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

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Josh Gupta-Kagan*

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

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

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

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INTRODUCTION

Mr. Greene is arrested for allegedly molesting an unrelated boy. That boy’s mother reports that Mr. Greene’s wife “had talked to her about how she doesn’t like the way the man makes their nine-year old daughter sleep in his bed when he is intoxicated and she doesn’t like the way he acts when she is sitting on his lap.” A child protection investigator goes to the nine-year-old’s school, takes her out of class, brings her to a private room and closes the door. The girl denies that Mr. Greene abused her and signals that she does not want to talk further. But the investigator does not accept her denials and repeatedly asks about possible abuse. After two hours, she says that her father did abuse her. The investigator removes her from her parents’ custody and places her in foster care. She recants the allegation. State officials have a doctor examine her; no evidence of sexual abuse is found. Three weeks later, lacking evidence to prove abuse, the state sends her home and closes the case.¹

Under the prevailing Fourth Amendment “special needs” doctrine, the seizure of the child in the above scenario is likely constitutional. That doctrine provides that searches and seizures serving states’ “normal need for law

¹ This fact pattern tracks that in Camreta v. Greene, whose facts are discussed in Part I.a, with one difference: in Camreta, a deputy sheriff joined the social worker in the interrogation, and jointly investigated the alleged sex abuse for possible criminal charges.
enforcement” require a warrant and probable cause, while searches and seizures serving “special needs beyond” law enforcement do not. The doctrine offers no means “to discriminate among distinct sorts of non-law-enforcement objectives,” so the importance of the non-criminal justice constitutional rights implicated by the searches and seizures are of no import. With no law enforcement purpose, no warrant or probable cause would be required. Although the searches and seizures involved could still be tested for reasonableness, their qualification as a “special need” is almost certainly outcome-determinative. Following this analysis, millions of investigative steps like the fact pattern above – seizures of children and parents for non-consensual interviews, searches of families’ homes, and inspections of children’s bodies – occur each year.

This article argues that the special needs doctrine should draw a line between searches and seizures that threaten fundamental constitutional rights beyond the search or seizure itself and those that do not. By focusing only on the presence or absence of law enforcement purposes, the doctrine in its present form ignores the infringements on children’s and parents’ privacy rights by the searches and seizures themselves, and the severe consequences – infringement on the fundamental substantive due process right to family integrity – that flow from these searches and seizures. The doctrine also ignores a basic purpose under Fourth Amendment law – to distinguish between searches and seizures that require a warrant and probable cause as a check on executive branch discretion and those that do not. When a search or seizure threatens fundamental constitutional rights and involves significant executive discretion, a warrant and probable cause should be required.

Child protection searches and seizures illustrate the problematic analysis and results created by the present special needs doctrine. Unlike special needs searches implicating public employment or other consequences beyond fundamental constitutional rights, child protection investigations implicate the 14th Amendment family integrity rights of millions of children and parents every year. Child protection investigations have given rise to two Supreme Court special needs cases, including Camreta v. Greene, on which the

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3 Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87 (1989). Schulhofer’s important article argues that the law enforcement/other purposes distinction is “chimerical and irrelevant.” *Id.* at 89. He proposes replacing that distinction with one between government activity to achieve some kind of “social control” versus searches and seizures “in aid of the internal governance objectives of public enterprises.” *Id.* at 118. I discuss that proposal, *infra*, at note 248 and accompanying text.

4 By “fundamental constitutional rights,” I mean those rights that have been held to apply to the states through that Amendment – that is, those rights held to be “the very essence of a scheme of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or have been held to be fundamental constitutional rights through some other source, most likely the Fourteenth Amendment. *Infra* note 251 and accompanying text.
above fact pattern is based, and which reached the Supreme Court (and was decided on jurisdictional, not Fourth Amendment, grounds) in 2011. Unlike the fact pattern above, Camreta involved a joint investigation between a deputy sheriff and child protection worker, both of whom were present in the interview. The case centered on whether the deputy sheriff’s involvement placed the seizure on the “normal need for law enforcement” side of the special needs line. The special needs doctrine mandated this focus – but it ignores the profound questions that arise independent of any law enforcement involvement. Because the only potential criminal consequences in Camreta were faced by the suspected father, the doctrine’s law enforcement focus ignored the consequences to the child – who was separated from her family and placed in state custody, infringing on one of the most fundamental liberty interests enjoyed by anyone, especially children. The doctrine ignored the invasiveness of the seizure itself, its consequences for the constitutional right of family integrity, and the level of discretion involved in performing the seizure. And when there is no law enforcement involvement (as occurs millions of times every year), the doctrine permits significant invasions of children and families’ privacy at home and elsewhere, implicating fundamental constitutional rights, without consideration of the severity or credibility of allegations. In the majority of cases affecting millions of families, child protection investigations infringe on liberty and threaten family integrity without giving children or families any benefit in return. Moreover, the doctrine ignores a troubling aspect of many child protection investigations — poorly performed interviews of children, such as the interview in Camreta, inadequately regulated by state agencies. When, as alleged in Camreta, abuse or neglect has not occurred, they create false allegations that lead to unnecessary state intervention in families. When abuse or neglect has occurred, they create evidentiary problems when states appropriately seek to intervene in families.

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

Despite its flaws, the special needs doctrine distinguishes between searches and seizures that threaten important rights and are thus more invasive than those that do not. This article breaks new ground by identifying the value of drawing a bright line between searches and seizures implicating some fundamental rights, and those that do not. Such a bright line values constitutional liberties by creating incentives for policy makers to avoid more invasive forms of state intervention; by choosing a policy option that infringes on liberty less, governments can ensure the administrative state can do its work without the burdens and limitations that come with a warrant and probable cause requirement. By focusing on the administrative state’s workings, the doctrine can also push the government to develop clear administrative procedures that adequately substitute for a warrant procedure. The doctrine should be reformed to account for searches and seizures conducted with the purpose of implicating significant non-criminal constitutional rights and the level of executive branch discretion.

This article connects child protection investigations and the special needs doctrine which governs them – both of which have independently received critical academic focus. This article will build off of that recent work, while offering new analysis both of child protection cases and the special needs doctrine. Doriane Lambelet Coleman has made a powerful normative argument against excepting child protection searches and seizures from warrant and probable cause requirements: the invasiveness of these searches measured against the strength of privacy and liberty interests at stake requires traditional Fourth Amendment protections.\(^6\) Her normative case needs no repetition here. Her doctrinal argument, however, depends on the special needs doctrine in its present form, concluding that the entanglement between law enforcement and civil child protection authorities in these searches renders the special needs doctrine inapplicable.\(^7\) This conclusion overstates the extent of law enforcement entanglement. Many, perhaps most, child protection searches and seizures do not involve law enforcement and do not come with law enforcement consequences. Absent such law enforcement entanglement, the currently prevailing special needs test will apply to most such searches and seizures, and would likely approve of the warrantless searches and seizures that Coleman has argued so powerfully against. Considered from her perspective, then, the special needs doctrine needs reevaluation.

The academy has criticized the special needs doctrine, including the law enforcement purpose threshold, for its “doctrinal incoherence”\(^8\) and for

\(^6\) Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413 (2005).

\(^7\) Id. at 425-26.

\(^8\) Schulhofer, *supra* note 3, at 89.
being “notoriously unclear,”9 but has spent little time considering how the doctrine’s bright line – which has existed for multiple decades and remains strong – could be tied more meaningfully to the rights implicated by specific searches and seizures. An early and oft-cited work called for replacing the law enforcement versus other purposes distinction with a distinction between searches and seizures serving “internal governance imperatives of a self-contained public activity” and searches and seizures serving “external social control”10 – an approach which only indirectly considers the constitutional rights at stake and less effectively incentives government to choose less liberty-infringing policy options.

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

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

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

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9 Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254, 257 (2011). See also id. at 257-58 (summarizing past criticism).
10 Schulhofer, supra note 3, at 89, 118.
I. CAMRETA V. GREENE AND CHILD PROTECTION SEARCHES AND SEIZURES: ILLUSTRATING THE PROBLEM WITH THE CURRENT SPECIAL NEEDS TEST

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

First, they illustrate the special needs problem effectively because they implicate the fundamental but non-criminal constitutional right of family integrity – “perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court.”\(^\text{11}\) Relatively, child protection cases have shown that their various fact patterns present hard special needs questions to the Supreme Court. Two different child protection cases, *Camreta* and *Ferguson v. City of Charleston*,\(^\text{12}\) have already done so. Given the lack of resolution of the Fourth Amendment issue in *Camreta* (which the Court dismissed for mootness\(^\text{13}\)), a future child protection case is likely to shape special needs doctrine.\(^\text{14}\)

Second, analyzing child protection searches adds to our academic understanding of the special needs doctrine. Courts and academics have traditionally addressed all “administrative search” cases under one heading, ignoring important differences between different categories of cases. Others in the academy have contributed to “disentangling” different types of cases – and thus analyzing each category more coherently.\(^\text{15}\) For example, Eve Brensike Primus identifies two categories: “dragnet” cases (such as police roadblock or health inspection cases) “special subpopulation searches” of individuals with reduced expectations of privacy.\(^\text{16}\)

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\(^{12}\) 532 U.S. 80 (2001). *Ferguson* is discussed *infra* Part II.c.

\(^{13}\) 131 S.Ct. 2020, 2026 (2011).

\(^{14}\) There are other possible scenarios. For instance, state action to commit individuals to mental institutions involuntarily requires clear and convincing evidence that the individual is mentally ill and must be institutionalized to protect the individual or others. *Addington v. Texas*, 441 U.S. 418 (1979). Evidence might include the individual’s statements, medical records, and articles at his home, e.g. id. at 421, and might be gathered by entering an individual’s home or seizing the individual for a mental health evaluation. *Gooden v. Howard County*, 954 F.2d 960 (4th Cir. 1992) (*en banc*) (involving an entry into a private home, justified by reasonably perceived exigent circumstances). Civil schemes may regulate individuals’ right to own firearms – now recognized as a fundamental constitutional right and applied against states, *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) – and may include provisions for seizing such guns. E.g. D.C. Code § 7-2502.10 (establishing an administrative procedure for revoking a certificate permitting gun ownership and compelling surrender of a weapon without mentioning a warrant or probable cause). If such procedures are valid, it is because the Second Amendment permits significant regulation, not because of the civil/criminal distinction.

\(^{15}\) Brensike Primus, *supra* note 9, at 260. Christopher Slobogin, commenting on Brensike Primus’s article, has agreed that scholars have “tended to lump all of these decisions together,” even if she makes an “overstated” case. Christopher Slobogin, *The Implications of Disentanglement*, 111 Colum. L. Rev. Sidebar 103, 104 (2011).

\(^{16}\) Brensike Primus, *supra* note 9, at 260.
do not fall neatly into either category and thus raise unique questions about the doctrine. They are not dragnet searches because all individuals are not stopped equally; child protection investigations only follow individualized allegations of child abuse or neglect. Nor do these investigations involve individuals with reduced expectations of privacy; children or parents who are searched or seized at their homes – core elements of child protection investigations – have no reduced privacy expectations. Arguably children at school have reduced expectations of privacy – a point contested in Camreta – but that only addresses a slice of child protection investigations.

Third, child protection searches and seizures represent a widespread and important issue in their own right, affecting millions of children and millions more adults every year. Moreover, the scope of these searches and seizures illustrates important policy incentives that may result from reforming the doctrine. Child protection agencies receive nearly 1.6 million reports of alleged child abuse or neglect each year, regarding nearly 3 million children. Those large numbers should be understood in the context of what happens in the resulting investigation. The majority of investigations – more than 80 percent – are closed without an administrative finding of abuse or neglect. Perhaps even more of these investigations should close without findings of abuse or neglect; the Second Circuit has described administrative findings of abuse or neglect as “at best imperfect,” noting that three-quarters of administrative challenges to such findings are successful. Challenges frequently only occur when the administrative findings lead a parent to lose a job, and a long backlog of administrative challenges may exist in some jurisdictions, suggesting that many parents with legitimate claims do not

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17 [*Infra note* Error! Bookmark not defined. and accompanying text.]

18 [*Infra note* 79.]

19 The federal government counted 1,581,882 reports. U.S. Department of Health and Human Services, Administration for Children and Families, Administration for Children, Youth, and Families, Children’s Bureau, *Child Maltreatment 2010* at 11 (2011), available at [http://www.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf](http://www.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf) (hereinafter *Child Maltreatment 2010*). This figure excludes child protection hotline calls which did not report alleged abuse or neglect. This figure only includes data from 45 states; extrapolated to include all states and territories, there were more than 2 million reports. See id. at 5 (reporting 3.3 million reports, multiplied by the “screened in” rate of 60.7 percent).

20 The federal government counted 2,987,515 children. Id. at 32. This counts only the children “who received a CPS response,” id., meaning it excludes children subject to referrals “screened out” by CPS agencies. See id. at 5 (discussing screening procedures). Accounting for children who were the subjects of multiple hotline calls and multiple CPS responses, the government counted 3,604,100 children – showing that a significant number of affected children face multiple CPS investigations each year. Id. at 32 (“duplicate count”).

21 Id. at 20.

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

23 Id.

24 See John O’Brien, NY denied thousands accused of child abuse the chance to clear their name, *Syracuse Post-Standard*, 22 March 2010, available at
challenge these administrative findings. (Of course, there may also be cases closed without a finding of abuse or neglect in which such a finding is justified.) Child protection agencies substantiate abuse or neglect in the remaining 20 percent of reports, affecting about 695,000 children. Neglect is the maltreatment found by child protection agencies in the majority of cases; physical or sexual abuse accounts for no more than 26.8 percent of cases.

Each of the 3 million children who are subject to these investigations has at least one parent or caretaker. Many have one or more siblings, and many share homes with people beyond their nuclear families. The total scope of child protection investigations is thus quite large: several million (perhaps as many as 10 million) children and adults subject to searches and seizures at home, school, and elsewhere every year. Following their own protocols, child protection agencies insist on inspecting homes and interviewing children, parents and other caregivers in each investigation. After investigations touching all of these individuals, the number of children subject to these investigations who child protection agencies remove from their families is fairly small—about 254,000 children, or 8.5 percent of the 3 million children subject to these investigations.

Examining these data has led some child welfare experts to argue that child protection agencies do not need to investigate several million children to protect one-quarter million through removal from parental custody. These commentators argue that the current rate of investigations require child protection agencies to spend too much time investigating cases unlikely to lead to the removals, either because the allegations are not credible or because the allegations are not sufficiently severe—unnecessarily intervening in many families, and draining limited resources from cases that need greater


25 Child Maltreatment 2010 at 20, 22.

26 U.S. Department of Health and Human Services, Administration for Children, Youth, and Families, Administration for Children and Families, Children's Bureau, Child Maltreatment FY 2010 at 24 (2010), available at http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf. The number may be lower than 26.8 percent because some children are found to have suffered from multiple forms of maltreatment; the 26.8 percent figure double counts children found to have been both physically and sexually abused. The federal data does not separately report the proportion of child protection hotline reports of neglect (as compared with abuse). One study of small samples of hotline calls suggest that the majority of hotline reports are also of neglect. Jane Waldfogel, The Future of Child Protection 14 (1998).

27 Infra notes 61-63 and accompanying text.

attention.  Connecticut’s reformist child welfare director estimated that 40 percent of all investigations could be diverted to a less adversarial and approach.  

More traditional Fourth Amendment protections would create incentives for states to triage child protection hotline calls more effectively and thus reduce the scope of privacy invasions that these investigations entail.

Relatedly, some evidence exists that by not investigating families at lower risk of maltreatment, child protection authorities can better protect children in more serious cases: A study of Missouri’s “differential response” pilot – through which state officials only investigated more severe allegations and diverted less severe reports – concluded that by reducing the number of less serious investigations, authorities had more investigatory time to focus on sexual abuse cases.  Those investigations were more comprehensive and police were able to gather enough evidence to arrest more perpetrators of sexual abuse and prevent them from preying on more children.

If the Missouri study is correct, then creating incentives to limit the number of child protection searches and seizures will serve both the government’s interest in protecting children and parents’ and children’s privacy and family integrity interests.

Fourth, these searches and seizures have occurred so frequently and for many years without definitive rulings on their constitutionality, or much attention from the academy.  Camreta v. Greene is one of a relatively small set of cases challenging CPS investigatory tactics.  As a result, Fourth Amendment concepts appear to be largely foreign to the day-to-day operations of child protection investigations.  A 225 page manual guiding District of Columbia investigations, for instance, does not mention the Fourth Amendment, and does not refer to “probable cause,” “warrant,” or “reasonable suspicion” as concepts that limit investigators’ authority.

