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Fourth Amendment Implications of Interviewing Suspected Victims of Abuse in School

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NOTES

FOURTH AMENDMENT IMPLICATIONS OF INTERVIEWING SUSPECTED VICTIMS OF ABUSE IN SCHOOL

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INTRODUCTION

A mixture of rain and snow fell outside the window as nine-year-old S.G. sat in her elementary school classroom on February 24, 2003.[1] S.G. typically struggled in school, suffering from a learning disability that made it difficult for her to reason and communicate.[2] At about 1:00 p.m. that day, a guidance counselor, Ms. F., unexpectedly arrived at the classroom door and called S.G. out into the hall.[3] The counselor explained to S.G. that someone was there to see her.[4] Ms. F. then took her to a conference room near the principal's office where a child protective worker and a uniformed police officer were waiting.[5] S.G. had no idea what to expect, but when she saw the two men, she became scared—so scared that she started feeling ill.[6] Ms. F. placed her in the room and walked out, leaving her alone with them.[7]

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[1] *See* Brief for Respondents at 1, Camreta v. Greene, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478); *Weather History for Bend, Oregon*, OLD FARMER'S ALMANAC (Feb. 24, 2003), http://www.almanac.com/weather/history/OR/Bend/2003-02-24.

[2] *See* Joint Appendix at 42, *Camreta*, 131 S. Ct. 2020 (Nos. 09-1454, 09-1478).

[3] *See* Greene v. Camreta, 588 F.3d 1011, 1017 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Joint Appendix, *supra* note 2, at 54.

[4] *Camreta*, 588 F.3d at 1017.

[5] *See* Brief for Respondents, *supra* note 1, at 1–2.

[6] Joint Appendix, *supra* note 2, at 54.

[7] *Camreta*, 588 F.3d at 1017.

The caseworker then proceeded to question S.G. for more than an hour about whether she was being sexually abused at home.[8] S.G.'s parents were never notified that the caseworker and the police officer were coming to the school or that an interview was taking place.[9] S.G. would later say that she was "too scared" to ask the caseworker questions or tell him that she wanted to leave.[10] Although she initially denied being abused, S.G. eventually started saying "yes" to everything the caseworker asked because, as she revealed afterward, she was becoming afraid that she would miss her bus home and believed that answering affirmatively was the only way she would be allowed to leave the interview.[11] When S.G. was finally allowed to leave, she went home—only to find that the same two men were already at her house, talking to her mother.[12] S.G. told her mother that she felt sick and went to the bathroom.[13] She vomited five times.[14]

The caseworker, however, saw things differently. His name was Bob Camreta, and he had been assigned to investigate whether a nine-year-old girl—S.G.—was in immediate danger of sexual abuse.[15] The girl's father had just been arrested for the alleged sexual abuse of a seven year old and then released on bail.[16] S.G.'s father had been allowed to return home, where he had unsupervised daily contact with S.G. and her younger sister.[17] Camreta knew that sex offenders frequently molest their own children and was therefore concerned for the girls' safety.[18] He also knew that if he went to speak with the girls at home, their father could influence them.[19] With these possibilities in

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[8] *Id.*

[9] *Id.* at 1016–17.

[10] *See* Joint Appendix, *supra* note 2, at 54–56.

[11] *See* Brief for Respondents, *supra* note 1, at 3–4.

[12] *See* Joint Appendix, *supra* note 2, at 49.

[13] *Id.*

[14] *Id.* at 43.

[15] Greene v. Camreta, 588 F.3d 1011, 1016, 1028 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

[16] *Id.* at 1016.

