exclusionary rule against its social cost. Therefore, to determine when the exclusionary rule applies in child abuse cases, it is necessary to more broadly consider the deterrent value and social cost of the rule in such cases.

Certainly, deterring police and child welfare agencies from illegally obtaining evidence in child abuse investigations is a matter of profound constitutional concern.⁴⁵⁸ Forcibly entering homes, examining children, questioning children without parental permission, and other forms of compulsory investigation represent profound intrusions into family life.⁴⁵⁹

It is difficult to say, however, to what extent applying the exclusionary rule in civil child protection proceedings would in fact substantially deter police, as opposed to child protection workers, from unlawfully obtaining evidence in child abuse investigations. As discussed earlier, police are probably primarily concerned with obtaining a successful prosecution in a child abuse investigation, rather than supporting a civil child protection proceeding. However, empirical research is lacking on this issue. Furthermore, the police do work closely with child protection agencies in some jurisdictions, and sometimes serve as important witnesses in child protection proceedings.

There is a strong need for an effective mechanism to assure that the rights of families are respected by child welfare agencies. Child protection agencies generally do not have the sophistication of the police regarding the constitutional rights of families in child abuse investigations, and many lack strong internal administrative mechanisms to

Under the above hypothetical, the child abuse is likely to continue and the application of the exclusionary rule will permit an ongoing illegality, namely the abuse of the child.

458. See *supra* notes 159-61, 252-55 and accompanying text.

459. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7-8 (1973).

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assure compliance. This is aggravated by the fact that child abuse cases tend to be factually complex and nonrepetitious.

The exclusionary rule could have a substantial effect in deterring child protection agency employees from conducting illegal searches, examinations, and other intrusions into family life. On the other hand, because child protection employees are generally not well trained in procedural rights under the Constitution, applying the exclusionary rule in civil cases might encourage child protection workers to increasingly rely on the police in child protection investigations. Because of the intimidating presence of the police, this may worsen the intrusive impact of such investigations on families falsely suspected of abuse.

Child protection agencies would be more deterred by the possible inadmissibility of evidence in child protection proceedings than in criminal cases, since they are seldom directly involved in criminal prosecutions. In some cases, however, such as those involving sexual abuse, criminal sanctions are often viewed as essential to effective work with abusive families.⁴⁶⁰ This is particularly true in states where juvenile courts hearing child protection proceedings lack the power to control the conduct of perpetrators. Thus, excluding evidence illegally seized by child protection workers in criminal cases may have a practical deterrent impact on employees of child protection agencies.

In fact, if the exclusionary rule is held not to apply to civil child protection cases, its application in criminal cases might partially compensate for its nonapplication in child protection cases. That is, if the courts conclude that the social cost of applying the rule to child protection cases is too high, applying it in criminal cases may help deter child protection workers from illegal conduct during their investigations. This assumes, of course, that child protection workers have some knowledge and concern about the outcome of the criminal proceedings, which will not always be true.

Among the alternative means to compel child protection agencies to respect the constitutional rights of families, there is the possibility of civil rights litigation.⁴⁶¹ Law suits against child protection agency employees and other social workers are on the increase, and there is

460. See, e.g., H. DAVIDSON & R. HOROWITZ, CHILD ABUSE AND NEGLECT LITIGATION, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES 141 (1981); Leaman & Huhn, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 31 (1980); Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 128 (1984).

461. For a discussion of constitutional torts, see W. LAFAVE & J. ISRAEL, *supra* note 65, § 3.1(k), at 157-59.

considerable anxiety among social workers concerning such liability.⁴⁶² On the other hand, the financial and professional risks from failing to protect a child from injury resulting from abuse may be more significant than the risks involved in violating a family's constitutional rights.⁴⁶³

Civil rights litigation is an appropriate remedy for glaring violations of personal liberty in child protection investigations, so long as child protection workers are not unfairly exposed to liability. Agencies can protect child protection workers by adopting clear, workable, and uncomplicated standards and procedures. If such standards and procedures have been adopted, child protection workers who follow them should not be unfairly exposed to the risk of liability. At the same time, if the standards and procedures are willfully disregarded, and gross invasions of personal liberty result, liability should be easier to establish.

While the exclusionary rule clearly does have deterrent value in child protection cases, there are significant social costs in applying the rule. But before identifying the particular social costs in this area, a preliminary word is needed concerning the methodology of evaluating social costs.