In the academy, Doriane

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29 E.g. Waldfogel, supra note 26.
32 Doriane Lambelet Coleman’s article is the clear exception to this lack of attention, and Coleman began her article by noting the “dearth of scholarly attention” to the subject. Coleman, supra note 6 at 423.
33 Government of the District of Columbia, Child and Family Services Agency, Investigations Practice Operational Manual (2011), available at http://cfsa.dc.gov/DC/CFSA/About+CFSA/Policy/CFSA+Policy+Manual+Table+of+Contents/Program+Policies/Program+-+Investigations (last visited 2 Nov. 2011). The manual refers to probable cause as the standard by which the Family Court will judge whether allegations of abuse or neglect are true and thus whether a child may be removed, id. at 49, but the term is not used in connection to the child protection investigation itself. Similarly, the manual refers to search warrants executed by police that lead to evidence of child abuse or neglect, id. at 84, but not as something that limit child protection investigations.
Lambelet Coleman has taken a crucial step towards addressing the Fourth Amendment status of child protection searches, making a compelling normative argument for applying traditional Fourth Amendment standards – probable cause and warrant requirements – to child protection searches and seizures. But Coleman frames her argument in connection to her conclusion that the special needs doctrine should not apply to such searches; she argues against applying some other “child welfare exception” to the warrant and probable cause requirements for such searches. I am not so sanguine that the current special needs doctrine would not apply to child protection searches; at the very least, many cases will present less child protection and law enforcement entanglement than Camreta did, making Coleman’s normative argument more difficult doctrinally.

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

A. Camreta v. Greene: Facts

An Oregon Department of Human Services caseworker, Bob Camreta, and Deschutes County Deputy Sheriff James Alford investigated allegations that Nimrod Greene had molested his daughters, S.G. and K.G. – the allegations triggered Camreta’s civil child protection investigation and Alford’s criminal investigation. Mr. Greene had been arrested for suspected sexual abuse of an unrelated seven year old boy, who told police that Mr. Greene twice touched the boy’s penis over his pants when Mr. Greene visited the boy’s home and was drunk. The boy’s mother told the police that Mr. Greene’s wife, Sarah Greene, said “she doesn’t like the way Nimrod makes [S.G. and K.G.] sleep in his bed when he is intoxicated.” The boy’s parents acknowledged that they lacked direct evidence that Mr. Greene abused his daughters, but that concern about Mr. Greene’s behavior towards his daughters while drunk “has come up in several ways from Sarah and Nimrod.”

About one week later, Mr. Greene was released from jail. Camreta learned of his release and of his resulting unsupervised contact with S.G. and K.G. Three days passed without action or investigation. Camreta and Alford then went to the school of S.G., who, at 9 years old, was the older sibling. Camreta intentionally chose to not seek the consent of either of S.G.’s parents, and to interview S.G. at school so that she would be “away from the potential

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34 Id. at 508-38.
35 Infra notes 56-58 and accompanying text.
36 The children are identified only by initials in all public court documents.
37 588 F.3d 1011, 1016 (2009).
influence of suspects, including parents.” Camreta did not seek a warrant or any court order before the interview.

At Camreta’s request, a school counselor took S.G. from her classroom, and brought her to a private room at the school where she was left alone with Camreta and Alford. S.G. felt “scared.” Camreta and Alford kept her alone in that room for two hours while they interviewed her. The deputy sheriff had his firearm visible and did not ask questions during the interview. The child protection social worker, Bob Camreta, took the lead in the interview, first asking S.G. if her father touched her. S.G. responded in the affirmative, but emphasized that these were good touches – hugs, kisses, “piggy-back rides, rides on his shoulders and horsey rides.” Camreta did not accept that answer, and kept asking S.G. if her father touched her “in a bad way.” The questions repeated until, in S.G.’s words, “I just started saying yes to whatever he said.”

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

After the interview, both criminal and civil child protection authorities believed they had sufficient evidence to act. A grand jury indicted Mr. Greene for felony sexual assault of S.G. and the unrelated boy. A court ordered Mr.
Greene to have no contact with S.G. or K.G. Camreta discussed the no
contact order with Ms. Greene and left convinced that Ms. Greene denied Mr.
Greene’s abuse and would not protect her children from future abuse, an
assertion Ms. Greene denies.44 Camreta then filed a petition in the local
juvenile court asking for “protective custody” of S.G. and K.G. The court
issued such an order and the government removed S.G. and K.G. from their
parents and placed them in foster care.45

S.G. and K.G. remained in state custody for 20 days. During that
time, the state sent them both to the “KIDS Center” for interviews and
physical exams. S.G. told interviewers that her father had not abused her and
that her statements to the contrary to Camreta and Alford were false. During
the exam, S.G. was asked to undress and examiners looked all over her body,
including with a magnifying glass, and took pictures of her “private parts.”46
The exam did not reveal evidence of sexual abuse.47 The Department of
Human Services then asked the juvenile court to return S.G. and K.G. to Ms.
Greene’s custody, which the court did.48

The criminal charges against Mr. Greene resolved in plea deal: Mr.
Greene entered an Alford plea regarding the abuse of the unrelated boy, and
the charges that he abused S.G. were dismissed.49

S.G. testified in her deposition that she continued to feel guilty for the
false statements made during her interrogation, and that she felt “real bad”
because those statements led to her removal from her parents’ custody for
several weeks, and her father’s criminal prosecution.50

B. Similar themes in child protection searches and seizures more generally

The Camreta facts evoke four key themes in child protection
investigations. First, child protection searches are often – though not usually –
genuinely joint efforts between civil and criminal law enforcement agencies.
Camreta investigated the basis for a civil child welfare case and Alford the
basis for a criminal case, and there was no evidence that one was cover for the
other. Such joint investigations between civil child protection agencies and law
enforcement are commonplace, especially for allegations of sexual or physical
abuse, whose facts (if accurate as alleged) typically establish both civil and
criminal violations. And, as Coleman has explained in detail, collaboration

44 588 F.3d at 1018.
45 Id. at 1018-19.
46 The phrase “private parts” comes from S.G.’s deposition. Id. at 1019. Although not
elaborated in the opinion, evaluators presumably examined her vagina and anus for any
injuries consistent with sexual abuse.
47 Id.
48 Id. at 1020.
49 Id.
50 Camreta v. Greene, Nos. 09-1454 and 09-1478, Brief for Respondents, at 12 (2011), available at
http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/09_1454_Brief_U
pdates/09-1454_RespondentBrief.authcheckdam.pdf.
between child protection agencies and law enforcement “is diverse and wide ranging,” and likely to expand due to pressure to coordinate investigations.\(^{51}\)

Still, this collaboration ought not be overestimated – and, for this reason, Coleman asks it to prove too much. Laws requiring notification of and cooperation with law enforcement – which the Fifth Circuit has held bring some child protection searches over the line to an “ordinary law enforcement” purpose\(^{52}\) – apply to investigations of physical or sexual abuse, not generally to neglect or to less severe allegations.\(^{53}\) But the majority of child protection allegations and investigations are for neglect – not physical or sexual abuse. Nationally, only 26.8 percent of substantiated cases involve physical or sexual abuse – meaning the vast majority would not trigger the mandatory law enforcement involvement.\(^{54}\) The reported child protection Fourth Amendment cases suggest that even some physical abuse investigations do not involve police officers or the expected sharing of information for law enforcement purposes, rendering law enforcement entanglement a “contingency [that] is certainly of secondary importance.”\(^{55}\) As Wayne LaFave has pointed out, “[t]he police ordinarily need not be directly involved” in child protection investigations.\(^{56}\) One non-legal commentator has put it more strongly, writing that “child welfare agencies bear almost the complete responsibility for investigating child abuse.”\(^{57}\) Indeed, as Stephen Schulhofer

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\(^{51}\) Coleman, \textit{supra} note 6, at 492-96.

\(^{52}\) \textit{Roe v. Texas Dept. of Prot. & Reg. Servs.}, 299 F.3d 395, 407 (5th Cir. 2002).

\(^{53}\) Tex. Fam. Code Ann. § 261.301(f), \textit{cited in Roe}, 299 F.3d at 407. Although the exact line between allegations which must be shared and those which need not be shared varies by state, some line between severe and less severe cases is common. \textit{See}, e.g., Ark. Code Ann. § 12-18-504 (requiring reporting to law enforcement allegations of “severe maltreatment” only); Conn. Gen. Stat. Ann. § 17a-101b(c) (“sexual abuse or serious physical abuse” only); Fla. Stat. Ann. § 39.301(2) (“criminal conduct” only); Ga. Code Ann. § 19-7-5(e) (abuse only); 325 Ill. Comp. Stat. Ann. 5/7 (severe cases only, such as death, brain damage, skull fractures, torture of a child, or sexual abuse); Iowa Code Ann. § 232.70 (sexual abuse only); Md. Code Ann. Fam. Law § 5-704(b) (abuse only); Miss. Code Ann. § 43-21-353(1) (sex abuse, serious physical injury, or other felony only); N.H. Rev. Stat. Ann. § 169-C:38 (sexual abuse, “serious bodily injury” or other crime only); N.C. Gen. Stat. § 7B-307(a) (abuse only); 23 Pa. Cons. Stat. Ann. § 6365(c) (only for specifically referenced crimes in § 6340(a)(9), such as homicide, sexual abuse, or serious physical injuries).

\(^{54}\) \textit{Supra} note 26.

\(^{55}\) \textit{Darryl H. v. Coler}, 801 F.2d 893, 902 (7th Cir. 1986). Some state statutes presume that police will not always join investigations of physical or sexual abuse. Texas law, for instance, provides that “[t]he inability or unwillingness of a local law enforcement agency to conduct a joint investigation” does not absolve a child protection agency of investigating. Tex. Fam. Code Ann. § 161.301(g). \textit{See also} Fla. Stat. Ann. § 39.301(2) (giving law enforcement discretion to accept or reject reports from the Department of Children and Family Services for criminal investigation). This statement may be dated – Coleman convincingly documents expanded law enforcement and child protection cooperation – it demonstrates the core point that most investigations do not involve law enforcement entanglement.

\(^{56}\) Wayne R. LaFave, 5 \textit{Search & Seizure} § 10.3 (4th ed. 2010 update).

has argued, governments often permit both administrative and criminal sanctions for the same actions, and that permission, “cannot by itself defeat an administrative scheme, if the administrative category is to exist at all.”  

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

Third, specific child protection investigation steps occur regardless of the veracity or severity of the allegation. The “Investigations Practice Operational Manual” of the District of Columbia child welfare agency offers a case in point. It directs CPS investigators to “conduct a thorough investigation” into every allegation of child abuse or neglect. Each allegation triggers a requirement “to interview and assess ALL children in the home,” and such interviews must include physical observations (including photographs “when applicable or appropriate”). Social workers must “examine” all “family living areas,” “[d]etermine sleeping arrangements for all household members,” and interview other household members. All these steps must occur simply because somebody has alleged that one child in a home has been abused or neglected. That allegation could be severe – for example, repeated sexual abuse – or relatively minor – that a 10 year old may have been left home alone for several hours. The allegation could be from a credible source – like a pediatrician who has a record of making accurate allegations and who saw the particular child in question immediately prior to making the allegation – or

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58 Schulhofer, *supra* note 3, at 117.
59 The special needs doctrine’s focus on law enforcement consequence to the individual seized is discussed in Part II.c.
60 *Camreta v. Greene*, Nos. 09-1454 and 09-1478, Brief for Petitioner Bob Camreta, at i (2010), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1454_PetitionerBobCamreta.authcheckdam.pdf.
62 *Id.* at 66 (emphasis in original).
63 *Id.*
64 *Id.* at 74.
65 *Id.* at 75.
from an anonymous caller, or a from a neighbor, family member, or ex-partner of the parent with an ongoing dispute with that parent. The allegation may be the latest in a pattern of allegations from multiple sources about a family, or the first allegation. None of these variables affect the steps to be taken – search every room of the relevant home, and interview all children and all adults in that home.

This phenomenon distinguishes child protection investigations from law enforcement investigations, in which the probable cause standard requires officials to evaluate a tipster’s “veracity,” “basis of knowledge,” and “overall reliability” before determining what investigatory steps must be taken.66 These factors flow into a “totality of the circumstances” test to determine if probable cause exists for a search or seizure in a criminal investigation,67 no similar factual evaluation generally occurs in child protection cases. By removing discretion from the decision whether to investigate particular tips, the child protection system broadens the scope of invasive investigations beyond what is necessary to protect children. A leading study of a set of child protection investigations found a large “extent to which the system seems to be used for family and other quarrels,” that is, with ex-partners, family members, or neighbors reporting abuse or neglect based on spite rather than evidence. The study found such reports less likely to be substantiated than others – yet triggering the same invasive investigation.68 Wallis ex rel. Wallis v. Spencer69 provides an extreme example. In that case, a woman in a mental hospital told her therapist that the woman’s brother-in-law was in a satanic cult and planned to murder his two-year-old son on the fall equinox. The therapist called the child protection agency to report the mentally ill woman’s allegation. The woman who was the source of the allegation had had no contact with the family against whom she made allegations for 18 months. She had also made a previous allegation that her brother-in-law was sexually abusing his daughter – an allegation for which the child protective service found no credible evidence.70 Confronting an allegation from an individual who lacked a basis of knowledge, had previously made a false allegation, and was in a questionable mental state, authorities investigated the allegation, removed both the children from their parents, and subjected them to sex abuse examinations (including body cavity examinations). The children stayed in state custody for two and one-half months before being returned to their parents – with no evidence of any physical or sexual abuse discovered.71

67 Id.
68 Waldfogel, supra note 26, at 19.
69 202 F.3d 1126 (9th Cir. 1999).
70 Id. at 1131-32.
71 Id. at 1132-35. The extreme state actions in Wallis should suffice to prove the search and seizure unreasonable even if the special needs test applied. Wallis also illustrates a different point – that by exempting child protection investigations from warrant and probable cause
Although child protection law and policy prevent officials from exercising discretion to invade liberty less by declining to investigate particular reports or declining to perform certain investigatory steps based on the facts of certain cases, child protection investigators have a significant amount of discretion regarding when, where, and how to investigate, and can use that discretion to invade liberty more. Bob Camreta, for instance, chose to interview S.G. at her school, during the school day, and without first contacting her mother, and, at least as alleged by S.G., chose to keep S.G. in a room with him until she agreed that her father had molested her. Other reported cases reflect the wide variety of searches performed by child protection investigators following their interpretation of individual cases. Some are quite disturbing. One investigator responded to a report that a six year old girl exhibited some sexualized behavior, and decided to take photographs of the child’s vagina and buttocks, despite having no training in physically examining children for evidence of sexual abuse. The investigator made the child’s mother “spread Jackie’s labia and buttocks” so the investigator could take pictures.\footnote{Roe v. Tex. Dep’t of Prot. & Reg’l Servs., 299 F.3d 395, 398-99 (5th Cir. 2002).} The investigator’s supervisor testified that this action was within the investigator’s discretion.\footnote{Id. at 399.} The child soon developed anxiety symptoms requiring counseling and her mother was reduced to tears; no evidence of abuse was found.\footnote{Id. at 399.}

Fourth, it is exceedingly difficult to discern the truth about specific allegations, and investigative steps taken by child protection authorities can hinder the search for truth. Did Camreta pressure S.G. into making false allegations, which she recanted when his high-pressure interrogation ended? Or did S.G. tell the truth to Camreta, only to later change her story to protect her family or following pressure from either or both parents? Quite simply, we will never know. If we assume that Mr. Greene was guilty of abusing his daughter, the facts of the interrogation — repeated, aggressive, leading questions of a 9 year-old afraid she would be kept from going home — and S.G.’s subsequent recantation would make it difficult for the government to meet its burden of proving that Mr. Greene did, in fact, abuse S.G. It might make S.G.’s earlier statements inadmissible.\footnote{Idaho v. Wright, 497 U.S. 805 (1990).} At the least, it would provide

\footnote{Roe v. Tex. Dep’t of Prot. & Reg’l Servs., 299 F.3d 395, 398-99 (5th Cir. 2002). The facts of this case were striking enough that Coleman used them to introduce the topic in \textit{Storming the Castle to Save the Children}. Coleman, \textit{supra} note 6, at 414-15.}
\footnote{Id. at 399.}
\footnote{Id. at 399.}
fertile grounds for cross examination of both S.G. and Camreta and make for an uncertain trial. Moreover, S.G.’s statements to Camreta were not recorded – making independent verification of both her statements and his questioning impossible. Effective investigative techniques are essential to both identifying child abuse and neglect and to gathering convincing evidence so that the state may act on it when appropriate. States – including Oregon, where Camreta occurred – have developed detailed guidelines to ensure appropriate techniques.\footnote{Oregon Department of Justice, Crime Victims’ Assistance Section, Oregon Interviewing Guidelines (2d ed. 2004), available at http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf.}

\textbf{C. Ninth Circuit and Supreme Court litigation’s focus on whether it was primarily a law enforcement or child protection seizure}

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

Judge Berzon’s Ninth Circuit opinion concluded that the extensive entanglement between civil and criminal child abuse investigations generally, and in the investigations regarding S.G. and her father specifically, rendered the special needs doctrine inapplicable.\footnote{588 F.3d at 1025-30.} But the opinion also expressed some discomfort with that result acknowledging that both protecting children through the civil foster care system and criminally sanctioning child abusers are both “governmental activity of the highest importance.”\footnote{Id. at 1029.} Despite the great importance of both civil and criminal purposes, the existence of only the latter determined the Ninth Circuit’s result.