[17] *See id.*

[18] *Id.*

[19] *See id.*

mind, Camreta decided to interview S.G. in a different setting, a familiar one where she would feel comfortable, but be free of threats or coercion by her father.[20] Camreta chose her school.[21]

According to Camreta, child protective workers in his agency regularly conducted in-school interviews of children.[22] After requesting the assistance of a police officer, Camreta went to S.G.'s school and received permission to interview S.G. in a conference room.[23] A school counselor introduced Camreta and the police officer to S.G. and then left.[24] To make S.G. comfortable, Camreta began by talking to her about topics such as her school, home, pets, family, and homework.[25] According to Camreta, when he finally asked S.G. about her father, she revealed that her father had been sexually abusing her for years.[26] Camreta concluded that S.G. needed protective services and arranged for services to be provided to her and her family.[27]

The case of S.G. demonstrates the competing interests at stake during in-school interviews of suspected victims of child abuse. Children, of course, have a strong interest in being free from abuse. But they also have a strong interest in being free from intrusive, traumatic questioning by strangers.[28] The parents of such children have their own set of interests, which include seeing their children's rights protected; preserving their own rights, including their rights over their children; and avoiding unwarranted investigations of child abuse. Such investigations can severely harm parents' reputations and their families. Child protective agencies, acting on behalf of the State, have a strong interest as well—protecting children from harm.

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[20] *See id.*

[21] *Id.*

[22] *Id.*

[23] Brief for Petitioner James Alford at 8, Camreta v. Greene, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478).

[24] *Id.* at 8–9.

[25] *Id.* at 9.

[26] *Id.*

[27] *Id.* at 10.

[28] *See* Doriane Lambelet Coleman, *Storming the Castle To Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 418–19 (2005) ("[D]epending upon the child and the nature of the investigation, the process [of investigating child abuse] can cause emotional and psychological damage [to the child] ranging from temporary discomfort to significant long-term harm.").

However, this interest can only be defended when agencies have the necessary investigative tools to discover that a child is in danger.

These interests have increasingly conflicted as child abuse investigations have become more prevalent. The number of investigations in the United States has increased significantly in recent decades, partly due to the introduction of mandatory reporting laws.[29] About 3.3 million reports of child abuse, involving over six million children, were filed in the United States in 2008.[30] Yet, only about twenty-five percent of these children were determined to actually be victims of abuse, suggesting that many children may needlessly undergo the sort of traumatic questioning S.G. underwent, about abuse that never occurred.[31]

Child abuse investigations typically focus on activities taking place inside the child's home, but may be hampered by several impediments in that environment. Frequently, the abuser is a member of the household. Approximately seventy-eight percent of abusers are children's biological parents.[32] As the caseworker that interviewed S.G. noted, children within the home may be subject to the influence of the abuser or other family members, who may encourage or threaten the child to conceal the abuse.[33] Children may be too intimidated to answer questions honestly or reliably in such a setting. Going to the home to investigate abuse also notifies the abuser of the investigation, which may allow him or her to take measures to hide the abuse.

Conducting interviews of children at their schools instead of their homes can help overcome these impediments. In the school setting, children are removed from negative influences at home and thus may be more open and truthful with investigators. At the same time, these children are still in a familiar setting, which

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[29] Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 824, 829 (2010) ("Annual reports of child abuse increased 41% between 1988 and 1997 and rose another 15% between 1998 and 2007." (footnote omitted)).

[30] *Id.* at 823.

[31] *See id.* at 823, 829.

[32] *Id.* at 826.

[33] *See* Greene v. Camreta, 588 F.3d 1011, 1016 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

may further help to facilitate an interview. The suspected abuser is also usually unaware that the interview is taking place and therefore cannot interfere.

However, as effective as in-school interviews may be in investigating abuse, these interviews nonetheless pose serious concerns regarding children's Fourth Amendment rights. Children, like adults, have a right to be free from unreasonable seizures of their persons. When a child protective worker pulls a child out of class to question him about suspected abuse, is this a seizure? If so, can such a seizure be justified in the absence of a warrant? On what grounds might it be justified? Clear standards answering these questions are essential to ensure that the interests hanging in the balance of these investigations are adequately protected.

This Note argues that in-school interviews of children regarding child abuse constitute seizures under the Fourth Amendment and that such seizures are unconstitutional absent a warrant, consent, or exigent circumstances. Part I of this Note provides a basic background of Fourth Amendment seizures and discusses the Fourth Amendment's role in the context of child abuse investigations. Part II examines the controversy surrounding in-school interviews of suspected child abuse victims and the implications of such interviews for children's Fourth Amendment rights. Part III proposes a rule for in-school interviews consistent with Fourth Amendment principles. It also demonstrates how such a rule answers the Supreme Court's questions about in-school child abuse interviews that arose in the recent case of *Camreta v. Greene*,[34] and how it may be translated into guidelines for child protective agencies.