Because the exclusionary rule was first developed in the area of criminal law, deciding whether to apply it to a particular area of civil law inevitably requires a comparison of the relative costs and benefits of the rule in the criminal context. To dispense with the rule, we must conclude that the costs weigh more heavily against the benefits of the rule than in the area of criminal law.⁴⁶⁴

The consequences of applying the exclusionary rule in civil child abuse cases are arguably far more serious than the consequences of applying the rule in the typical criminal proceeding. Perhaps the most compelling social cost of applying the exclusionary rule to civil child protection proceedings is that, if the rule is applied, there may be no means to protect the child. By law, child protection proceedings are to be brought only when the special protection of the court and the child welfare agency are essential to the protection of the child.⁴⁶⁵ The

462. D. BESHAROV, *supra* note 11, at 13-16.

463. *Id.* at 2-9.

464. In *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court weighed the costs and benefits of applying the exclusionary rule in the context of immigration proceedings and determined that applying the rule under such cases had greater costs and fewer benefits than in the area of criminal law. *Id.* at 1050.

465. See, e.g., D.C. CODE ANN. § 6-2124(c) (1981) (providing that child protection proceedings are to be brought only "when it has been determined that the child cannot be adequately protected . . . by any other services"); IND. CODE ANN. § 31-6-11-10(b) (Burns Supp.

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circumstances are different from those in a criminal case where there is an identified victim who is at risk of further harm from the accused. The police can provide direct protection to the potential victim, and the victim may have civil remedies against the accused, civil remedies in which the accused will not have the benefit of the exclusionary rule.

In line with this analysis, an exception to the exclusionary rule might be created for protective proceedings, i.e., proceedings brought for the sole purpose of safeguarding one individual from another identified individual. This exception would include, but be broader than, child protection proceedings. Consider the following:

A police officer has illegally obtained evidence of the assault of a young woman by her boyfriend. The evidence cannot be used against the boyfriend in a criminal proceeding. Unable to afford a private attorney, the woman seeks the assistance of the district attorney to obtain a civil injunction under state law. The evidence may be admitted in the proceeding seeking injunctive relief.

This example is analogous to a child abuse case in which, although the perpetrator cannot be prosecuted because of the unlawful seizure of critical evidence, the evidence can be introduced in the civil child protection proceeding.

There are, it must be admitted, particular criminal cases in which excluding evidence may inevitably endanger members of the public. In those cases, the social cost of applying the exclusionary rule is as great as in civil child abuse and neglect proceedings. An example might be a case in which an individual has been charged with a series of sexually motivated homicides. Because critical evidence has been illegally obtained, the Constitution requires that the individual be set free, even if the evidence indicates that he will continue to commit murders and assaults.

Nevertheless, it is illogical to focus on an unusual or extreme example from the criminal law when balancing the costs and benefits of the exclusionary rule in civil proceedings. Although it seems anomalous that the costs and benefits of applying the rule in a particular category of civil cases should be compared to the costs and benefits of applying the rule in the entire area of criminal law, this is the approach currently followed by the Supreme Court.⁴⁶⁶

1987) (providing that the child protective service team shall "by juvenile court order, provide protective services to prevent cases where a child may be a victim of further child abuse or neglect").

466. See *supra* note 156 and accompanying text.

In summary, the deterrent value of applying the exclusionary rule to civil child protection cases is significant, but is balanced in part by the fact that applying the rule would probably increase police involvement in civil investigations. Involvement of the police is likely to be experienced by families as more rather than less intrusive, even if police are better schooled than social workers in constitutional protections. The cost of applying the rule in the civil proceeding would be overwhelming for the child who is the subject of the proceeding. On balance, therefore, the rule should not be applied in the civil proceeding.

There is no compelling reason not to apply the rule in a criminal case, whether the evidence has been illegally obtained by a child protection worker or by police. Applying the rule to child protection workers would deter collusion in illegally obtaining evidence for the police, and may, to some extent, make child protection workers more careful about adhering to constitutional requirements whenever a possibility of prosecution exists.

VI. CONCLUSION

While most parents, professionals, agencies, and members of the public cooperate with child abuse investigations, state laws need to be strengthened to address those situations where they do not. Clear legal requirements and remedies not only can prove useful in cases of blatant noncooperation, but also can subtly influence the conduct of routine investigations. When investigators know that they have the right to information and know how legally to go about getting it, they can take a more straightforward and thorough approach in conducting an investigation.

There are difficult constitutional issues that must be addressed in creating investigative remedies. These constitutional issues present sharply conflicting concerns—the need to safeguard families from state intrusion and the need to protect children from possible maltreatment. There are no solutions that can fully accommodate both concerns. Nevertheless, we should not evade these issues because of their difficulty; we should implement solutions that seem consistent with good policy and current law while we await definitive answers by the courts.