Camreta’s arguments to the Supreme Court in favor of applying the special needs doctrine and S.G.’s rebuttals also illustrate some of the difficulties created by the special needs binary. Camreta offered one argument relying on that binary, focusing on the lack of law enforcement consequences to S.G.,\footnote{Camreta v. Greene, Nos. 09-1454 and 09-1478, Brief for Petitioner Bob Camreta, at 19-21, 27-29 (2010), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdf/09_10_09_1454_PetitionerBobCamreta.authcheckdam.pdf. Camreta also offered an analogy to school search cases, which he argued lessened children’s expectation of privacy. Id. at 30-34. That argument is discussed infra note 136.} then a second argument that explicitly sought to merge criminal and civil investigations. The first argument ignores crucial elements of S.G.’s story,\footnote{Wright did not address whether such statements would be admissible in under rules of evidence in a civil case.} to satisfy the Confrontation Clause. \textit{Id.} at 827. Wright did not address whether such
and the second runs headlong in the special needs doctrine as currently formulated.

Camreta first argued that S.G. was a mere witness – an argument which only makes sense if one focuses entirely on criminal consequences. Camreta relied on an earlier special needs case (discussed in Part II.c) that upheld police officers’ right to briefly stop motorists to inquire if they were witnesses to a crime at the location of the stop – like those motorists, Camreta argued, S.G. was a potential witness to a crime and not a suspect.\(^{80}\) If one considers only the criminal investigation, this analogy has some force. But S.G. faced much more serious consequences than being made a witness in a criminal case. She was detained not only to provide evidence regarding someone else, but to provide evidence that would have a profound effect on her life. Her seizure and interrogation led the state to forcibly remove her and her sister from both her father and her mother, and to place them in state custody for several weeks. S.G.’s seizure and interrogation thus led directly to the emotional harms caused when the state separates children from their parents, deprived her of physical liberty by placing her in state custody, and subjected her to the various well-documented risks of living in foster care.\(^{81}\) Those concerns, however, all fall on the non-criminal side of the special needs binary, preventing S.G. from making those arguments without also attacking the special needs doctrine that had granted her victory in the Ninth Circuit. Rather than argue those points, S.G. was forced to distinguish the motorist-witness case on other grounds – the length and character of the seizure.\(^{82}\) These factors relate to the reasonableness of the seizure – an analysis that is only relevant when the special needs doctrine applies.\(^{83}\)

Camreta next argued that states should be permitted to follow the “best practice” of interviewing potential child-abuse victims in “a single joint interview with law enforcement and child-protective caseworkers present.”\(^{84}\)

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\(^{80}\) Id. at 19–21, 37–38. The United States, as *amicus curiae*, similarly argued that absent a “serious threat of prolonged incarceration or other punishment,” S.G.’s seizure did not violate her Fourth Amendment rights. *Camreta v. Greene*, Nos. 09-1451 and 09-1478, Brief for *Amicus Curiae* United States of America, at 26 (2011), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_09_10_09_1454_PetitionerAmCuUSA.authcheckdam.pdf.


\(^{83}\) *Infra* note 152 and accompanying text.

\(^{84}\) *Camreta v. Greene*, Nos. 09-1454 and 09-1478, Brief for Petitioner Bob Camreta, at 28–29 (2010), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_09_10_09_1454_PetitionerBobCamreta.authcheckdam.pdf.
Joint interviews reflect the understanding that authorities can emotionally traumatize a child by forcing him to tell and re-tell how a close family member physically or sexually abused them to multiple audiences. Such teams could also have expert forensic interviewers as members, whose involvement could prevent false allegations or doubtful statements that flow from poorly conducted interviews. But such multi-disciplinary collaboration requires breaking down lines between law enforcement and other agencies – the same lines that are bolstered by the special needs test. Camreta’s brief left it unclear how exactly the concern with higher quality interviewers ought to fit into the Fourth Amendment analysis.

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

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

83 Accordingly, Congress has urged states to use multidisciplinary teams to investigate abuse allegations. 42 U.S.C. § 5106(a)(2)(A) (cited in Camreta, Brief for Petitioner, at 28).
86 See Lindsey E. Cronch et al., Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions, 11 Aggression and Violent Behavior 195, 196 (2006) (noting that poorly-conducted interviews can lead to false allegations). That Camreta relied on this authority, Brief for Petitioner at 29, is not without irony; Camreta and Alford did not interview S.G. through a multidisciplinary team or a trained forensic interviewer, and S.G. alleged that Camreta used precisely the kind of bad interview techniques that lead to false allegations. Moreover, S.G. alleged that her mother would have consented – and, in fact, did consent (though Camreta and Alford did not act on her consent) – to an appropriate multidisciplinary interview, which would have made any Fourth Amendment issues moot. Brief for Respondent Sarah Greene and S.G. at 68-69.
88 Id. at 71-74.
89 Id. at 39.
proposed test led to insupportable lines. A school nurse could likely take a child into her office, but, S.G. argued, an outside official could not do so “to deal with situations that are not related to the school.” S.G. conceded that an outside nurse could bring the child to her office to address the child’s possible illness, leading to this ultimate question from Justice Scalia: “[L]ikewise, it’s not a nurse, but it’s a social worker who’s brought in to interrogate the child about something else that is going to very much harm that child, why is that any different?” Counsel’s answer: “Well, Your Honor, because child welfare investigations are also harmful to children. And when – when a child is asked, interrogated about whether or not her father touches her inappropriately, that’s not a neutral action. Whether or not she has been abused that causes trauma to the child.”

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

D. Circuit court cases in other CPS search and seizure cases also focus on special needs test.

The Camreta litigants were not alone in their focus on law enforcement entanglement. Synthesizing various circuit courts’ rulings in child protection cases, LaFave’s Fourth Amendment treatise focuses on the existence of any entanglement with law enforcement. When police are not included in the search – as they often are not – and when a child abuse investigation is “sufficiently disentangled from general law enforcement purposes,” then the “valid administrative purpose” of protecting children from abuse creates a special need justifying a lower standard than probable cause. Otherwise, they would not so qualify.

90 Id. at 40-46.
91 Id. at 40-41.
92 Id. at 43.
93 Id. at 44.
LaFave accurately accounts for how at least five federal circuit courts of appeal (including the Ninth Circuit, in *Camreta* and earlier decisions\(^97\)) have addressed these cases – with a particular focus on whether they fall on the “special needs” or “normal law enforcement” side the special needs doctrine’s bright line. The Fifth Circuit’s 2008 decision in *Gates v. Texas Department of Protective and Regulatory Services*\(^98\) illustrates the point.\(^99\) Investigating allegations that Gary Gates physically abused some or all of his 12 children, child protection investigators took several steps that involved law enforcement. They brought one child to a “Child Advocacy Center” interview to be witnessed by child protection and law enforcement authorities. They also searched the Gates family home with deputy sheriffs.\(^100\) The Fifth Circuit concluded that the search of the Gates’ home “was closely tied with law enforcement” and thus the special needs doctrine did not apply.\(^102\) In an earlier case, the Fifth Circuit had held that Texas law entangled sex abuse investigations with law enforcement – even when no police officer or other

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\(^97\) See *Calabretta v. Floyd*, 189 F.3d 808, 816-17 (9th Cir. 1999) (explaining why it would not apply T.L.O. to a child protective search).

\(^98\) 537 F.3d 404 (5th Cir. 2008).

\(^99\) The Second Circuit has illustrated the same point, declaring a sex abuse examination of a five year old (which included the insertion of cotton swabs into the child’s vagina and anus and which revealed no evidence of abuse) unconstitutional because no special need existed in that particular case – though it suggested such a need might exist in a future case. *Tenenbaum v. Williams*, 193 F.3d 581, 588-91, 603-04 (2d Cir. 1999) (summarizing facts of the underlying search and seizure). So has the Seventh, applying T.L.O. to a child protection worker’s search of a child’s body for injuries on public school premises any law enforcement involvement or purpose. *Daryl H. v. Color*, 801 F.2d 893, 900-02 (7th Cir. 1986). The Tenth Circuit has suggested a similar point in dicta in two cases. *Jones v. Hunt*, 410 F.3d 1221, 1227-29 (10th Cir. 2005) (discussing but not deciding whether T.L.O. applied because the alleged conduct would have violated any Fourth Amendment standard); *J.B. v. Washington County*, 127 F.3d 919, 929-30 (10th Cir. 1997) (noting the special needs question but concluding that probable cause existed and so the search was valid regardless of the doctrine’s application).


\(^100\) Id. at 413.

\(^101\) Id. at 414. The sheriff’s office may also have been called because Texas law requires child protection authorities to notify law enforcement authorities of all child abuse reports, and to engage law enforcement in a joint investigation of allegations of immediate risk of physical abuse – as was the case in this investigation. *Tex. Fam. Code Ann.* §§ 261.105(b) & 261.301(f), *cited in Gates*, 537 F.3d at 423.

\(^102\) Id. At 424.
law enforcement authority participated in a search – by requiring notification of cooperation with law enforcement for such investigations.103

The special needs doctrine’s current iteration has failed to lead to results that create clear rules or justifiable distinctions between the wide variety of child protection searches and seizures. Within the Seventh Circuit, the location of the search – apart from any greater or less law enforcement entanglement – matters; the search approved of in a public school is not permitted in private schools.104 And in another setting, the Seventh Circuit has adjudicated a Fourth Amendment child protection case challenging state officials’ seizure of a child from his home without reference to its prior precedent or the special needs doctrine.105 The Second and the Tenth Circuits have explicitly left open the question whether the special needs doctrine applies to any child protection searches, or only to those with law enforcement involvement.106

E. The special needs doctrine’s failure to provide satisfying answers in Camreta and other child protection search and seizure cases.

If courts followed the special needs doctrine in Camreta, they might reasonably reach the same result as the Ninth Circuit, and as several other circuit courts. I agree with that result, but the reasoning would be unsatisfying. It would vindicate S.G.’s claim based on a factor – Deputy Sheriff Alford’s involvement and presence – that was of little importance to S.G. herself. It would fail to provide a meaningful analysis to address a significant purpose of child protection searches and seizures – investigative steps to determine if the state should infringe on the fundamental right of family integrity – and instead focus on the state action’s connection to some law enforcement purpose. It would elevate that law enforcement purpose above the civil child protection purpose despite both representing, as the Ninth Circuit noted, “governmental activity of the highest importance.”107 It would draw a line between those two highly important purposes when the current trend right seeks to merge those purposes into a united investigation to minimize the number of interviews of potential child victims.108 And it would entirely ignore the millions of child protection investigations (probably the majority of such investigations) which

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103 Roe v. Tex. Dep’t of Prot. & Reg. Servs., 299 F.3d 395, 407 (5th Cir. 2002). In that case, only the child protection investigator was involved in the challenged search. Id. at 398-99.
104 Michael C. v. Grebach, 526 F.3d 1008, 1018 (7th Cir. 2008).
105 Brokaw v. Mercer County, 235 F.3d 1000, 1009-12 (7th Cir. 2000) (discussing Fourth Amendment claim without reference to special needs doctrine).
106 Supra note 99.
107 588 F.3d at 1029.
lack a law enforcement component yet implicate the same fundamental rights. In so doing, it would lead to odd, if not perverse, results: It would be easier for child protection authorities to invade family privacy to investigate allegations of neglect – the kind of allegations that do not trigger automatic requirements of reporting to law enforcement\(^{109}\) – than it would be to investigate allegations of more serious abuse or neglect.\(^{110}\)

Applying the current special needs doctrine could also plausibly lead to a different result in *Camreta*. As *Camreta* argued, S.G. (and children in child protection investigations more generally) do not risk criminal consequences, thus making them appear more like potential witnesses than targets of ordinary law enforcement activity. This analysis might lead to a different result than the Ninth Circuit reached in *Camreta*, but would not change the result in child protection investigations of parents’ homes – as in *Gates* – when law enforcement was also involved in those searches. This result, too, makes little sense. It would unduly prioritize parents’ privacy interests over children’s – even though it is children who are at risk of being taken into state custody – and it would prioritize the potential criminal consequences to parents over the loss of their children to foster care.

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

II. THE SPECIAL NEEDS DOCTRINE’S UNJUSTIFIED LINE AROUND LAW ENFORCEMENT SEARCHES AND SEIZURES

The difficulties apparent in *Camreta* and other child protection cases result directly from the special needs doctrine developed by the Supreme Court. That doctrine requires one to discern the “primary . . . programmatic purpose”\(^{111}\) of a particular search and seizure – “the normal need for law enforcement”\(^{112}\) or some other end. This section will explore how that binary developed without ever adequately justifying what distinguishes law enforcement searches and seizures from all other searches or seizures. The absence of a law enforcement purpose links the various types of cases that fall

\(^{109}\) See notes 53-54 and accompanying text.

\(^{110}\) Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 801 (1994) (criticizing Fourth Amendment cases’ focus on criminal purpose thusly: “If taken seriously, this would mean that, as between two equally unintrusive but low-probability searches, the search justified by a more compelling purpose – criminal enforcement to protect person and property – is less constitutionally proper.”) (emphasis in original).


\(^{112}\) *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).
under the “special needs” rubric – home safety inspections, suspicionless drug testing, school discipline searches, highway checkpoints, and others. That absence is the threshold criteria for all special needs cases, and, as such, the Court’s failure to provide some insight into it is glaring.

Despite failing to justify the bright line around law enforcement searches and seizures, the special needs case law provides some support for the reforms proposed in Part III. The case law focuses on the constitutional consequences that result from particular searches and seizures – one of the bases for the proposal to redraw the special needs’ bright line around all searches and seizures that threaten a significant invasion of fundamental constitutional rights. And the case law does discuss the value of some limitation on government officials’ discretion, an important value that a reformed special needs doctrine should reflect.

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

A. Origins – Camara v. Municipal Court

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

Camara’s holding relates directly to the consequences of a proposed administrative search: Roland Camara refused to permit a municipal employee to inspect his home to evaluate its compliance with the local housing code, and was prosecuted for that refusal. The Supreme Court held that one could not be criminally punished for refusing to consent to a warrantless search of one’s home – a holding which followed the dicta of an earlier case which stated that

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113 Different types of special needs cases do involve somewhat different analyses; for instance, executive branch discretion may be less concerning in a school discipline search – which depends on giving school officials discretion to respond to varied circumstances – than it is in applying a blanket drug test or checkpoint regime to all people meeting certain criteria. Brensike Primus, supra note 9 at 271 (contrasting “special subpopulation” and “dragnet” searches).

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“the right to privacy in the home holds too high a place in our system of laws to justify” a criminal consequence for refusal to permit a warrantless administrative actor entry into a home.\textsuperscript{115}

Before reaching that conclusion, the Court analyzed how the proposed health and safety inspection might trigger different concerns than a criminal investigation – an analysis so muddled that it illustrates the absence of a principled line around law enforcement purposes. The Court first wrote as if it would deny the entire concept of administrative searches and treat them identically to criminal searches: “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”\textsuperscript{116}

But the \textit{Camara} Court then significantly limited its holding, acknowledging the importance of such searches and that “routine period inspections of all structures” were necessary to enforce reasonable municipal regulations.\textsuperscript{117} This necessity compared with a relatively small privacy interest: “because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen’s privacy.”\textsuperscript{118} \textit{Camara} thus suggests simultaneously that the non-criminal purpose of a search does not justify diminishing Fourth Amendment protections and that a non-criminal purpose reduces the privacy interest to the point that individualized suspicion is not necessary – the seed of the doctrine later named “special needs.”

\textit{Camara} overruled a 1959 health inspection case, \textit{Frank v. Maryland},\textsuperscript{119} and tried, unpersuasively, to rely on statements by the \textit{Frank} majority and dissent to support a distinction between law enforcement and other types of searches.\textsuperscript{120} Although the \textit{Frank} majority had suggested such a distinction,\textsuperscript{121} its view was overruled in \textit{Camara}, and the \textit{Frank} dissent (whose viewpoint became the majority viewpoint in \textit{Camara}) merely said that that the facts necessary to establish probable cause would differ in a health inspection case from a criminal investigation.\textsuperscript{122} The relevant sections of both the majority

\textsuperscript{115} \textit{District of Columbia v. Little}, 339 U.S. 1, 7 (1950).