I. FOURTH AMENDMENT SEIZURES IN CHILD ABUSE INVESTIGATIONS

A basic background of Fourth Amendment seizures and their application to child abuse investigations is necessary to examine in-school interviews of suspected child abuse victims. This Part provides that background by discussing what constitutes a seizure and what is required before a seizure may occur. It demonstrates how these requirements have been treated in child

[34] 131 S. Ct. 2020 (2011).

abuse investigations. It then examines exceptions to the Fourth Amendment's general warrant requirement and the unique considerations they raise in the child abuse context.

A. Background of Fourth Amendment Seizures

1. Defining Fourth Amendment Seizures

A threshold matter in determining whether an individual has been subject to an unlawful seizure is determining whether a seizure has actually occurred.[35] A seizure is an "act or an instance of taking possession of a person or property by legal right or process."[36] However, not every taking constitutes a seizure.[37] For a taking to amount to a seizure, the deprived individual must have a "reasonable expectation of privacy" in the person or thing that was taken.[38]

When the seizure involves a person, courts must determine the degree of interference with the individual's legitimate expectations of privacy.[39] Courts have held that these interferences amount to seizures when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen."[40] Restraints may occur in a variety of contexts, including arrests, investigatory detentions, interviews, and other stops.[41] Actual physical restraint is not required; courts consider a person to be seized if a reasonable person in the same circumstances would believe he or she was not free to leave.[42]

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[35] *See* Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 620 (1990).

[36] BLACK'S LAW DICTIONARY 1480 (9th ed. 2009).

[37] *See, e.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 618 (1989).

[38] *See* Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); *see also* LEGAL INFO. INST., *Fourth Amendment: An Overview*, CORNELL UNIV. L. SCH., http://www.law.cornell.edu/wex/fourth_amendment (last visited Feb. 26, 2013).

[39] *Cf. Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (defining this standard in the general context of searches and seizures).

[40] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[41] Clancy, *supra* note 35, at 621.

[42] Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion)).

2. The Requirements of a Lawful Seizure

One way in which the Fourth Amendment protects citizens against unlawful seizures is by requiring seizing parties to obtain a warrant supported by probable cause prior to the seizure.[43] Probable cause exists when "the facts and circumstances within [the] knowledge [of government actors] and of which they had reasonable and trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[44] A neutral magistrate ensures that this standard is met before issuing a warrant permitting a seizure.[45]

Fourth Amendment jurisprudence, however, does not end with the question of whether or not there was a warrant, because the Fourth Amendment also separately states that individuals should be free from "unreasonable" searches and seizures.[46] The Supreme Court has interpreted this separate clause to be distinct from the clause containing the warrant requirement, allowing myriad "reasonable" exceptions to the Fourth Amendment's warrant requirement, including searches and seizures conducted under exigent circumstances or during investigatory detentions, searches incident to lawful arrests, and automobile searches.[47]

3. Approaches to Seizures in Child Abuse Investigations

The Fourth Amendment inquiry deserves particular scrutiny in the context of child abuse investigations.[48] Child protective workers are frequently accompanied by law enforcement officials and undertake necessarily intrusive actions in order to investigate child abuse.[49] For example, investigations often involve entering a child's home, interviewing the parents and the child, examining the child's body, and even removing the child from the home.[50] The need for such intrusive actions is not always unreasonable; child abuse most often occurs in private

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[43] *See* OTIS H. STEPHENS & RICHARD A. GLENN, UNREASONABLE SEARCHES AND SEIZURES: RIGHTS AND LIBERTIES UNDER THE LAW 9–10 (2006).

[44] *Id.* at 10 (third alteration in original) (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

[45] *Id.*

[46] *See* U.S. CONST. amend. IV.

[47] STEPHENS & GLENN, *supra* note 43, at 12–15.