The following is a brief summary of proposed responses to the key constitutional issues discussed in this article:

First, to enter a family residence, the child protection investigator either should have consent (obtained without coercion or trickery), or have a reasonable suspicion that the child has been maltreated and

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that evidence of the maltreatment will be found in the residence. Unless there are exigent circumstances, prior court approval should be required for a nonconsensual entry.

Second, a child protection agency should be permitted to briefly interview the child without parental permission where there is a reasonable suspicion of maltreatment. Unless there are exigent circumstances, prior court approval should be required for a nonconsensual interview when parents are present.

Third, while no additional quantum of proof should be needed to conduct a physical inspection or examination of the child, the examination should be permitted only if it is relevant and necessary to the investigation, and it should be done in a manner respecting the child's dignity and privacy. Ordinarily, an examination of older children and adolescents should be conducted by medical professionals. Older adolescents should be permitted to independently consent to such examinations.

Fourth, an agency should be able constitutionally to compel third parties to provide information that may be relevant to a child abuse investigation, without particularized evidence that the information will in fact indicate that maltreatment has taken place. If the party claims a privilege against self-incrimination, the agency may constitutionally compel testimony by offering use and derivative use immunity.

Fifth, the exclusionary rule should not apply in child protection proceedings, but should apply in related criminal proceedings, even where the evidence illegally obtained originated with child protection agency investigators.

Legislation is needed to implement these principles and to deal with a number of other issues as well, as discussed more fully in Sections II.G, III.E, and IV.C.2 of this Article. Legislation also should outline the duties and authority of child protection investigators to interview children, to conduct or arrange examinations, to question witnesses, to obtain relevant records, and to prepare written, audio, and visual records of their own investigations. It should authorize medical professionals to conduct an examination of a child on their own initiative as needed to confirm or rebut suspicions of maltreatment.

Legislation should clarify the duties of professionals and members of the public to cooperate with child protection investigations. This includes not just reporting maltreatment but also sharing any information relevant to the examination, even if otherwise protected by confidentiality or privilege. Schools and residential facilities also should

be required to provide unrestricted access to children for brief interviews and examinations, as requested by child protection agency investigators.

Finally, legislation is needed to establish or strengthen prepetition remedies for overcoming noncooperation with child abuse investigations. These remedies should permit child protection agency investigators to gain entry to the child's residence, to gain access to the child, and to obtain pertinent testimony and records. Such remedies must articulate the required level of suspicion and procedures required by the Constitution, and attend to other relevant procedural details needed to make the remedy work smoothly in the particular jurisdiction.

Equally important is the need to establish clearer and more complete administrative guidelines for child maltreatment investigations. Investigators need clear direction concerning such issues as limits in obtaining consent, how to proceed during emergencies, and what steps to take when faced with noncooperation by parents and other persons. By outlining concrete steps and criteria for child maltreatment investigations, agencies can help ensure that their investigators both persist in their investigations and obtain information by the least intrusive and offensive means practical, respecting the dignity of children and families.

Establishing or strengthening administrative criteria and procedures for child protection investigations requires intellectual exertion, including collaboration by agency policymakers, staff, legal counsel, and police. It also requires political courage, for in such a sensitive, difficult, and controversial area agency officials sometimes feel safer in leaving investigative procedures and decisionmaking to the discretion of individual investigators and supervisors. Establishing explicit criteria and procedures produces something that can be criticized, while failing to do so helps keep the investigative process obscured from the public view.

Yet strengthening investigative guidelines, which can help guide, but can never entirely replace, professional discretion, can benefit child protection agencies. Not only can they help the agency to better detect and stop the maltreatment of children without needlessly separating families, but guidelines can also help prevent sensational lawsuits caused by uncorrected maltreatment and harmful judicial interference. The Illinois investigative guidelines,⁴⁶⁷ created in

467. See *supra* text accompanying notes 311, 328-32. The reader should be aware that the American Bar Association, the author's employer, was involved in the development of the

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response to broad-based judicial challenges to Illinois investigative procedures,⁴⁶⁸ are a good example of an administrative effort to establish guidelines for investigations.

Illinois handbook. See *E.Z. v. Coler*, 603 F. Supp. 1546, 1549 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

468. *Darryl H. v. Coler*, 585 F. Supp. 383 (N.D. Ill. 1984), *aff'd in part and vacated in part*, 801 F.2d 893 (7th Cir. 1986), and *E.Z. v. Coler*, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), were filed prior to development of the Illinois handbook, which was created in part as a response to the litigation. While some aspects of the procedures were subject to criticism by the Seventh Circuit, *Darryl H. v. Coler*, 801 F.2d 893, 903-04 (7th Cir. 1986), Illinois has so far escaped any sweeping or comprehensive judicial prescriptions concerning the investigative process.