\textsuperscript{116} \textit{387 U.S.} at 530.

\textsuperscript{117} \textit{Id.} at 535-36.

\textsuperscript{118} \textit{Id.} at 537.

\textsuperscript{119} \textit{Frank v. Maryland}. \textit{Frank} held that a criminal conviction for refusing a warrantless health inspection of a home did not violate the Fourth or 14\textsuperscript{th} Amendments. \textit{Camara} explicitly overruled this holding of \textit{Frank}. \textit{387 U.S.} at 528.

\textsuperscript{120} \textit{359 U.S.} 360 (1959) (\textit{cited in Camara}, \textit{387 U.S.} at 537-38).

\textsuperscript{121} The \textit{Frank} Court opined that “the safeguards necessary for a search of evidence of criminal acts” would “greatly hobble[]” health inspections. \textit{359 U.S.} at 372 (\textit{cited in Camara}, \textit{387 U.S.} at 537).

\textsuperscript{122} \textit{359 U.S.} at 383 (\textit{cited in Camara}, \textit{387 U.S.} at 538). Justice Douglas’s \textit{Frank} dissent also went to some length to argue that the Fourth Amendment as providing meaningful protections beyond criminal investigations, describing anything else as a “fallacy.” \textit{Id.} at 377.
and dissent in *Frank* cited a yet earlier case, *Boyd v. United States*, but disputed *Boyd’s* meaning. *Boyd* itself was ambiguous regarding what types of searches and seizures would trigger a warrant requirement. On one hand, *Boyd* applied the warrant and probable cause requirements to a civil case involving forfeiture of goods which the government alleged to have been imported without payment of the proper customs duty. On the other hand, the *Boyd* Court also discussed how the forfeiture proceeding, “though technically a civil proceeding, is, in substance and effect, a criminal one,” or at least a “quasi-criminal” one because evidence justifying forfeiture would also have justified criminal sanctions for defrauding the government of revenue. Whatever lessons might be taken from *Frank* and *Boyd*, it is not, as *Camara* asserted, that a clear Fourth Amendment distinction exists between civil and criminal searches and seizures.

*Camara* did impose a warrant requirement for a reason that continues to resonate (even if the present special needs doctrine avoids it): Some check on executive branch discretion must exist to protect individual privacy, and only a warrant decision by a “disinterested party” could suffice. Limiting executive discretion is undoubtedly an essential purpose of the warrant requirement, and the Court discussed the level of discretion permitted by

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123 116 U.S. 616 (1886).
124 *Boyd* referred to “official acts and proceedings’ which triggered the warrant requirement. *Id.* at 624. The *Frank* majority distinguished “official acts and proceedings” from the health inspections at issue, while the dissent treated the health inspection as precisely within the *Boyd* “official acts and proceedings” category. *Compare* 359 U.S. at 372-73 (majority) & 359 U.S. at 383 (dissent).
125 The government had acted under a statute permitting it to obtain business records of importers so long as the demand occurred in “suits and proceedings other than criminal.” 116 U.S. at 619 (citing 18 Stat. 187). *See also id.* (quoting the government lawyer’s trial court motion demanding production of the record in question, which noted that “said action is a suit or proceeding other than criminal”). Scholars have supported this view of *Boyd* as consistent with the Framers’ concern about British “writs of assistance,” which permitted searches of any location without probable cause and without any criminal purpose. Schulhofer, *supra* note 3, at 115.
126 116 U.S. at 634. This language is also tied to the specific litigation purpose for which documents were sought in *Boyd*: the government filed a civil forfeiture suit, at least partly as a vehicle to demand production of documents regarding the items seized – production of which could have incriminated the individuals involved, thus raising Fifth Amendment concerns. *Id.* at 634-35; *see also id.* at 639 (Miller, J., concurring (“I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself.”)).
127 A government could obtain a warrant “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Camara*, 387 U.S. at 538. Schulhofer described this flexible standard as “antithetical to the traditional conception of ‘probable cause.”’ Schulhofer, *supra* note 3 at 91.
128 *Id.* at 532-33.
varying administrative schemes in a variety of cases decided in the fifteen years following Camara.\textsuperscript{130}

B. The T.L.O. “special needs” test

Eighteen years after Camara,\textsuperscript{131} Justice Blackmun gave the special needs doctrine its name and stated the rule that would be applied in future cases in a concurring opinion in New Jersey v. T.L.O: “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers”\textsuperscript{132} – that is, determine whether a search meets Fourth Amendment “reasonableness” standards rather than demand a warrant and probable cause. T.L.O. upheld a high school assistant principal’s search of a 14-year-old student. The decision (including Blackmun’s concurrence) lauded school officials’ use of discretion, and thus broke with Camara’s focus on a warrant requirement as a check on executive branch discretion. Blackmun was also silent regarding the consequences of the challenged search. Blackmun was consistent with Camara on other central points – he articulated a bright line between law enforcement purposes and all other purposes without any adequate justification. He also articulated a test that has the potential to permit the modern administrative state to operate and to prevent less invasive actions of the administrative state to provide cover for more invasive actions.

In T.L.O., the assistant principal suspected T.L.O. of having smoked a cigarette in the school bathroom – a violation of school rules, but not a crime. He brought her to his office and searched her purse, finding both a pack of cigarettes and rolling papers. Then, suspecting based on the rolling papers that her purse might contain more evidence of illegal drug possession – a crime – he searched further and found marijuana, drug paraphernalia, and documents implicating T.L.O. in drug dealing. The assistant principal then turned the evidence over to the police; the case reached the Supreme Court through litigation over T.L.O.’s motion to suppress the evidence of drug activity found by the assistant principal in the state’s ensuing delinquency case against her.\textsuperscript{133} Finding a warrant requirement and probable cause inapplicable to searches motivated by school discipline, which required quick, flexible, and informal action, the Court approved the search.\textsuperscript{134}

\textsuperscript{130} These cases are discussed in some detail in Brensike Primus, supra note 9 at 268-70. Those cases underscore the essential point from Camara – that the level of discretion held by the government official under a particular statutory or regulatory scheme is important to determining if a detached and neutral magistrate must issue a warrant.

\textsuperscript{131} For a concise summary of developments between Camara and T.L.O., see Schulhofer, supra note 3, at 93-99.

\textsuperscript{132} 469 U.S. at 351 (Blackmun, J., concurring).

\textsuperscript{133} 469 U.S. at 329.

\textsuperscript{134} 469 U.S. at 349-40, 347-48.
The most important difference between T.L.O. and Camara rests in their treatment of the warrant requirement. While Camara looked to the warrant requirement as a means to limit executive branch officials’ discretion, T.L.O. saw it as an obstacle to executive branch officials exercising discretion in a situation when such discretion is important. The search of T.L.O.’s purse qualified as a special need beyond the need for law enforcement because it was incident to establishing discipline and maintaining order in schools, tasks that required immediate action – which a warrant requirement would impede, even though children did have some expectation of privacy at school.

Although analysis of how an administrative scheme can cabin officials’ discretion and thus replace a judicial warrant continues in business regulation cases, T.L.O. represented a sharp shift in which limiting discretion no longer became a requirement of avoiding a warrant procedure. But the special need of prompt school discipline only partly explains T.L.O.; the absence of a law enforcement purpose is equally important. It is certainly true that the warrant requirement would interfere with school officials’ actions to enforce school rules. But it also interferes with police officers’ criminal investigations – interference the law accepts.

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135 See Brensike Primus, supra note 9, at 278 (comparing “dragnet” searches as those that required some mechanism to “cabin[] executive discretion” and “special subpopulation searches” as those that “required that the Court give executive officials the discretion necessary to pick out certain individuals for differential treatment”).

136 469 U.S. at 353 (Blackmun, J., concurring); see also id. at 338-41. Brensike Primus categorizes T.L.O. as a “special subpopulation” search, because children at school have reduced expectations of privacy. Supra note 9, at 270-71. Indeed, the Court has sometimes suggested that children have less privacy rights at school. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (“While children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”) (citation omitted). Nonetheless, a generalization that T.L.O.’s holding applies equally to any search or seizure of a child at school, regardless of any connection to maintaining discipline takes T.L.O. a step too far. The state officials pushed exactly that broad of a generalization in Camreta v. Greene, arguing that children’s lessened privacy in school justified the seizure of S.G.


138 Cf. Olmstead v. United States, 277 U.S. 439, 479 & n.12 (Brandeis, J., dissenting) (noting that the “beneficient” law enforcement purpose is “immaterial” to the constitutionality of a wiretap, and favorably quoting the argument that “it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government”); id at 485 (“To declare that in the administration of the criminal law the end justifies the means —
as public education is, it would be hard to argue that it is so much more important than public safety and criminal justice that it should be excepted from the Fourth Amendment limitations imposed on criminal investigations. The difference between the two types of searches, therefore, rests on the level of intrusion into protected privacy interests. And by the plain language of the special needs doctrine, it is not only the presence of a special need, but the absence of a law enforcement purpose that establishes such a limited intrusion.

Like Camara, T.L.O. failed to explain what makes “normal . . . law enforcement” searches so much more special than other searches that only individuals subject to them should enjoy the fullest Fourth Amendment protections. Blackmun’s opinion identified non-law enforcement needs – his examples included the need to police the border and to ensure an officer’s safety during a Terry stop and frisk\(^{139}\) – and did not justify the general rule itself. His only reference to law enforcement’s special status is an oblique reference to Camara’s language about searches not “aimed at the discovery of evidence of crime.”\(^{140}\) Moreover, both Blackmun’s concurrence and the plurality ignored the law enforcement consequences that actually resulted from the search. When the assistant principal found rolling papers, he suspected a criminal violation and searched more, and later turned over the evidence to the police, leading to a delinquency case against T.L.O. But the Court did not address whether the assistant principal intended to involve law enforcement at the time he searched further or only decided to do so after completing the search.\(^{141}\) It is certainly plausible, if not likely, that when the assistant principal decided to search T.L.O.’s purse further, he did so intending to find evidence of a crime and turn it over to law enforcement, thus transforming the purpose of a search from a school discipline search to one that also had law enforcement purposes. But the plurality simply concluded that the assistant principal had reasonable suspicion to search T.L.O.’s purse for more evidence of drugs, without considering whether that search had a law enforcement purpose.\(^{142}\) Blackmun’s concurrence did not even address the issue. T.L.O. thus left unexplored how to determine the validity of a search that could have had both law enforcement and school disciplinary purposes, and at what point the latter serves as a subterfuge for the former – questions that have become

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\(^{139}\) 469 U.S. at 352.

\(^{140}\) Camara, 387 U.S. at 537. Blackmun cited the page of Camara including the quoted language, 469 U.S. at 352, but without further explanation as to what exactly on that page he relied upon. The text prior to this cite related to roving Border Patrol stops, which are not discussed in Camara.

\(^{141}\) See Schulhofer, supra note 3, at 101 (criticizing T.L.O. on similar grounds).

\(^{142}\) 469 U.S. at 347.
more important as school discipline policies and law enforcement have become increasingly intertwined.  

C. The “special needs” test applied

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

The Supreme Court has applied the T.L.O. concurrence’s test repeatedly in a range of administrative search cases. In O’Connor v. Ortega, the Court addressed a state hospital’s search of the office of a doctor following allegations of financial mismanagement; no element of the search was turned over to law enforcement authorities. The search furthered the hospital’s needs as an employer, not a criminal case, thus, with multiple cites to Blackmun’s T.L.O. concurrence, the Court upheld the search. Applying O’Connor’s analysis, City of Ontario v. Quon upheld a search of a public employee’s text messages sent on a government-owned mobile device as part of an investigation into excess mobile charges; the only consequence was job discipline. The Court upheld blood and urine drug tests of railway employees for the purpose of ensuring railway safety, relying on T.L.O. The Court similarly upheld urinalysis drug testing of customs employees in positions that involve access to drugs, firearms, or classified material; employees who test positive could be fired, but would face no criminal consequences. Urinalysis of public high school students participating in athletics and other extra-curricular organizations – in which drug test results would lead to school consequences but no criminal or delinquency case – was

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similarly upheld, with the Supreme Court emphasizing the absence of law enforcement consequences.

The Court’s application of the special needs test is generally outcome determinative. If a search or seizure serves a special need apart from ordinary law enforcement, the Court proceeds to balance an individual’s reasonable expectation of privacy with the government and public interest in the challenged action. In practice, however, determining that a search is a special need other than law enforcement leads nearly invariably to the conclusion that the search or seizure was reasonable. Conversely, when the Supreme Court has found that a challenged action has a law enforcement purpose, it has found a Fourth Amendment violation. When the Court has found a special need apart from ordinary law enforcement, it has upheld challenged searches and seizures. It took 24 years from T.L.O. for the Court to provide an exception to this rule, holding in Safford v. Redding that a strip search of a teenage girl (with no law enforcement purpose or consequence) to have violated her Fourth Amendment rights. But even Safford is not particularly strong; the Court claimed it simply applied T.L.O.’s balancing test, yet still found that qualified immunity protected defendants, and so the teenage girl had no actual remedy.

The two most consequential post-T.L.O. special needs cases for this article’s purposes are Ferguson v. City of Charleston and Illinois v. Lidster. Both

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151 Earls, 536 U.S. at 829, 833-34; Acton, 515 U.S. at 651 & 658.
152 T.L.O., 469 U.S. at 352 (Blackman, J., concurring) (only when special needs beyond law enforcement exist “is a court entitled to substitute its balancing of interests for that of the Framers.”)
153 See Brensike Primus, supra note 9, at 256-57 (searches deemed special needs “are almost always deemed reasonable”).
156 Chandler v. Miller, 520 U.S. 305 (1997), is not an exception to this rule, even though the Court found a Fourth Amendment violation in a case not involving a law enforcement search. In Chandler, the Court held that a state law requiring candidates for certain offices to take a drug test violated their Fourth Amendment rights. Although there was no contention that such searches served law enforcement needs – “the results of the test are given first to the candidate, who controls further dissemination of the report,” id. at 318 – the Court found that no “special need” existed. Without evidence of an actual problem of drug users holding particular offices, the Court found that the state’s proffered need was not “important enough” to qualify as a special need. Id. Chandler thus stands for the proposition, tangential to this article, that a special need must indeed be special.
157 Barry Feld describes Safford as a “fact-specific limited right without any practical remedy,” not a significant challenge to the rule. T.L.O. and Redding’s Unanswered (Miss)answered Fourth Amendment Questions: Few Rights and Fewer Remedies, 80 Miss. L.J. 847, 870 (2011).
focus on the particular consequences of a challenged search or seizure to the individual searched or seized as the primary means of applying the special needs test. *Ferguson* involved drug tests designed to protect children from prenatal drug exposure. In 1989, a task force including a Charleston, South Carolina public hospital, local police, the County Substance Abuse Commission, and the Department of Social Services developed a policy for testing women for substance abuse during pregnancy and immediately after child birth.\textsuperscript{160} Hospital staff would notify police of positive drug tests, and arrest and prosecution would soon follow.\textsuperscript{161} Involved staff would follow chain of custody procedures—“presumably to make sure that the results could be used in subsequent criminal proceedings.”\textsuperscript{162} The challenged policy also shared information with child protection authorities—although the Court did not note this fact. Hospital officials disclosed the results of drug tests with an interdisciplinary group that met at the hospital for “Suspected Child Abuse and Neglect (SCAN)” meetings, which includes the Department of Social Services.\textsuperscript{163} The hospital informed women who tested positive upon birth of a baby that “a referral had been made to the Department of Social Services.”\textsuperscript{164} A hospital letter to patients summarized its policy, and listed the police, prosecutors, and child protection authorities and those who would be involved if women did not obtain treatment.\textsuperscript{165} But these facts did not feature prominently in the *Ferguson* litigation, which focused instead on the role of law enforcement and ignored child protection, starting with the district court’s jury instructions.\textsuperscript{166} The circuit court’s first opinion did not even address the child protection agency’s involvement,\textsuperscript{167} and its second opinion (on remand from the Supreme Court) summarized the facts of each case without mentioning the child protection agency’s involvement. Indeed, it appears from the reported decisions that the

\textsuperscript{159} 540 U.S. 419 (2004).
\textsuperscript{160} *Ferguson*, 532 U.S. at 70–71.
\textsuperscript{161} Id. at 72 & n.5. The hospital soon adjusted its procedures: After a first positive drug test, women could avoid police involvement by consenting to substance abuse treatment. A second positive drug test would trigger police notification. *Id.*
\textsuperscript{162} Id. at 71–72.
\textsuperscript{164} *Ferguson v. City of Charleston*, 308 F.3d 380, 389 (4th Cir. 2002).
\textsuperscript{165} *Id.* at 388.
\textsuperscript{166} The district court’s jury instruction, for instance, included this statement: “But what makes this case unusual and what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.” Brief for Petitioners at 5 (quoting district court’s jury instruction) (emphasis added). See also *Ferguson*, 308 F.3d at 393 (summarizing district court decision as “reject[ing] the special needs theory” because of law enforcement entanglement.”
\textsuperscript{167} *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999).
plaintiffs never challenged the sharing of information with child protection authorities. This was an entirely understandable litigation choice, and one that demonstrates how the special needs test’s line around law enforcement searches has hardened, shaping litigation to focus on that line.