[48] *See* Coleman, *supra* note 28, at 416–19.

[49] *Id.* at 415.

[50] *See id.* at 414–15.

settings, and both abusers and victims may go to great lengths to conceal the abuse.[51] However, the interests of child protection must be balanced against the competing privacy interests of the individuals involved; this is where Fourth Amendment analysis comes in.[52]

Because of the importance of the privacy interests at stake in child abuse investigations, courts have generally required a warrant for searches and seizures conducted during these investigations.[53] By requiring a warrant, courts ensure that a neutral magistrate—rather than an agent of the State conducting the investigation—performs the delicate balancing of interests and determines whether sufficient evidence exists to justify intrusions into the privacy of the parents and the child.[54] However, although courts generally prefer state agents to obtain a warrant before performing these investigations, child protective workers regularly act in the absence of a warrant, raising serious concerns about whether children's Fourth Amendment rights are being adequately protected.[55]

B. Warrantless Seizures in Child Abuse Investigations

Those conducting warrantless child abuse investigations have often defended these seizures under the various categorical exceptions to the warrant requirement.[56] In particular, four categories have been invoked frequently to justify these seizures: (1) seizures based upon consent, (2) seizures conducted under exigent circumstances, (3) seizures conducted as investigatory detentions, and (4) seizures based upon the "special needs" of

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[51] *See supra* text accompanying notes 32–33.

[52] *See* Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

[53] *See* Brief of the Legal Aid Society, Juvenile Rights Practice as Amicus Curiae in Support of Respondent at 17–19, Camreta v. Greene, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478) [hereinafter Brief of the Legal Aid Society].

[54] *See Tenenbaum*, 193 F.3d at 604; Brief of the Legal Aid Society, *supra* note 53.

[55] *See* Coleman, *supra* note 28, at 415.

[56] *See id.* at 461, 465–66, 469–70, 473–75.

government agents.[57] An examination of these four exceptions is critical to understanding how they apply to child abuse investigations.

1. Consensual Seizures

Consensual seizures require, at minimum, that the consent be "valid."[58] A valid consent is one made "knowingly, intelligently, and voluntarily."[59] In determining whether consent is voluntary, courts consider the "totality of all the circumstances," including the characteristics of the individual, the individual's actions or statements, the environment where the individual was asked to consent, and the actions or statements of the seizing party.[60]

However, unlike many cases involving adults, obtaining valid consent to a seizure during child abuse investigations poses particular, often unique, difficulties.[61] Generally, parents can consent to seizures of their children because of the control they have over their children as custodians.[62] But where parents are the suspected abusers, child protective services may attempt to obtain the child's consent instead.[63]

The problem is that a child generally has very limited ability to consent.[64] The law usually presumes that children are incapable of making most informed legal decisions for themselves.[65] Mature minors might be capable of consenting to seizures under certain circumstances, but the totality of these

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[57] *See* Greene v. Camreta, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Jones v. Hunt, 410 F.3d 1221, 1227–28 (10th Cir. 2005); Doe v. Heck, 327 F.3d 492, 513–14 (7th Cir. 2003); Lane v. Milwaukee Cnty. Dep't of Soc. Servs. Children & Family Servs. Div., No. 10–CV–297–JPS, 2011 WL 5122615, at *5–6 (E.D. Wis. Oct. 28, 2011); Smith v. Tex. Dep't of Family & Protective Servs. Child Protective Servs., Civil Action No. SA-08-CA-940-XR, 2009 WL 2998202, at *9–10, *12 (W.D. Tex. Sept. 15, 2009); Transcript of Oral Argument at 36–37, *Camreta*, 131 S. Ct. 2020 (2011) (Nos. 09-1454, 09-1478).

[58] *See* STEPHENS & GLENN, *supra* note 43, at 84.

[59] *Id.* at 13.

[60] *See id.* at 84–85.

[61] *See* Coleman, *supra* note 28, at 462 n.144.

[62] *See* Brief of the Legal Aid Society, *supra* note 53, at 21–22.

[63] *See id.* at 21; *see also* Hafemeister, *supra* note 29, at 826.