APPENDIX
STATUTES AUTHORIZING INVESTIGATIVE ENTRIES

	Remedy for Entry into the Child's Home	Remedy for Entry into Other Places Where Evidence May Be Found	Standard of Proof to Gain Entry	Ex Parte Procedure to Gain Entry
Alabama	X		Good Cause	
Alaska				
Arizona				
Arkansas	X	X		
California	X	X	Cause	
Colorado	X		Good Cause	
Connecticut				
Delaware				
D.C.				
Florida				
Georgia				
Hawaii				
Idaho				
Illinois				
Indiana	X	X	Prob. Cause	X
Iowa	X		Prob. Cause	
Kansas				
Kentucky	X	X	Prob. Cause	X
Louisiana	X	X	Good Cause	X
Maine				
Maryland				
Massachusetts				
Michigan				
Minnesota				
Mississippi				
Missouri				
Montana				
Nebraska				
Nevada				
New Hampshire				
New Jersey	X	X		X
New Mexico				
New York				
North Carolina				
North Dakota	X	X	Prob. Cause	X
Ohio				
Oklahoma				
Oregon				
Pennsylvania				
Rhode Island				
South Carolina	X		Prob. Cause	X
South Dakota				
Tennessee	X		Cause	
Texas	X		Cause	
Utah				
Vermont				
Virginia				
Washington				
West Virginia				
Wisconsin				
Wyoming	X	X	Prob. Cause	X

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Explanation of Chart

This chart surveys state statutes authorizing investigative entries in child abuse investigations. Each statute has been examined for the presence of four criteria: One, a remedy established for entry into the child's home to inspect or search; two, a remedy established for entry into other places where evidence may be found; three, a standard of proof to gain entry; and four, an *ex parte* procedure to gain entry.

The existence of a "remedy for entry into the child's home" to inspect or search will be established where the statute specifically provides for access to the child's home for investigative purposes. For example, the language of the following Indiana statute is clearly applicable: "A court may issue warrants only upon probable cause . . . to search any place for . . . [e]vidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children." IND. CODE ANN. § 35-33-5-1(a)(6) (Burns 1985). Note that a statute allowing entry for the purpose of merely locating or interviewing the child will be insufficient.

The second criterion, "the remedy for entry into other places where evidence may be found," is similarly specific. There must be statutory language providing for entry, not only into the home or place where the child is located, but also into any place where evidence is likely to be found.

The third criterion, "the standard of proof to gain entry," is established where the statute provides for some threshold level of causation to trigger the right to search. "Good cause," "probable cause," or "reasonable cause" are typical standards that will suffice.

The fourth criterion, an "ex parte procedure to gain entry," is met wherever the statute allows the investigator to apply for a judicial remedy or court order without notice to the other party. Generally, any search warrant provision applicable to a child abuse investigation will suffice to meet the requirement.

An "X" mark on the chart indicates express statutory language on point in regard to any requirement. Absence of an "X" mark indicates no express affirmative language or inconclusive statutory language. Note that in some cases where there is no express affirmative language, courts fill in the gaps through judicial interpretation.

The following state statutes establish remedies for investigative entries:

ALA. CODE § 26-14-7(c) (1986); ARK. STAT. ANN. § 42-813(b), (c) (Supp. 1985); CAL. CIV. PROC. CODE §§ 1822.50-.51 (West 1982 & Supp. 1988); COLO. REV. STAT. § 19-10-109(3) (1986); IND. CODE ANN. § 35-33-5-1(a)(6) (Burns 1985); IOWA CODE ANN. § 232.71(3) (West Supp. 1988); KY. REV. STAT. ANN. § 199.335 (Baldwin 1985); LA. REV. STAT. ANN. § 14:403(G)(5) 122 (West Supp. 1988); N.J. STAT. ANN. §§ 9:6-8, 30:4C-12 (West 1976 & 1981); N.D. CENT. CODE §§ 29-29.1.01,-1.02,-1.03; 50-25.1-05 (1974 & Supp. 1985); S.C. CODE ANN. § 20-7-650(C) (Law. Co-Op. 1985); TENN. CODE ANN. § 37-1-406(e) (Supp. 1987); TEX. FAM. CODE ANN. § 34.05(c) (Vernon Supp. 1988); WYO. STAT. § 14-6-218 (Supp. 1988).