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

Second, doctrinally, it clarified that one should look to the “primary” and “programmatic purpose” of a particular search. This programmatic inquiry focuses on policies, not the subjective intent of individuals involved in a particular search, and thus makes judicial inquiries less factually difficult – by avoiding the need to determine an individual’s subjective intent – and by creating a legal incentive to develop policies that avoid excessive entanglement between a legitimate “special need” and law enforcement. The Court identified a law enforcement policy purpose based not on the details of the actual search itself – which looked like any mundane hospital blood draw or urine test. Rather, the purpose was evident in the use of the fruits of that search – which the hospital promptly turned over to police – and the reasonably expected consequences from that decision.

Third, Ferguson demonstrates the special needs test’s ability to preserve important constitutional rights in the face of short-term political pressure. The hospital’s actions arose in a particular social and political context: “the problem of ‘crack babies’ was widely perceived in the late 1980’s as a national epidemic, prompting considerable concern both in the medical community and among the general populace.” The Court did not note that the most visible

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168 Id. at 81.
169 See infra 235-245 and accompanying text.
170 532 U.S. at 84-85. This feature of Ferguson also evokes some of the most powerful language of Boyd v. United States – the case relied upon in Frank and, by extension, in Camara. Supra notes 123-Error! Bookmark not defined. and accompanying text. Boyd found a Fourth Amendment violation even without authorities conducting a physical search; the mere compulsion that individuals surrender private documents created a Fourth Amendment violation: “It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .” 116 U.S. 616, 630 (1886).
171 532 U.S. at 70 n.1.
The legal effect of society’s concern about women exposing developing fetuses to crack-cocaine was evident in child welfare. The foster care population swelled when child protection agencies responded to increased use of crack-cocaine in those years. Removals of children born to substance-abusing mothers formed a hugely disproportionate amount of this increase; removals of infants increased 89% in New York and 58% in Illinois over three years, and most of those removals occurred “within days following birth.” 172 Subsequent longitudinal studies express significant doubt on the wisdom of these removals. Cocaine use during pregnancy is undeniably bad – but its effects are less severe than feared in the 1980s and 1990s, with increased risks of attention and self-regulation problems, but no significant effects on children’s physical growth, developmental test scores, or language outcomes. 173 Moreover, rather than removing infants exposed to drugs in utero from their parents, at least one child protection system has placed such cases on a “differential response” track, in which the family is not even investigated or generally subject to a finding of neglect that could lead to a removal. 174

Lidster v. Illinois is important for a different reason – it focuses on a law enforcement consequence to the individual searched or seized, and thus became a primary case relied upon by the state officials in Camreta. 175 Lidster upheld a highway checkpoint in which police stopped cars at the same location and time of day as a fatal hit-and-run that had occurred several days prior. Police asked motorists if they had witnessed the crime and did not expect to stop the culprit. The police officers’ goal – to catch a criminal other than the individuals seized at the checkpoint – distinguished Lidster from a highway checkpoint designed “to look for evidence of drug crimes committed by occupants of those vehicles,” which the Court had ruled unconstitutional. 176

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175 Supra note 80 and accompanying text.
176 540 U.S. at 423 (“The stop’s primary law enforcement purpose was not to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood
Even the *Lidster* dissent recognized the “valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier.”  

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

D. **Boundaries of the special needs doctrine**

Clearly defining what qualifies as a special needs case and what qualifies as a case considering some other warrant and probable cause exception is essential for various reasons. Mixing together different categories of administrative search cases can lead not only to confused analysis, but to the erosion of important Fourth Amendment safeguards. It is thus important to treat searches that have a law enforcement purpose—yet which do not trigger the warrant and probable cause requirement—as something other than a special needs search.
Recent Supreme Court cases suggest clearer boundaries around the special needs doctrine, and the delineation of other doctrines which exempt certain state action from warrant and probable cause requirements by addressing searches with law enforcement purposes directed at the individual searched under a reasonableness frame — and explicitly avoiding a special needs analysis. The Court has found a set of searches targeting individuals with such reduced expectations of privacy that the searches are permissible without a warrant or probable cause. The most recent and most clearly articulated example is *Samson v. California*, in which the Court upheld suspicionless and warrantless searches and seizures of state parolees; the opinion makes no effort to present the searches as justified by a special need beyond law enforcement and did not pretend the searches served any purpose other than ensuring criminal convicts had not slid into recidivism upon their parole.\footnote{547 U.S. 843, 847, 855 n.4 (2006); see also id. at 858 (Stevens, J., dissenting) (“Not surprisingly, the majority does not seek to justify the search of petitioner on ‘special needs’ grounds.”).}

Similarly, the Court in *United States v. Knights* upheld a warrantless search of a probationer’s apartment, with explicit consideration of the state’s “interest in apprehending violators of the criminal law,” given high recidivism rates of probationers.\footnote{534 U.S. 112, 118, 122 (2001). One factual distinction may make explain the unanimity of the *Knights* Court: reasonable suspicion (but not probable cause) existed to search Knights’ apartment. *Id.* at 116. The *Samson* dissenters focused on this difference; they would have permitted the warrantless search in *Knights* on reasonable suspicion, but prohibited the warrantless search in *Samson* because it lacked any individual suspicion. 547 U.S. at 857 (Stevens, J., dissenting). The difference goes to a “reasonableness” analysis — whether some individualized suspicion should be necessary to render the search reasonable, a debate beyond the scope of this article.}

One can question the results and analysis in *Samson* and *Knights*,\footnote{Many have questioned the *Samson* and *Knights* results. E.g. Brensike Primus, *supra* note 9, at 296-97 and 308 (criticizing *Samson*); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 Case W. Res. L. Rev. 1 (2008) (criticizing the Court’s Fourth Amendment “reasonableness” cases); Robert Cacace, *Samson v. California: Tearing Down a Pillar of Fourth Amendment Protections*, 42 Harv. C.R.-C.L. L. Rev 223 (2007).} but at least the Court did not try to push them within the boundaries of the special needs doctrine, thus avoiding the intellectual contortions of earlier cases. Two cases decided one week apart in 1987 confused the line between special needs and reduced privacy cases. In *Griffin v. Wisconsin*,\footnote{483 U.S. 868 (1987). In his *Ferguson* dissent, Justice Scalia cited *Griffin* for the proposition that “the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches *by law enforcement officials who, of course, ordinarily have a law enforcement objective.*” 532 U.S. at 100 (Scalia, J., dissenting). The majority opinion’s response to Scalia appropriately}
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Samson trace their lineage, the Court upheld a warrantless search of a probationer’s home holding that probation presented a special need “beyond normal law enforcement.” The majority weakly argued that supervision (including warrantless searches) of probationers helped ensure their re-entry into society without harming society via recidivism. The Court similarly squeezed a different type of search into the special needs box in New York v. Burger, upholding a warrantless and suspicionless search of an automobile junkyard. The “ultimate purpose” of the search was undeniably to deter and catch criminal behavior (specifically, the frequent use of automobile junkyards to hide stolen cars and parts), yet the Court described it as “[a]nother situation[] of ‘special need’.” Tellingly, the Court omitted the second half of the special needs test – whether the special need was beyond that of ordinary law enforcement. Some more recent lower court cases addressing DNA testing of criminal convicts also reflect the weak arguments that come from trying to squeeze searches designed to gather evidence of crimes by the individuals searched into a special needs analysis.

E. What makes law enforcement purposes so important?

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

Later Supreme Court and cases have briefly discussed factors that might explain what makes law enforcement searches so different. But none

focused the special needs doctrine on law enforcement purposes and entanglement. Id. at 79 n.15.

186 Knights twice cited Griffin as supporting its reasonableness analysis. 534 U.S. at 117-18, 119, 120. Samson cited Griffin in support of its reasonableness analysis. 547 U.S. at 848, 849, 854.

187 Id. at 874.
188 Id. at 875.
189 482 U.S. 691 (1987). The bulk of Burger explained the Court’s ruling that the search could occur because auto junkyards were a “pervasively regulated industry[,]” id. at 693, in which business owners’ reasonable expectation of privacy is reduced. Id. at 700-01.
190 Id. at 693. See also id. at 708 (“[M]otor vehicle theft has increased in the State and . . . the problem of theft is associated with this industry.”). Schulhofer aptly explained this flaw in Burger. Schulhofer, supra note 3, at 103.
191 Id. at 702.

192 I do not suggest that Burger is unimportant to the special needs doctrine. Once the Court applied the special needs doctrine to Burger – however flawed that decision may have been – the Court embarked on an important discussion of when an administrative scheme can adequately cabin officials’ discretion and replace a warrant procedure. Infra notes 231-233 and accompanying text.

193 Infra notes 229-230 and accompanying text.
194 Supra notes 139-140 and accompanying text.
195 Supra notes 119-Error! Bookmark not defined. and accompanying text.
are satisfying. First, O’Connor v. Ortega noted that supervisors in government agencies should focus on running an efficient government office and, unlike police officers, should not “learn the subtleties of the probable cause standard.”

Indeed, many state actors have far less interaction with the justice system than police officers and, one may argue, should not face the same restrictions on their behavior. One circuit court evoked this concern when, citing O’Connor, it wrote: “If forcing a non-law-enforcement government officer to follow ordinary law-enforcement requirements under the Fourth Amendment would impose intolerable burdens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be . . . subjected to less stringent reasonableness requirements instead [of probable cause and warrant requirements].”

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

Second, Justice Powell’s T.L.O. concurrence suggests that law enforcement officials have an inherently “adversarial relationship” with criminal suspects, unlike school officials with students. That distinction may have surprised T.L.O., who would likely have characterized her relationship with the assistant principal who searched her purse and turned her over to the police as adversarial. The point is even weaker when applied to child protection searches. Just as police “have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial,” child protection

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196 Cf. Schuhlhofer, supra note 3, at 114 (“Unfortunately, Justice Blackmun’s concurrence and the Court opinions based on it never attempt to justify the permissive side of his test. . . . And [later cases] cited his formulation as one already accepted and in no need of defense.”).

197 480 U.S. at 724-25.

198 T.L.O., 469 U.S. at 353 (Blackmun, J., concurring) (noting that teachers should not be expected to determine the existence of probable cause quickly).

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

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

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

202 Id. at 349.
investigators have the responsibility to investigate child abuse and neglect, locate abusive and neglectful parents and abused and neglected children and remove the latter from the former, and facilitate legal proceedings to effectuate such removals. Child protection investigations are inherently adversarial to parents, and to children who do not want protection from the state.\footnote{Indeed, one child welfare reform seeks to handle many abuse and neglect allegations differently — in the federal government’s terms, with a less “adversarial orientation.” U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, \textit{Differential Response to Reports of Child Abuse and Neglect}, at 6 (2008), available at \url{http://www.childwelfare.gov/pubs/issue_briefs/differential_response/differential_response.pdf}. See also Harvey Schweitzer & Judith Larsen, \textit{Foster Care Law: A Primer} 65 (2005) (child protection investigation “is most often adversarial rather than cooperative . . . .”). The issue of a child who wishes to speak with authorities is discussed \textit{infra}, notes 339, \textit{Error! Bookmark not defined.} and accompanying text.}

Third, the Court has suggested that the probable cause requirement is “rooted . . . in the criminal investigatory context.”\footnote{O’Connor, 480 U.S. at 723; \textit{Von Raab}, 489 U.S. at 667.} But the authorities relied on for this assertion focus less on anything unique to criminal investigations and more on the distinction between individualized investigations and “routine administrative caretaking functions”\footnote{Both O’Connor and \textit{Von Raab} cite \textit{Colorado v. Bertine}, 479 U.S. 367, 371 (1987) (cited at 480 U.S. at 723 and 489 U.S. at 667), which, in turn, relies on a footnote in \textit{South Dakota v. Opperman}, stating: “The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. The probable cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.” 428 U.S. 364, 370 n.5 (1976) (citation omitted). \textit{Bertine}, like \textit{Opperman}, involved a police inventory search of automobiles — searches governed by a separate category of Fourth Amendment law and which provided no occasion to address a non-routine, non-inventory search or seizure implicating an important constitutional right other than the various rights associated with criminal procedure. \textit{Bertine} also cited a footnote in \textit{United States v. Chadwick}, 433 U.S. 1, 10 n.5 (1977) (\textit{cited in Bertine}, 479 U.S. at 371) which is even less on point for the special needs doctrine. The \textit{Chadwick} footnote simply notes the \textit{Opperman} holding regarding police inventory searches and states “the salutary functions of a warrant simply have no application in that context.” \textit{Id.}} — a reference which evokes standardized, discretionless searches like at a border checkpoint or an airport, and says nothing about “noncriminal” investigations which are anything but routine and which implicate important constitutional rights. The Court might have cited \textit{Cady v. Dombrowski}, which recognized a “community caretaking” exception to the warrant and probable cause requirements when a search or seizure is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”\footnote{413 U.S. 433, 441 (1973).} \textit{Cady}’s language is roughly analogous to the special needs doctrine.\footnote{For a comparison of the community caretaking and special needs doctrines, see Michael R. Dimino, Sr., \textit{Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment}
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explanation, offering no citation for its “totally divorced” language. In context, Cady’s language merely explains that local law enforcement officers have frequent contact with automobiles for a variety of non-criminal purposes – enforcement of traffic, parking, and vehicle safety laws. Cady does not offer an explanation for why a bright line exists between criminal and non-criminal purposes. Then again, like early special needs cases, Cady did not deal with noncriminal searches or seizures that implicated important constitutional rights.

Fourth, Justice Breyer suggested in Lidster that searches or seizures which place the individual searched or seized at risk of arrest and prosecution are particularly likely “to provoke anxiety or to prove intrusive.” Breyer distinguished highway checkpoints designed to identify, stop, and punish criminal drug activity from “information-seeking” stops designed to ask the public for “help in providing information about a crime in all likelihood committed by others.” On one hand, Breyer’s focus on the likely consequence to the individual searched or seized is an essential element of a more analytically sound special needs doctrine, as argued in Part III.b. But on the other, this focus says nothing about why law enforcement searches in particular should be treated differently. In Camreta v. Greene, a seizure “provoke[d] anxiety” and “prove[d] intrusive” because of the civil consequences to a child’s home life – she was removed from her parents’ custody for several weeks – rather than because of any criminal consequence to the child. Put another way, focusing on the anxiety caused by law enforcement searches can help explain why those searches do not qualify for special needs, but does not explain why only those cases should.

In sum, in the 26 years since T.L.O. and 41 years since Camara, the Supreme Court has offered no sufficient explanation of what makes law enforcement purposes or entanglement so important that it distinguishes special needs searches and seizures from those that will trigger the warrant and

Reasonableness, 66 Wash. & Lee L. Rev 1485, 1519-27 (2009). In addition, Opperman – the ultimate source of the Court’s assertion that the warrant requirement is “rooted” in criminal investigations – cited Cady multiple times, 428 U.S. at 367, 368, 369 n.4, 374-76 & n.10, with a particular focus on Cady’s description of “noncriminal in nature” contact between police and individuals. Id. at 367.

413 U.S. at 441.

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


211 Id. at 424, 423.

212 See infra notes 41-43 and accompanying text.
probable cause requirements. As Akhil Amar wrote, the Supreme Court’s criminal versus other searches distinction provides “no answer.”  

_F. A concluding synthesis_

The special needs doctrine is now a well-established element of Fourth Amendment law, directing courts and litigants to analyze whether a particular search falls on the law enforcement or non-law enforcement side of the doctrine’s bright line. Despite its frequent application, the doctrine remains without any adequate justification for drawing this bright line where it does. In addition, since _T.L.O._, it has lost its focus on the reasons noted in _Camara_ and other cases for why the warrant requirement exists – cabining executive branch officials’ discretion. As discussed in Part I, these faults are on vivid display in _Camreta_ and other child protection cases – which involve state action implicating civil but fundamental rights, and state action involving significant discretion.