[64] *See* Coleman, *supra* note 28, at 462 n.144.

[65] *See* Bellotti v. Baird, 443 U.S. 622, 635–37 (1979).

circumstances—including the education, intelligence, and age of the child—must be considered when determining whether a child consented voluntarily.[66]

2. Seizures Under Exigent Circumstances

Exigent circumstances provide a second possible basis for warrantless seizures of children. Under the exigent circumstances exception, an emergency must make a warrant impracticable at the time of the seizure, and the seizure must be based upon probable cause.[67] This exception reflects the reality that there are true emergencies during which it is not reasonable to expect a government agent to take the time necessary to obtain a warrant prior to conducting a seizure.[68] Exigent circumstances include situations in which "a person's life or safety is threatened; a suspect's escape is imminent; evidence is about to be destroyed or removed; or some other consequence improperly frustrates legitimate law enforcement efforts."[69]

Courts have generally found this exception applicable to child abuse investigations.[70] For example, when a child has been abused so severely that the child's health and safety is at imminent risk, courts have allowed child protective workers and law enforcement officers to enter a child's home and remove the child without a warrant.[71] These courts have held that the state's substantial interest in protecting the child from abuse and the child's interest in being free of abuse are greatest when the child is facing immediate danger.[72] If the child is in imminent danger such that there is no time to obtain a warrant, then child protective agencies may be permitted to seize the child even without prior judicial authorization of their actions.[73] However, the potential overuse of the exigent circumstances exception—

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[66] *See* Coleman, *supra* note 28, at 462 & n.144.

[67] STEPHENS & GLENN, *supra* note 43, at 118–19.

[68] *See id.* at 118.

[69] *Id.*

[70] *See* Greene v. Camreta, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395, 407–08 (5th Cir. 2002); Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000); Tenenbaum v. Williams, 193 F.3d 581, 604–05 (2d Cir. 1999); Calabretta v. Floyd, 189 F.3d 808, 813, 816–17, 819 (9th Cir. 1999).

[71] *See* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 508–09 (1988).

[72] *See* Coleman, *supra* note 28, at 475–76.

[73] *See* Hardin, *supra* note 71.

perhaps by well-meaning but panicked caseworkers—raises serious issues.[74] The suggestion that a child might be a victim of abuse triggers serious, legitimate concerns.[75] However, the seriousness of the concern is not the end of the exigent circumstances inquiry. The threat must be so imminent that it would not be practicable to obtain a warrant, and probable cause for the seizure must exist.[76] Thus, if a child protective agency has time to obtain a warrant or lacks sufficient evidence to justify a seizure, then the agency may not invoke the exigent circumstances exception.[77]

3. Investigatory Detentions

The third category of warrantless seizures includes investigatory detentions, which became known as "*Terry* stops" after gaining recognition following *Terry v. Ohio*.[78] In *Terry*, the Supreme Court held that law enforcement officers may conduct a reasonable search when they briefly detain individuals who appear to be engaged in suspicious activity.[79] The Court recognized the impracticability of obtaining a warrant under circumstances requiring "necessarily swift action predicated upon the on-the-spot observations of the [police] officer on the beat."[80] To evaluate the reasonableness of the search in *Terry*, the Court looked to whether the search was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[81]

As a whole, *Terry* has come to stand for the proposition that a brief search or seizure may be permissible if the seizing party has "reasonable suspicion" to initiate the detention.[82] This reasonable suspicion standard requires a lesser showing than probable cause does.[83] In *Terry*, several individuals were detained after a police officer saw them repeatedly congregating near a store, walking past the store, and staring in the store

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[74] *See* Coleman, *supra* note 28, at 465–66.
[75] *See* Brief of the Legal Aid Society, *supra* note 53, at 14–16.
[76] *See* STEPHENS & GLENN, *supra* note 43, at 118–19.
[77] *See* Coleman, *supra* note 28, at 464–66.
[78] 392 U.S. 1 (1968).
[79] *See id.* at 19–20, 22–23, 30–31.
[80] *See id.* at 20, 24.
[81] *Id.* at 19–20.
[82] *See* STEPHENS & GLENN, *supra* note 43, at 97.
[83] *Id.* at 94.