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

**III. TOWARDS AN IMPROVED SPECIAL NEEDS TEST**

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

_A. The special needs test’s value_

One can reasonably question whether the Supreme Court ought to jettison the special needs test entirely: After all, the Fourth Amendment’s text says nothing about the particular type of search, or suggest in any way that a search by police officer ought to be treated differently than a search by a

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213 Amar, _supra_ note 110 at 770. _See also id._ (“The unsupported idea that the ‘core’ of the [Fourth] Amendment is somehow uniquely or specially concerned with criminal law is simply an unfortunate artifact.”)
social worker or health inspector.\footnote{See id. at 758 (describing as false Fourth Amendment case law’s distinction between criminal and civil purposes because the Amendment’s text “applies equally to civil and criminal law enforcement” and “[i]ts history is not uniquely bound up with criminal law”).} I do not share this view. The special needs test has the potential for the Fourth Amendment to regulate meaningfully and rationally the wide variety of searches and seizures that occur in the modern administrative state and the different privacy interests those actions involve. The test reflects three important values.

First, drawing some bright line recognizes that many administrative searches involve minimal privacy intrusions while providing some important social benefit, and permits those to occur without permitting such searches to serve as cover for more invasive government action. \textit{Camara} dealt with a housing code search and the Court acknowledge the “vigorous” case “that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures.”\footnote{\textit{387 U.S. at 532}. An earlier case, not decided on constitutional grounds, addressed health department inspections. \textit{District of Columbia v. Little}, 339 U.S. 1 (1950).} Modern constitutional law respects this role of government and the special needs doctrine protects that role from overly burdensome Fourth Amendment regulation. Accordingly, \textit{Camara} acknowledged that the warrant requirement may be inappropriate if “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,” a theme reiterated by the Supreme Court\footnote{\textit{O’Connor v. Ortega}, 480 U.S. 709, 721 (1987); \textit{Marshall v. Barlow’s, Inc.}, 436 U.S. 307, 316 (1978) (discussing a potential warrant requirements burden on the Occupational Safety and Health Act’s entire regulatory scheme).} and lower courts.\footnote{\textit{E.g., Tenenbaum v. Williams}, 193 F.3d 581, 603 (2d Cir. 1999) (“If forcing a non law-enforcement government officer to follow ordinary law-enforcement requirements under the Fourth Amendment would impose intolerable burdens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be relieved of those requirements and subjected to less stringent reasonableness requirements instead.”).}

Conversely, the special needs test also provides a mechanism to ferret out administrative searches used as subterfuge for criminal investigations, and the Supreme Court’s record shows the promise of enforcing a line between true “special needs” and something else. \textit{Ferguson v. Charleston} aptly demonstrates the Court’s ability to enforce the line. But it is not the only case. In a series of highway checkpoint cases, the Court has distinguished between those with a primary purpose of “general . . . crime control” and those focusing on “roadway safety.”\footnote{\textit{Delaware v. Prouse}, 440 U.S. 649, 659 n.18 (1979).} A highway checkpoint with the “primary purpose of interdicting illegal narcotics” does not qualify for the special needs...
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doctrine, while a “sobriety checkpoint” to take drunk drivers off the road and thus prevent accidents in the immediate future does. In analogous areas, state courts have distinguished between police who entered a home to determine if unconscious individuals had overdosed on drugs and needed medical attention from police who seized a teenager in no obvious distress who they suspected of drug involvement. One need not agree with the precise lines courts have drawn – for instance, one can question whether a sobriety checkpoint designed to both take drunk drivers off the road and arrest and charge them with driving under the influence ought to qualify for the special needs doctrine – to recognize that the line exists and thereby provides some meaningful protection of Fourth Amendment interests.

I acknowledge that the Court’s record in policing against subterfuge is imperfect. Justice Blackmun, the original author of the special needs test, himself was criticized in New York v. Burger for applying a special needs framework to a search designed to determine if a vehicle dismantling business possessed stolen property; Blackmun, writing for the Court, found that the reduced expectation of privacy due to the “closely regulated” business qualified it for “special needs” treatment. Dissenting, Justice Brennan aptly refocused on the line between administrative and law enforcement searches. Other courts have engaged in some intellectual contortions to fit a particular search on the “special needs” and not “ordinary law enforcement” side of the line. For instance, a Ninth Circuit panel held that a search of a computer suspected to have been the source of recent and potentially ongoing hacking into a public university’s network was justified by the special needs doctrine.

220 Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 447 (1990). Sitz is not directly framed as a special needs decision. In response to plaintiffs’ argument that there was no special need beyond law enforcement – because drunk drivers were not just taken off of the road but arrested and charged with driving under the influence – the Court said that a separate body of “prior cases dealing with police stops of the motorists on public highways” governed, and that those cases permitted a balancing test. Id. at 450. That was a somewhat odd statement since Justice Blackmun had cited some of those highway stop cases in his T.L.O. “special needs” opinion. 469 U.S. at 352 (Blackmun, J., concurring) (citing United States v. Birgnoni-Ponce, 422 U.S. 873 (1975) and United States v. Martinez-Fuerte, 428 U.S. 543 (1976)). Regardless, the result is the same as if the Court had explicitly found a special need – the Court went on to apply a balancing test to determine if the stops were reasonable.
221 Compare State v. Pincard, 785 N.W. 2d 592 (Wisc. 2010) and State v. Kinzi, 5 P.3d 668 (Wash. 2000).
223 Id. at 724 (Brennan, J., dissenting). In a narrow sense, Brennan’s point is indisputable – a search designed to uncover criminal activity fails the special needs test articulated by Blackmun in T.L.O. Whether the reduced expectation of privacy in a closely regulated business should trigger some other exception to the probable cause and warrant requirement is another matter, beyond the scope of this article.
224 United States v. Heckenkamp, 482 F.3d 1142 (9th Cir. 2007).
The search was done in consultation with police officers, and to protect the university’s server and network from the effects of a federal crime – recklessly causing damage by intentionally accessing a protected computer without authorization. Distinguishing a search conducted in consultation with law enforcement to prevent or interrupt an ongoing crime from a search for “ordinary law enforcement” purposes is a distinction far too fine.

Courts’ difficulty in enforcing the line between true special needs cases and law enforcement searches and seizures arises with greater frequency when courts do not respect the boundaries of the special needs doctrine discussed above. That was the case in Burger, which was largely decided based on the reduced expectation of privacy held by a closely regulated business. Lower court cases showing difficulty policing the special needs line similarly confuse reduced privacy cases with special needs cases. One Ninth Circuit judge, echoing several circuit courts, has written that extracting DNA from convicted criminals counts as a “special need” when done to aid the offender’s “rehabilitation through deterrence,” even if that action will “of course . . . aid in catching him” if said rehabilitation fails. A later Ninth Circuit opinion held that taking a convict’s DNA for purposes of including it in a “cold case file” renders the special needs doctrine inapplicable. This distinction only teaches law enforcement officials to assert a goal of “rehabilitation through deterrence” rather than catching repeat offenders. It would be more appropriate to determine whether the fact of a criminal conviction so reduces the individual’s reasonable expectation of privacy that extracting their DNA does not violate their Fourth Amendment rights.

Second, a test designed to permit the administrative state to work helpfully focuses Fourth Amendment doctrine on the machinery of the administrative state, and incentivizes legislative and regulatory standards to protect individual privacy. Thus, in New York v. Burger, Justice Blackmun wrote

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225 Id. at 1144-45.
226 Id. at 1145-46 (citing 18 U.S.C. § 1030(a)(5)(B)).
227 Supra Part II.d.
228 See supra notes 189-190 and accompanying text.
229 United States v. Kincade, 379 F.3d 813, 841 & n.2 (9th Cir. 2004) (Gould, J., concurring). Various state and federal courts have upheld mandatory DNA testing of convicts under a special needs analysis. Id. at 830-31 (majority opinion, collecting cases). Sandra Carnahan has tried to articulate similar special needs to justify DNA databases. Sandra J. Carnahan, The Supreme Court’s Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database, 83 Neb. L. Rev. 1, 19-28 (2004). The Ninth Circuit plurality in Kincade declined to rule whether the special needs doctrine would apply to the DNA tests, 379 F.3d at 832, and instead ruled that the totality of the circumstances rendered the tests reasonable, prominently noting that the individuals searched had a significantly reduced expectation of privacy. Id. at 833. Still, this opinion followed long and detailed discussion of the Supreme Court’s special needs cases, including cases using special needs language that is better thought of as reduced privacy cases. Id. at 821-32.
230 Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009).
for the Court that to justify an exception to the warrant requirement, a regulatory scheme must adequately substitute for a warrant by giving notice that particular searches are lawful and of the search’s scope, and by limiting the discretion of state officials performing such searches.\textsuperscript{231} Again, the potential for poor application of this regulatory and legislative focus lies: \textit{Burger} itself exemplifies how the Supreme Court’s examination of a regulatory regime’s adequacy can be “flaccid.”\textsuperscript{232} But \textit{Burger’s} discussion of how a detailed regulatory regime can provide the same value that a warrant provides is an important element of explaining the value of the special needs test – which also permits replacement of a warrant requirement with an administrative scheme. It also creates incentives for legislatures and agencies to more specifically delineate procedures for special needs searches and seizures to increase the likelihood of deference to challenged searches and seizures,\textsuperscript{233} and thus to impose some modest limits on official discretion to balance administrative search regimes with individual privacy, and reduce the wide variations in responses to similar facts.\textsuperscript{234}

Third, through its focus on “programmatic purpose”\textsuperscript{235} (rather than individual officials’ subjective intent), the special needs doctrine creates an incentive for policy makers to limit the most invasive form of state intervention. Commentators have recognized how the special needs test encourages state and local governments to “develop more effective, flexible approaches” to various social problems “without imposing the often ignored costs of enlarging the scope of criminal liability.”\textsuperscript{236} The school setting at issue in \textit{T.L.O.} provides the most apt examples of the special needs doctrine’s incentive structure. \textit{T.L.O.} and its progeny encouraged school districts developing drug testing policies to draw bright lines in these policies – the districts whose drug test policies were upheld in \textit{Acton} and \textit{Earls} decided by policy to neither threaten to nor actually turn over drug test results to the juvenile justice system, and instead offered those students assistance and less severe, non-law enforcement punitive consequences. Whatever the pedagogic or disciplinary benefits of those drug tests,\textsuperscript{237} the special needs test helps limit those policies to school issues and avoid more severe consequences.

\textsuperscript{231} 482 U.S. 691, 703 (1987). Whether Blackmun’s analysis lived up to that standard in \textit{Burger} is another matter; Brensike Primus, supra note 9, at 283-84, argues he failed to do so.
\textsuperscript{232} Schulhofer, supra note 3, at 98; see also id. at 102-03 (describing the relatively minimal limits imposed by the regulatory scheme at issue).
\textsuperscript{233} Amar, supra note 110, at 816-17.
\textsuperscript{237} For example, Justice Ginsburg challenged the reasonableness of the student drug testing policy of all students engaged in extracurricular activities – upheld in \textit{Earls} – as irrationally
T.L.O. has been less successful at limiting the severity of state intervention following school disciplinary incidents. School districts and law enforcement agencies have grown closer and closer – to the point that the mainstream media has prominently explored how fourth graders’ schoolyard offenses can become law enforcement and courtroom matters, and the U.S. Attorney General and Secretary of Education have called on such practices “to stop.”

This failure results not from an analytical flaw, but a failure to enforce T.L.O.’s rule. Summarizing school search cases, the Illinois Supreme Court has observed that the decisive variable tends to be the level of involvement of law enforcement officers in particular searches. While police involvement in a particular search certainly is relevant, overemphasizing this point violates Ferguson’s instruction to focus on the programmatic purpose of many of these searches. That purpose is increasingly to identify evidence to turn over to law enforcement, a trend which should (but has not yet) lead courts to more seriously enforce the special needs test in school contexts. Schools would have authority to maintain safety and discipline but should be prevented but routinely and programmatically turning schoolyard offenses into criminal cases – a key element of the school-to-prison pipeline.

Schools should be forced to choose between using the informal procedures permitted by T.L.O. for school disciplinary consequences only, or the more formal warrant and probable cause procedures if they turn students over to law enforcement.

Child protection investigations could provide another example of the programmatic purpose test’s value – if the special needs doctrine focused on serious consequences other than law enforcement consequences. There can be no doubt that requiring probable cause and a warrant before seizing children for interviews or inspecting homes would impose an administrative burden on state child protection officials. That burden creates an important

“steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.” 536 U.S. at 853 (Ginsburg, J., dissenting).


People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996). See also Barry C. Feld, T.L.O. and Redding’s Unanswered (Misanswered) Fourth amendment Questions: Few Rights and Fewer Remedies, 80 Miss. L.J. 847, 889 (2011) (“Courts’ assessments of the proper standard – reasonable suspicion or probable cause – to search often hinge on whether a school official or a police officer initiated it.”)


An administrative burden must be distinguished from imposing a burden that would prevent the government from achieving its purpose in child protection investigations. The defendants in Camreta argued that the latter was the case, an argument which requires
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and valuable incentive for those officials to find some alternative means to achieve their goals without triggering those Fourth Amendment protections. As discussed above, the majority of child protection investigations involve relatively low-risk allegations and the vast majority do not lead to removals, leading some child protection systems to develop “differential response” systems. These systems ask families who are the subjects of low-risk allegations to participate in voluntary “family assessments” to determine what, if any, services would help the family and help keep the children safe. Such families would not be generally subject to substantiation for abuse or neglect or removal of children. Crucially, the core fundamental right of family integrity would not be at stake with such assessments, thus the special needs doctrine would apply. Investigative resources – including those necessary to seek warrants and document probable cause – would focus on higher-risk cases. Some jurisdictions now assign up to 70 percent of abuse and neglect allegations to family assessment tracks, something that more meaningful Fourth Amendment protections could make the norm.

Incentivizing family assessment tracks will reduce invasions of children’s and families’ privacy, and likely serve children’s interests more effectively than the status quo of investigating all children who are the subjects of child protection hotline reports. One of the remarkable features of the status quo is how little good is done when child protection authorities investigated families for suspected abuse or neglect but do not remove children. A longitudinal study of children who had been the subject of a child maltreatment investigation found that the children, as compared to children with similar family problems but no child protection contact, had no perceptible differences in social support, family functioning, or child behavior establishing that obtaining a warrant would prevent the government from adequately investigated alleged abuse. Camreta v. Greene, Nos. 09-1478 and 09-1454, Brief for Petitioner James Alford, at 43-46 (2010), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1478_PetitionerJamesAlford.authcheckdam.pdf. That point was contested by S.G. Brief for Respondent, supra note 82, at 53.

242 See notes 19-31 and accompanying text.


problems. The bottom line, as the study’s title suggests, is that these investigations were “a missed opportunity for prevention” – specifically, to provide proven services. The study’s findings were so dramatic that the medical journal which published it simultaneously published an editorial radically asserting that “Child Protective Services has outlived its usefulness” and recommending that the better response to allegations of neglect is to provide various service interventions rather than formal investigations.

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

B. Reasonably foreseeable consequences to fundamental constitutional rights, not just law enforcement purposes

The first and most important reform to the special needs test should be to broaden its focus beyond the existence or absence of law enforcement purposes, and to focus instead on the reasonably foreseeable consequences of a challenged search or seizure on fundamental constitutional rights. I would define “fundamental constitutional rights to include all those either deemed

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246 Id.

247 Abraham B. Bergman, Child Protective Services has Outlived its Usefulness, 10 Archives of Pediatric Adolescent Medicine, 978, 978-79 (2010).

248 Schulhofer, supra note 3, at 118.

249 As Schulhofer readily acknowledges, the terms “social control” and “internal governance” do not have crystal clear boundaries. Id. at 116. It is likely that there would be significant overlap between his approach and mine, as many (if not most) searches and seizures that affect fundamental constitutional rights would also work to achieve some form of social control. The primary principled difference between his approach and mine is that a test focusing on the constitutional rights implicated by a search or seizure more directly invites analysis of such actions in their full constitutional context. Infra notes 279-288 and accompanying text. In practice, we may differ in our approach to school search cases, which Schulhofer categorizes as “internal governance” actions, id. at 118, but which I contend often implicate fundamental constitutional rights.

250 Id. at 118.
“implicit in the concept of ordered liberty” and thus incorporated against the states via the Fourteenth Amendment, or, like the right to family integrity, deemed to be a fundamental right provided by another amendment. A focus on criminal consequences is already present – even if the Supreme Court has not adopted that language. Limiting that focus to criminal consequences cannot be justified, and the doctrine must be reformed to account for constitutional consequences beyond those of the criminal justice system. If the purpose of the search or seizure makes reasonably likely or foreseeable a consequence significantly implicating a constitutional right beyond the Fourth Amendment, the special needs doctrine should not apply.

1. A focus on consequences explains results in special needs cases.

Focusing on the presence or absence of intended or reasonably foreseen criminal consequences best explains the results of special needs cases. The intended criminal consequences explains the decisions against searches and seizures in *Camara, Edmond,* and *Ferguson,* and the absence of such consequences explains decisions in *Acton, Earls, Skinner, Von Raab, O'Connor,* and *Quon.* *T.L.O.* may be explained by the lack of an intended law enforcement consequence at the initiation of the search, when the assistant principal thought he was searching for cigarettes and not marijuana, and may be criticized for ignoring the law enforcement consequence (presumably intended) that followed. *Lidster* may be explained by the absence of expected or intended criminal consequences to the individuals stopped. Given the “notoriously unclear” state of this particular doctrine, a focus on reasonably foreseen consequences does not explain every case, especially *Burger* and *Sitz.* But, as argued above, the Court did not properly conceive of *Burger* as a special needs case (even if it that misconception led an important discussion of administrative substitutes for a warrant procedure) and the Court drew a flawed line in *Sitz.*

Indeed, the Court’s first major administrative search case, *Camara v. Municipal Court,* struck down a scheme that imposed criminal sanctions on individuals who refused to consent to a particular search. *Camara* also

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252 The risk that officials may unexpectedly find some evidence of a crime and turn that evidence over to the police does not make the discovery reasonably foreseeable. For instance, the seizure in *Lidster* led to the discovery of admissible evidence of and prosecution for drunk driving. 540 U.S. at 422.
253 *Supra* notes 141-143 and accompanying text.
254 *Brensike Primus,* *supra* note 9 at 257.
255 *Supra* notes 189-190 and accompanying text.
256 *Supra* note 220 and accompanying text.
257 Summarizing the case, the Court wrote: “appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. . . .”
framed its discussion of law enforcement purposes in terms of consequences to the individual searched; the home search at issue minimally invaded individuals’ privacy because the search was not “aimed at the discovery of evidence of crime,” 258 an implicit recognition that the intended or reasonably expected consequences matter to the level of privacy invaded. Stephen Schulhofer offered a similar analysis of Camara, writing that the Court must have “meant to stress not [law enforcement] motivation but [law enforcement] effects.” 259

The Court reinforced the conclusion that consequences matter to the administrative search analysis just four years later, in Wyman v. James. 260 The Court upheld a state law requiring individuals to consent to home visits as a condition of receiving welfare benefits. Barbara James refused to give such consent, but the only consequence was her loss of welfare benefits. 261 No criminal consequence followed and, as individuals lack a constitutional entitlement to welfare benefits, “nothing of constitutional magnitude was involved.” 262 A similar statement could be made regarding later cases upholding searches and seizures under the special needs doctrine; when all that is at issue is public employment (O’Connor and Quon), railway and sensitive employment positions (Skinner and Von Raab), and extracurricular or athletic school activities (Acton and Earls), no constitutional rights are involved, and criminal prosecution is neither likely nor intended.

The Fourth Circuit Court of Appeals has misread Wyman and other special needs cases as holding that “investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context” – even when the search at issue is by a child protection social worker. 263 This superficial analogy – it was a social worker in Wyman and it is a social worker here, not a police officer – ignores the different implications of the two social workers’ visits. In Wyman, the social worker could take away something to which the individual had no constitutional right. In the child protection context, the social worker could take away a parent and child’s right to family integrity – something with the utmost constitutional protection. The Fourth Circuit’s superficial analogy is understandable given the special needs

therefore conclude that . . . appellant may not constitutionally be convicted for refusing to consent to the inspection.” 387 U.S. at 540 (emphasis added).

258 Id. 537.

259 Schulhofer, supra note 3, at 93.


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

262 Id. at 324.

263 Wildauer v. Frederick County, 993 F.2d 369, 372 (4th Cir. 1993).
doctrine’s focus on “ordinary law enforcement” versus other purposes – but it is no less wrong.

The consequences of a search were again decisive in *Ferguson v. City of Charleston*. The search itself – a routine blood draw of pregnant women admitted to a hospital, performed by medical personnel outside of the presence of police – did not raise constitutional concerns. Only the subsequent sharing of positive drug test results with law enforcement and the resulting criminal prosecutions made the hospital’s actions unconstitutional.264 This is *Ferguson*’s key lesson – it is not a search’s circumstances, but its consequences that matter most. One might argue that law enforcement purposes deserve special treatment because police officers’ orders to submit to a search or seizure impose extra anxiety on individuals. Indeed, it would surely unsettle a woman in labor or immediately post-partum to be interrupted in her hospital room by a uniformed and armed police officer insisting that she take a drug test. Precisely because that did not happen in *Ferguson*, that case stands for the proposition that something else – namely, the consequences of a search or seizure – determine on what side of the special needs binary the search or seizure falls.

*Ferguson* reached this conclusion through explicit references to the constitutional rights at stake when law enforcement became involved, stating that an intention of “incriminating” patients triggers constitutional protections for criminal suspects.265 Child welfare cases also trigger a set of constitutional protections identified by the Supreme Court – a hearing on a parent’s fitness,266 an elevated burden of proof if the case reaches a termination of parental rights stage,267 and any other protection required by procedural due process rights. These cases also trigger a set of statutory protections designed to protect children’s and parents’ right to family integrity and to codify their procedural due process rights – such as a right to counsel,268 a right to an

264 Supra notes 160-174 and accompanying text.
265 *Ferguson*, 532 U.S. at 85 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).
268 A large majority of states provide parents with a right to counsel throughout a child abuse or neglect case. Vivek Sankaran, *A National Survey on a Parent’s Right to Counsel in Termination of Parental Rights and Dependency Cases*, http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/National%20Survey%20on%20Parents%27%20Right%20to%20Counsel.pdf. Describing children’s right to counsel is more difficult because some states provide a right to an attorney to represent the child’s views and others provide a right to an attorney to represent what that individual believes to be in the child’s best interest. Regardless, the vast majority of states provide some kind of legal representation to children in child abuse and neglect cases.
agency’s “reasonable efforts” to prevent removal of a child from a parent,\(^{269}\) and a right to regular judicial reviews of ongoing foster care.\(^{270}\)

Less dramatically, the Supreme Court focused on the consequences to individuals being searched and seized in *Illinois v. Lidster*, which approved of an “information-seeking” highway checkpoint that sought information from the public about a hit-and-run crime that had happened on the roadway the previous week, and which led to police arresting a drunk driver.\(^{271}\) The checkpoint had an undeniable law enforcement purpose – to obtain evidence leading to an arrest in the hit-and-run case. But the consequence of that purpose was not directed at the individuals stopped at the checkpoint who “in all likelihood” would not include the culprit.\(^{272}\) In another checkpoint case, a search was ruled unconstitutional when the checkpoint’s purpose was “to determine whether a vehicle’s occupants were committing a crime” – that is, when the expected consequences of the seizure were directed at the individuals seized.\(^{273}\)

This focus on consequences also helps respond to one critique of the special needs doctrine. Ric Simmons accuses the Court of “weakening the ‘noncriminal purpose’ requirement” in the special needs cases that followed *T.L.O.*\(^{274}\) While *T.L.O.* asserted a clear non-law enforcement purpose – maintaining school discipline – Simmons argues that the later cases approving suspicionless drug testing of students were “barely distinguishable from a standard law enforcement purpose: ‘deterring drug use by our Nation’s schoolchildren.’”\(^{275}\) This riddle is resolvable if we look past the stated special need and analyze the intended and foreseeable consequences of the search. Drugs’ illegality does not mean that concern about drug use necessarily has a criminal purpose or consequence.Explicitly refusing to turn over evidence of drug use to law enforcement and instead requiring that students engage in drug treatment places a search on the noncriminal side of the line. Conversely, *T.L.O.* wrongly approved a criminal consequence – turning over the evidence found in the search to police, leading to prosecution of *T.L.O.* as a delinquent – without considering whether the search had a purpose or reasonable...
expectation of imposing such a consequence. That criticism stands despite the more clearly non-criminal purpose articulated in that case.

2. Analyzing the constitutional and not just criminal consequences of a search or seizure

The special needs doctrine usefully focuses on consequences. But its limited focus on criminal consequences is unjustified. A better approach is to reform the doctrine to focus on important constitutional consequences. If a search or seizure is reasonably likely to threaten another constitutional right, it should not satisfy the special needs doctrine.

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

My approach would place the Fourth Amendment special needs doctrine in the constitutional context of specific searches and seizures. Though a novel idea for the special needs doctrine, it is hardly novel for other constitutional rights generally or for the Fourth Amendment. In the Supreme Court’s procedural due process jurisprudence, the greater the importance of the private interest affected, the greater the process required to affect that interest. Not coincidentally, modern procedural due process law, like the

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276 Supra note 143 and accompanying text.
277 A focus on consequences – and, specifically, on the absence of criminal consequences – also explains the results in Von Raab and Skinner, upholding suspicionless drug testing of certain public employees. Paralleling his criticism of the school drug testing cases, Simmons criticizes these cases involved searches whose purpose “was essentially to deter illegal activity (drug use), with the dubious argument that deterring illegal activity went beyond the standard goals of law enforcement because of the dangerous or sensitive positions that the employees occupied.” Simmons, supra note 181 at 868. The holding is less dubious when one considers the absence of any criminal consequences imposed on employees whose drug tests show evidence of illegal conduct.
278 Supra Part II.e.
279 Supra note 262 and accompanying text.
280 129 S.Ct. at 2642.
281 Matthew v. Eldridge build this principle into its procedural due process test, requiring analysis of “the private interest that will be affected by the official action” as the first element of the three-part procedural due process test. 424 U.S. 319, 335 (1976). Commentators have recognized that the Matthews test “calls for more formal procedures where more grievous
special needs doctrine, developed in response to the modern administrative state, and the need to develop legal tests that recognized the different impacts of different types of government action. Similarly, when a search or seizure implicates a private interest of constitutional dimension, that fact should be an essential element of the search’s context.

The Court has also explicitly integrated First and Fifth Amendment values into the Fourth Amendment. A proposed search and seizure of items with First Amendment protections – say, a reporter’s notebook, or a mosque’s building – call for applying the Fourth Amendment with “scrupulous exactitude.”282 The Court has integrated Fifth Amendment self-incrimination values into the Fourth Amendment. *Boyd v. United States* – the 19th century case indirectly relied upon in *Camara* – explicitly connected the Fifth Amendment implications of the document seizure at issue to the Court’s holding that the seizure violated the Fourth Amendment.283 Though the Court may not have applied this principle scrupulously in all cases,284 it stands for the proposition that people have a greater expectation of privacy when other fundamental constitutional rights are at stake.285 Similarly, in applying the community caretaking doctrine (itself somewhat analogous to the special needs doctrine), the Washington Supreme Court has explicitly weighed individuals’ constitutional rights beyond the Fourth Amendment, including the freedoms of association and expression.286

The lesson, as Akhil Amar put it, is that we should look to the entire Constitution “to identify constitutional values that are elements of constitutional


282 *Stanford v. Texas*, 379 U.S. 476, 485 (1965). Justice Douglas made a similar point in his *Frank v. Maryland* dissent, connecting the First, Fourth, and Fifth Amendments as “safeguarding not only privacy and protection against self-incrimination, but ‘conscience and human dignity and freedom of expression as well.’” 359 U.S. at 376 (Douglas, J., dissenting) (citation omitted). Douglas’s dissenting view became the majority view when *Camara* overturned *Frank*.

283 Supra note Error! Bookmark not defined. and accompanying text.

284 Amar, supra note 110, at 805-06, has criticized the Court for its handling of *Zurcher v. Stanford Daily* for failing to apply the Stanford principle faithfully.

285 Avoiding law enforcement consequences by imposing First Amendment consequences should not resolve special needs doctrine. Alafair S. Burke hypothesized civil seizures of noisemaking devices as an attractive alternative to criminal sanctions of noisemakers, and a positive illustrations of the policy incentives served by the special needs test’s focus on law enforcement purposes. *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 Wash. L. Rev. 986, 1031 (2003). Civil seizure may indeed be preferable to criminal sanctions – but that fact alone should not place the proposed seizures under a relaxed Fourth Amendment framework, because such seizures could directly affect First Amendment rights. (If the particular devices lack significant First Amendment protection, it is a different matter.)

Beyond Law Enforcement

reasonableness” under the Fourth Amendment. That a search or seizure, as in Camreta, affects a fundamental constitutional right protected by the Fourteenth Amendment must be considered in evaluating the action’s constitutionality; the failure of the present special needs doctrine is it avoids such evaluation by focusing entirely on the presence or extent of a law enforcement purpose. Schulhofer’s line between “social control” and “internal governance” searches and seizures would be a dramatic improvement on the status quo, but less precisely directs consideration of other constitutional values rather than a test focused on whether a search or seizure implicates constitutional rights.

Of course, delineating fundamental constitutional rights is no obvious task. I would include all substantive rights which spring from the Constitution itself, most of which are found in the Bill of Rights or later Amendments (especially the 14th Amendment). As an illustration, one can distinguish searches and seizures of public school students which threaten juvenile justice or child protection consequences from searches and seizures implicating school disciplinary actions like short suspensions. The former implicates rights substantively created by the Constitution while the latter only implicates rights created by state law, which trigger modest procedural constitutional protections only. A more difficult case might involve more severe school disciplinary consequences like expulsion. Litigation would necessarily focus on which reasonably foreseeable consequences of various searches and seizures trigger constitutional protections – a task entirely in line with the special needs doctrine’s focus on consequences and a contextual constitutional understanding of the Fourth Amendment.

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287 Amar, supra note 110, at 805. As the phrase “constitutional reasonableness” suggests, Amar called for a review of the reasonableness of most searches and seizures, rather than a warrant and probable cause approach – an approach I do not share. His separate insight that Fourth Amendment analysis must incorporate other constitutional concerns directly applies to my approach.

288 Amar says to examine the Bill of Rights, in which he includes the Fourteenth Amendment. Id. at 805 n.170. For clarity of application, I would examine all substantive constitutional rights deemed fundamental – either deemed “implicit in the concept of ordered liberty” and thus incorporated against the states via the Fourteenth Amendment, Palko v. Connecticut, 302 U.S. 319, 325 (1937), or deemed to be a fundamental right under another Amendments.

289 Supra note 249.


292 Id. at 584.
More generally, this contextual analysis flows from Fourth Amendment principles that animate the seminal case of Katz v. United States293 and its discussion of what creates a “reasonable expectation of privacy” that the Fourth Amendment will protect. Justice Harlan’s concurrence explained that the Fourth Amendment protects an expectation of privacy “that society is prepared to recognize as ‘reasonable.’”294 Harlan later expanded on the thought: “This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.”295 If an action “significantly jeopardize[s] the sense of security which is the paramount concern of Fourth Amendment liberties,”296 then it deserves significant Fourth Amendment protection.

Applying these lessons to child protection investigations powerfully illustrate why constitutional rights beyond those accorded criminal suspects must be included. Child protection searches directly affect Fourteenth Amendment rights. They threaten to support state action to take custody of a child away from a parent – the most fundamental interference with a parent’s constitutional right to “care, custody, and control” of their child,297 and to the child’s right to remain with the parent.298 Indeed, in Camreta, the child suffered precisely that kind of “uncertainty and dislocation” when placed in foster care for three weeks as a result of her allegedly coerced statements.299 It should be plain that this type of action can shake an individual’s “sense of security.”

Even when a child protection investigation does not lead to the removal of a child from her family, they affect Fourteenth Amendment rights. The Constitution gives parents immense authority – the right to be a “despot,” likely benevolent, over their children.300 The seizure of children to discuss allegations of abuse or neglect is itself a sharp limit of this parental authority. Indeed, that limitation is the entire point – state officials seek to isolate children from their parents to discuss, free of parental influence, whether the parents have provided adequate care.301 Searches of the family home and compelled interviews of everyone in the home necessarily imply a limit of the

294 Id. at 361 (Harlan, J., concurring).
296 Id.
298 The Supreme Court has expressed its concern that unnecessary intervention in family life will cause children to “suffer from uncertainty and dislocation.” Stanley v. Illinois, 405 U.S. 645, 647 (1972). Circuit courts have consistently found that children have a right to family integrity. E.g., Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983); Wallis ex rel. Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1998).
299 Stanley, 405 U.S. at 647.
301 The Camreta defendants acknowledged this point. Supra note 38 and accompanying text.
parent’s authority over their home – the physical location where a parent’s constitutional rights are at their highest, unmediated by school or other authority figures.

Child development theory – on which the Supreme Court has relied in other cases involving children’s constitutional rights – is consistent with constitutional protections against such interventions into the parent-child relationship. Coleman has summarized the scientific evidence that children have a sense of privacy and bodily integrity from very young ages – a sense which searches and seizures may violate – and those violations “cause real emotional and psychological harm.”

In their seminal work on state intervention in children’s lives, Joseph Goldstein, Albert Solnit, Sonja Goldstein, and Anna Freud wrote:

Any invasion of family privacy alters the relationships between family members and undermines the effectiveness of parental authority. Children, on their part, react with anxiety even to temporary infringements of parental autonomy. The younger the child and the greater her own helplessness and dependence, the stronger is her need to experience her parents as her lawgivers – safe, reliable, all-powerful, and independent.