window.[84] The Supreme Court held that although such behavior did not provide probable cause to arrest, it did provide a reasonable suspicion that the individuals were possibly engaged in criminal activity.[85] Additionally, the officer's detention of the individuals on this basis was brief.[86] Thus, the stop was permissible under the Fourth Amendment.[87]

In the years following *Terry*, the courts have cut back on the reach of the *Terry* stop, such that lengthier "stops" may not be justified on the lower standard of reasonable suspicion.[88] When an investigatory detention continues beyond the period of time necessary to resolve the "reasonable suspicion" that motivated the stop, these courts have held that a search or seizure might no longer be reasonable and should therefore be supported instead by probable cause.[89]

Investigatory detentions have not been widely considered in the context of child abuse investigations, but at least some authority suggests that the standards governing these investigatory detentions might apply.[90] The Tenth Circuit, for example, analyzed a brief in-school interview of a child under the *Terry* stop standard.[91] In this case, a child protective caseworker conducted a ten-minute interview of a child who allegedly abused another child at school.[92] The court ratified the interview, noting that the *Terry* stop standards—that the stop be justified at its inception and reasonably related in scope to the original circumstances of the stop—were met.[93]

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[84] *Terry*, 392 U.S. at 6.

[85] *See id.* at 22–23.

[86] *Id.* at 24–25.

[87] *Id.* at 23, 30–31.

[88] *See Warrantless Searches and Seizures*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 37, 38, 48–49, 51–52 (2005).

[89] *See id.* at 38, 48–49.

[90] *See* Doe v. Bagan, 41 F.3d 571, 574 n.3 (10th Cir. 1994); *see also* Lane v. Milwaukee Cnty. Dep't of Soc. Servs. Children & Family Servs. Div., No. 10–CV–297–JPS, 2011 WL 5122615, at *5 (E.D. Wis. Oct. 28, 2011); Smith v. Tex. Dep't of Family & Protective Servs. Child Protective Servs., Civil Action No. SA-08-CA-940-XR, 2009 WL 2998202, at *11 (W.D. Tex. Sept. 15, 2009).

[91] *See Bagan*, 41 F.3d at 574 n.3.

[92] *Id.* at 574.

[93] *Id.* at 574 n.3.

4. Seizures Based upon the "Special Needs" of State Agencies

The fourth category, consisting of seizures that are justified by the "special needs" of administrative agencies, is one of the most recently developed and controversial categories of warrantless seizures.[94] Under this exception, if an administrative agency has a special need to conduct a seizure in the course of its regulatory activities, it may do so if the need is "beyond the normal need for law enforcement."[95] Under such circumstances, courts have required mere "reasonable suspicion," rather than probable cause, to justify a seizure.[96]

The Supreme Court applied this exception in *New Jersey v. T.L.O.*, in which the Court upheld a public school administrator's warrantless search of a student's purse.[97] The purse was searched after the student was found smoking in the bathroom, and the search revealed that the student was carrying marijuana.[98] The Court found the search to be justified, stating that a school's special needs include "the preservation of order and a proper educational environment."[99] In order to meet those needs, the Court continued, a school requires "close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[100] The Court held that the Fourth Amendment still applies to schools, but that this warrantless search was reasonable at its inception because of the school's administrative interest in "maintaining security and order" within the school.[101]

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[94] STEPHENS & GLENN, *supra* note 43, at 127. Although some sources treat the larger category of seizures justified by "special needs" distinctly from the category of administrative warrantless seizures, *see, e.g.*, *Warrantless Searches and Seizures*, *supra* note 88, at 111, 116, the author of this Note—like Stephens and Glenn—will use the terms interchangeably, since this Note is concerned only with "special needs" in the particular context of seizures conducted by child protective services (administrative) agencies, *cf.* STEPHENS & GLENN, *supra* note 43, at 127–28; JOEL SAMAHA, CRIMINAL PROCEDURE 242 (8th ed. 2012) (including "administrative" seizures within a larger discussion of "special needs" seizures).