Therefore, no state intrusion ought to be authorized unless probable and sufficient cause has been established . . .

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

Child protection cases also illustrate why the special needs doctrine ought not elevate criminal consequences over all other consequences because they show that criminal consequences are not inherently more severe than others. To maintain the current special needs doctrine, one must accept that it is worse to be placed in prison for a short period of time than to lose your children, or, from the child’s perspective, to be taken from your parents and

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303 Coleman, supra note 6 at 515-16.
304 Id. at 520-21.
305 Joseph Goldstein, et al. The Best Interests of the Child: The Least Detrimental Alternative 97 (1996). Although this passage speaks of “probable and sufficient cause,” it does not speak directly to Fourth Amendment standards. The Court
306 Supra notes 61-66 and accompanying text.
placed with strangers. As Amy Sinden has convincingly written, “[c]onsidering the fear and trauma that removal can invoke in a child, it seems reasonable to suppose that many parents, if given the choice, would rather themselves spend several days in prison, than see their child taken away from all people and things familiar to spend even a few nights with well-meaning strangers in foster care.”

The Supreme Court has occasionally suggested that it views the fundamental substantive due process right of family integrity and the right to liberty at stake in a criminal case as similarly serious. The most detailed discussion comes in *Santosky v. Kramer*, which addressed the burden of proof borne by the state in a termination of parental rights case. Having decided that a preponderance of the evidence burden gave insufficient deference to the fundamental constitutional rights at stake, the Court addressed whether a “beyond a reasonable doubt” burden – with its analogies to criminal cases – was needed, or whether a “clear and convincing” burden would suffice. The Court chose the latter because termination of parental rights cases often involved psychiatric evidence on issues “difficult to prove to a level of absolute certainty.”

This explanation suggests not that the rights at stake in a termination case are less than the rights at stake in a criminal trial. Rather, it suggests that the type of facts needed to be proven – that a child is “permanently neglected” in the former, compared with whether a defendant committed specific acts in the latter – necessitates a partially elevated burden. By declining to hold that the interests at stake in child welfare cases are categorically less important than those in criminal cases, *Santosky* evoked the dissenting opinions written the prior term in *Lassiter v. Department of Social Services*, in which the Court held by a 5-4 vote that parents do not have a constitutional right to counsel in termination of parental rights proceedings.

One justice wrote that “there can be few losses more grievous than the abrogation of parental rights.” Another went further: “Although both

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307 Sinden, supra note 281 at 360-61. Sinden gives a fuller critique of the too-often assumed primacy of loss of physical liberty over other forms of liberty at 358-68. See also Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 17 (2002) (“Removing children from their homes is perhaps the most severe government intrusion into the lives of citizens.”).

308 At least one state court has equated the Fourth Amendment rights of children in child protection cases to adults accused of crimes, while ruling a requested sex abuse exam of a teenage girl when conclusive proof of such abuse already existed. *In re Shernise C.*, 2011 N.Y. App. Div. LEXIS 8199, *1 (N.Y. App. Div. 2d Dep’t 2011) (“An innocent child should certainly have as much right to be free from an unreasonable search and seizure as someone suspected of committing a crime.”).


310 Id. at 768.

311 Id. at 769.

312 Id. at 747.


314 Id. at 40 (Blackmun, J., dissenting).
deprivations [a prison sentence and termination of parental rights] are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law.\textsuperscript{315}

Such statements are not limited to family integrity cases. The Court recently noted that the nominally civil sanction of deportation is “sometimes the most important part” of consequences that flow from a criminal conviction.\textsuperscript{316} That is, core criminal sanctions – a prison sentence, a fine, the public stigma associated with a criminal conviction – may all impose a less grievous harm to many individuals than a sanction imposed by the civil immigration law.

Still, the law does generally prioritize criminal consequences over civil ones, even those that implicate fundamental rights and severely limit liberty. An earlier burden of proof case highlighted how the beyond a reasonable doubt burden serves to bolster the “moral force of the criminal law” and thus is unlikely applicable to civil actions, even those leading to severe liberty infringements.\textsuperscript{317} The “moral force” of criminal law also reflects the social stigma that accompanies a conviction.\textsuperscript{318} It is therefore unsurprising that at least one commentator has suggested the special needs doctrine serves to distinguish “morally-stigmatizing” government goals from less stigmatizing ones.\textsuperscript{319} Put another way, criminal investigation can “damage reputation or manifest official suspicion,”\textsuperscript{320} and impose a “targeting harm” distinct from the harm to one’s privacy of a particular search or search.\textsuperscript{321}

But even this morally-stigmatizing force does not justify drawing a line around criminal consequences. For instance, the stigma attached to drunk driving (at least, when it does not lead to harmful accidents) is less stigmatizing

\textsuperscript{315} Id. at 59 (Stevens, J., dissenting).
\textsuperscript{316} Padilla v. Kentucky, 120 S. Ct. 1473, 1480 (2010). Padilla noted that deportation is “not, in a strict sense, a criminal sanction,” but emphasized the “close connection” between the criminal and civil bodies of law. Id. at 1481-82.
\textsuperscript{317} Addington v. Texas, 441 U.S. 418, 428 (1979) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Like Santosky, Addington also focused on other differences between criminal cases and the problem at issue – civil commitment of the mentally ill. “The subtleties and nuances” of mental health conditions and diagnoses threatened to make a beyond a reasonable doubt burden insurmountable in any case. Id. at 429. Which dicta in Santosky and Addington are most important cannot be definitively determined from the text of the opinions themselves.
\textsuperscript{318} Merely describing conduct as criminal – even if prosecution cannot or does not occur – creates a stigma worthy of the Supreme Court’s attention. Lawrence v. Texas, 539 U.S. 558, 575 (2003).
\textsuperscript{319} Andrew E. Taslitz, A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston, 9 Duke J. Gender L. & Pol’y 1, 29 (2002).
\textsuperscript{321} Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 Colum. L. Rev. 1456, 1486-87 (1996).
than the social meaning attributed to drug use. Yet searches aimed at identifying the latter can be distinguished from criminal enforcement purposes – as *Von Raab, Skinner, Acton*, and *Earls* make clear – while the seizures aimed at the former in *Sitz* lead to criminal consequences. *Ferguson* provides an even more powerful example by illustrating the tremendous stigma applied to maternal drug use, especially among poor black women.

One can broaden the point: society holds somewhat stereotypical and idealized views of parenthood, especially motherhood, and concomitantly places a tremendous stigma on bad parents, especially bad mothers. The stigma is both gendered and racial; our country’s long and troubled racial history “has long stereotyped poor Black women . . . as incompetent, uncaring, and even pathological mothers.” Beyond legal literature, other writers have identified the powerful social meaning attached to judgments of one’s quality as a mother, and how deeply rooted such judgments are in American history and society.

It should be apparent that this social stigma has nothing to do with whether evidence of maternal drug use supports a criminal charge against the mother, a civil action to remove a child from that mother’s custody, or both. Any use of such evidence would impose a severe stigma. That is particularly so when such evidence is used to establish that such mothers are unfit parents, as occurs in child protection cases – that is, to target individuals specifically for a formal, adverse, and stigmatizing judgment. And when child protection authorities place children in state custody, the stigma passes down to them as well.

Finally, lower federal court child protection cases aptly illustrate why the special needs doctrine should focus on important constitutional consequences of searches and seizures because federal appellate courts addressing a set of child protection cases have already begun linking 14th Amendment analyses to Fourth Amendment analyses. These cases arise when parents and children challenge what they allege to be an unnecessary and unconstitutional removal of the child by child protection authorities. Parent and child plaintiffs typically allege that the challenged removal violated their 14th Amendment right to family integrity and the child’s Fourth Amendment protections against unreasonable seizures. In *Tenenbaum v. Williams*, the U.S.

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323 Id. at 76-77.
Court of Appeals for the Second Circuit addressed a 14th and Fourth Amendment challenge to the state’s removal of a child and subsequent medical examination of her. After discussing and not deciding whether the special needs doctrine applied, the Second Circuit stated: “Whatever Fourth Amendment analysis is employed, then, it results in a test for present purposes similar to the procedural due-process standard.” That test raised a colorable claim of an unconstitutional removal, and thus demanded a ruling in favor of the parents and child. At least two other circuits have held similarly.

The connection drawn in Tenenbaum and similar cases between the Fourth and Fourteenth Amendments is particularly clear in cases that challenge the removal of a child as a violation of both Amendments. A removal involves physically taking custody of a child and is thus undeniably a seizure for Fourth Amendment purposes. A removal directly infringes on a parent’s due process right to care custody and control – which the Supreme Court has held may generally not occur without their first occurring a hearing on the parent’s fitness. A less clear connection exists to a CPS investigation like the seizure at issue in Camreta – state action that intervenes in family integrity to a lesser degree immediately and only threatens a future removal. But the fundamental point that the 14th Amendment rights at stake affect the Fourth Amendment analysis applies in full force.

C. Refocus on the warrant requirement’s purpose

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

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328 193 F.3d 581, 605 (2d Cir. 1999).
329 Gates v. Tex. Dep’t of Prot. & Reg’y Servs., 537 F.3d 404, 428-29 (5th Cir. 2008); Raskea v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003) (“The action challenged in this case involved not only a warrantless search, but also the removal of a child from his parent, [implicating] the interest of the parents in keeping the family together) (citing Santosky v. Kramer, 455 U.S. 745 (1982)); Wallis ex rel Wallis v. Spencer, 202 F.3d 1126, 1137 n.8 (9th Cir. 1999) (“[T]he same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children [as applies to parents’ claims].”).
331 As argued supra notes 189-191 and accompanying text, Burger incorrectly held that the search at issue served special needs rather than law enforcement purposes.
Child protection again demonstrates how the special needs’ focus on law enforcement purposes prevents it from fulfilling its goal of determining when a warrant is required. Child protection investigations have substantial case-by-case variation necessitating significant executive discretion regarding when and how to perform an investigation. These investigations are inherently adversarial, creating an “often competitive enterprise” in which child protection investigators try to ferret out evidence of abuse or neglect. Even with some regulatory guidance, these investigations call out for a check on state officials’ discretion. And the regulatory guidance that does exist can be violated, as the Camreta facts – leading questions asked in direct violation of state guidance for interviewing children – reveal. Yet, unless the special needs doctrine can consider purposes beyond law enforcement, it will likely permit an unjustified exception to the warrant requirement for child protection searches and seizures, and fail to even consider violations of government guidelines for child protection investigations. At the very least, just as Burger required an administrative scheme to limit discretion in a business regulation case, the special needs doctrine should inquire whether a warrant is necessary to check executive branch discretion in child protection investigations.

D. Applying a reformed special needs test in child protection cases

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

333 Supra notes 203 and accompanying text.
335 Oregon guidelines caution against “asking numerous leading questions,” “making coercive statements,” as those lead to “a higher possibility that some children will make false accusations.” Oregon Department of Justice, supra note 76, at 28. In Camreta, the social worker repeatedly made coercive statements: In response to S.G.’s denial of any abuse by her father, “He would say, ‘No, that’s not it,’ and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers.” Greene v. Camreta, 588 F.3d 1011, 1017 (9th Cir. 2009) (quoting S.G.’s deposition).
physical or sexual abuse that would be relatively likely to trigger law enforcement involvement.\footnote{Recall that the majority of administrative findings of child maltreatment are for neglect, not physical or sexual abuse. Supra note 26 and accompanying text. Similarly, state-specific data shows that a similar proportion of removals result from neglect and not physical or sexual abuse. E.g. District of Columbia, Child and Family Services Agency, Annual Report FY 2010, at 23 (2011) (listing “neglect” as the primary reason in 531 of 809 removals, with physical and sexual abuse accounting for only 202; the remainder fell into categories accurately counted as neglect and not abuse, like a parent’s drug abuse, incarceration, or “caretaker ill or unable to cope”).}

Secondly, child protection searches involve significant discretion. Although every allegation, no matter how severe or how credible, must be investigated, and every investigation must include certain steps,\footnote{Camreta would also be fairly easy under Schulhofer’s test, discussed supra note 248 and accompanying text. A child protection investigation does not serve the “internal governance objectives” of a public school. Rather, it balances “the individual interest in the security of private activity” – from a parent’s perspective, to raise one’s children as one sees fit, and, from a child’s, to live with one’s family – and “the public interest in effective social control” – prevention of child abuse or neglect and protection of children from such maltreatment, and, thus, Schulhofer would require a warrant and probable cause. Schulhofer, supra note 3, at 118.} essential details remain in individual case workers’ discretion: when to search a home or seize a child, whether to request consent before such steps, how to interview a potential victim, perpetrator, or witness, whether a physical exam is needed and if so, who should perform it. These decisions follow a subjective and case-specific evaluation of evidence.

Under this analysis, \emph{Camreta} becomes fairly easy.\footnote{Supra notes 61-65 and accompanying text.} The seizure at issue implicated fundamental constitutional rights, and led to state officials removing S.G. from her family for three weeks. The time, place, and manner of the seizure were entirely discretionary. \emph{Camreta} and \emph{Alford} chose when to seize and interview S.G. (several days after receiving the allegation, without performing much background investigation, and without requesting consent from either of S.G.’s parents), chose where to do it (at school, to best isolate S.G. from her parents), and chose how to do so (with a series of leading and high pressure questions). Moreover, the interview’s details illustrate the problems that arise when child protection authorities exercise unchecked discretion.

Such a ruling applied to child protection searches more broadly would have significant benefits, suggested throughout this article. States would face incentives to limit the number of investigations triggering such severe consequences to children through mechanisms like differential response. States would also face incentives to individualize investigations to a greater extent, considering an allegation’s severity and its credibility. The answer to every allegation need not be an invasive search of a home and nonconsensual interviews of children. Incredible allegations, or allegations which appear
motivated by personal quarrels among adults need not trigger such invasions—and could not, under a ruling outlined above.\(^{339}\)

We can imagine two twists on the facts of _Camreta_. First, assume that a child protection investigator visits a school to speak with school staff. A teacher brings the child to the investigator, who explains who he is. The child responds, “can I tell you about what my dad does to me when he drinks?” and the investigator then brings the child to the multidisciplinary center for an interview. If a child voluntarily speaks with state officials, then there should be no Fourth Amendment problem.\(^{340}\) Although she may not understand the consequences of disclosing abuse to child protection officials, she appears to consent willingly to an interview of reasonable duration. And if children can voluntarily speak to police when they themselves face law enforcement consequences, it stands to reason that they can also speak to child protection officials when they may face child protection consequences. This fact pattern is similar to a motorist in _Lidster_ who tells a police officer “yes, I saw the hit and run, and I would like to tell you about it.” Because a voluntary conversation is permitted, some very limited contact with children to determine if they will voluntarily talk with investigators should be permitted—but with close scrutiny of the voluntariness of a child’s response.\(^{341}\)

Second, following a detailed investigative regimen, a child protection investigator determines that there is reasonable suspicion that a father molested his daughter. Following administrative protocol, he performs as much investigation as possible without revealing the existence of an investigation to the child or her parents, speaking with school staff and others familiar with the family. He then seeks the child’s mother’s consent to bring the child to a multi-disciplinary center to be interviewed about the alleged abuse by a trained forensic interviewer; this would be the only investigatory interview of the child and it would be recorded in its entirety. The mother refuses to consent, denying any abuse. The investigator then brings the child to the center for an interview, and invites the parent to attend. This twist supposes more effective administrative limits on official discretion. The interview itself would be more rigorous and effective than the interview actually performed in _Camreta_. The interviewer would follow more certain protocols; each interview would necessarily follow its own course, but the

\(^{339}\) Cf. supra notes 68-71 and accompanying text.

\(^{340}\) Justice Sotomayor suggested this point in the _Camreta_ oral arguments. She was concerned that, under the plaintiffs’ theory, Camreta might not have been able to even ask S.G. if she wanted to talk with authorities. _Camreta_ Oral Argument Transcript at 37-38. Justice Sotomayor first said, that if S.G. had told Camreta, “I wish somebody had asked me before. I’m so afraid of my daddy,” then a seizure surely would be acceptable.

methods used would be more standardized than under a regime that permitted each individual investigator to interview children when and how he or she saw fit. Although a closer case than the facts of *Camreta*, I would not apply the special needs doctrine and would require a warrant and probable cause before such a seizure could take place because the immediate and potential consequence to the child is so severe, and, separately, the remaining discretion to the state official – especially the discretion to determine when evidence established that a forensic interview was necessary – so great that these protections are essential. It must be noted that this result would not necessarily prevent the interview from occurring; probable cause may well exist that a multi-disciplinary center interview would reveal evidence of child abuse.

**CONCLUSION**

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