[95] *See* STEPHENS & GLENN, *supra* note 43, at 127–28.

[96] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 332 n.2 (1985).

[97] *Id.* at 340–43.

[98] *Id.* at 328.

[99] *Id.* at 339–40.

[100] *Id.*

[101] *Id.* at 338, 340, 343.

Under these circumstances, the school administrator only needed "reasonable grounds" to believe that the student was "violating either the law or the rules of the school" to conduct the search.[102]

The federal circuit courts are split over whether the special needs exception should apply to warrantless searches and seizures in child abuse investigations.[103] The Fourth and Seventh Circuits—which favor applying the exception—have held that child protective agencies have special needs to conduct such seizures as part of their administrative responsibilities in protecting children.[104] On the other hand, the Ninth, Fifth, Tenth, and Third Circuits have found that these needs do not go "beyond the normal need[s] for law enforcement," as required; they argue that law enforcement activities are so entangled in child abuse investigations that the two are essentially inseparable.[105] The Second Circuit has taken a middle-of-the-road approach, declining to adopt a categorical rule that the special needs exception applies, but noting that "[t]here may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context."[106]

II. WARRANTLESS IN-SCHOOL INTERVIEWS OF SUSPECTED VICTIMS OF CHILD ABUSE

With the necessary background on the Fourth Amendment now established, this Part examines the current controversy surrounding a particular investigatory tool in child abuse investigations—interviews of suspected victims in schools. Part II.A discusses the competing interests at stake in the controversy over whether and how these interviews should be conducted in light of Fourth Amendment concerns. Part II.B discusses how this controversy recently reached the Supreme Court in *Camreta*

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[102] *Id.* at 341–42.

[103] *See* Coleman, *supra* note 28, at 473–75.

[104] Wildauer v. Frederick Cnty., 993 F.2d 369, 372–73 (4th Cir. 1993); Darryl H. v. Coler, 801 F.2d 893, 900–02 (7th Cir. 1986).

[105] Greene v. Camreta, 588 F.3d 1011, 1024–30 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395, 406–07 (5th Cir. 2002); Franz v. Lytle, 997 F.2d 784, 791 (10th Cir. 1993); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092–94 (3d Cir. 1989).

[106] Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

v. Greene,[107] but was left unresolved. Part II.C shows how lower courts have answered the Fourth Amendment questions surrounding these interviews. Part II.D discusses the impact of the current state of this controversy on child protective agencies and on the rights of the children that these agencies interview.

A. The Controversy Surrounding In-School Interviews

In-school interviews of suspected victims of child abuse reveal a fundamental tension between the Fourth Amendment rights of children and the need to protect these children from abuse.[108] On the one hand, these interviews are usually conducted in the absence of parental consent and a warrant, raising serious Fourth Amendment concerns.[109] The child in school may not know or be able to recognize what her rights are during the interview.[110] She may feel compelled to answer any questions asked, regardless of whether or not she understands the gravity of the answers or would prefer not to answer.[111]

On the other hand, such interviews may more effectively protect children from abuse. Children who are interviewed in the home may be subject to the influence of family members who pressure them to hide the abuse, and in-school interviews may remove children from this influence.[112] They may also prevent the abuser from knowing of the interview in advance and thus coaching or threatening the child to answer in a particular way.[113] Children may also be more at ease in the familiar school environment than elsewhere. For these reasons, several states have statutes listing schools among the locations where child

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[107] 131 S. Ct. 2020, 2026 (2011).

[108] *See* Coleman, *supra* note 28, at 415–18.

[109] *Id.* at 465–66.

[110] *Cf.* LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 77–79 (3d ed. 2006) (describing a "coercive" search by school officials, in which students were repeatedly threatened that a warrant would be obtained from the police if they resisted the search).

[111] *Cf. id.* (describing a case in which children felt compelled to comply with school officials' demands during a search because the children were "[a]ccustomed to receiving orders and obeying instructions from school officials," so much so that they "were incapable of exercising unconstrained free will" during the search).

[112] *See* Brief of the Legal Aid Society, *supra* note 53, at 28; Coleman, *supra* note 28, at 438.

[113] *See* Coleman, *supra* note 28, at 438.

abuse investigations may be conducted.[114] The tension between the advantages of these interviews and the risk that they violate children's Fourth Amendment rights has given rise to a controversy regarding whether and under what circumstances child protective agencies should conduct these interviews.[115]

B. *Reaching the Supreme Court: The Controversy of In-School Interviews in* Camreta v. Greene

The Supreme Court recently examined this controversy—but ultimately left it undecided—in *Camreta v. Greene*.[116] In *Camreta*, the Court was confronted for the first time with the question of whether an in-school interview of a nine-year-old girl regarding suspected abuse constituted a seizure, and, if so, what Fourth Amendment protections should have applied.[117] However, the Court did not reach the merits of the claim, holding instead that the case was moot since the child had since moved out of state and was about to turn eighteen.[118] Accordingly, the issue, long brewing in the circuit courts and of critical importance to the daily operations of child protective agencies across the country, remains undecided.

In *Camreta*, a caseworker, accompanied by a law enforcement officer, interviewed the nine-year-old child, S.G., in her school for somewhere between one and two hours.[119] The interview took place several days after the caseworker learned that the girl's father had been released home on bail following his arrest for sexually abusing a seven-year-old boy.[120] Neither the social worker nor the law enforcement officer obtained a warrant

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[114] *See id.* at 438 n.57 (citing statutes from California, Michigan, and Georgia that encourage in-school interviews of children during child abuse investigations).

[115] *See* Greene v. Camreta, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Jones v. Hunt, 410 F.3d 1221, 1227–29 (10th Cir. 2005); Doe v. Heck, 327 F.3d 492, 513–15 (7th Cir. 2003); Lane v. Milwaukee Cnty. Dep't of Soc. Servs. Children & Family Servs. Div., No. 10–CV–297–JPS, 2011 WL 5122615, at *5 (E.D. Wis. Oct. 28, 2011); Smith v. Tex. Dep't of Family & Protective Servs. Child Protective Servs., Civil Action No. SA-08-CA-940-XR, 2009 WL 2998202, at *9–11 (W.D. Tex. Sept. 15, 2009).

[116] 131 S. Ct. 2020 (2011).

[117] *Id.* at 2026–27.

[118] *See id.*

[119] *Camreta*, 588 F.3d at 1016–17 & n.1 (noting that there was disagreement between the parties regarding the length of the interview).

[120] *Id.* at 1016.

prior to the interview.[121] The Ninth Circuit held that S.G. had been seized without a warrant, in violation of her Fourth Amendment rights.[122]

The Ninth Circuit examined which Fourth Amendment standards apply to such seizures.[123] The court held that in-school interviews generally require a warrant.[124] The court also acknowledged, though, that a warrantless interview might be justified in the presence of exigent circumstances or parental consent; however, since the child's parents had not consented, and exigent circumstances did not exist—as the caseworker had chosen to wait several days before conducting the interview—neither exception applied and the seizure was unlawful.[125]

Although the Supreme Court did not reach the merits of *Camreta*, the questions that the Justices posed during oral argument offered important insights into key issues of the in-school interview controversy. First, the Court questioned whether these interviews were seizures and, thus, subject to the requirements of the Fourth Amendment.[126] When *Camreta* reached the Supreme Court, the parties conceded that a seizure

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[121] *Id.* at 1017.

[122] *Id.* at 1022, 1030.

[123] *Id.*

[124] *See id.* at 1030.

[125] *Id.* at 1030 & nn.17–18. Even though the court found that the seizure was unconstitutional, it nonetheless granted the caseworker and police officer qualified immunity for their unlawful actions and thus found them not liable. *Id.* at 1031–33. The court reasoned that the child's rights in these types of interviews had not been "clearly established" prior to the interview in question. *Id.* It explicitly stated, though, that its present holding regarding the standards applicable to in-school interviews of child abuse victims would be binding precedent that would prevent future state actors from claiming qualified immunity in these situations. *Id.* at 1021–22, 1033. The Supreme Court affirmed the Ninth Circuit's ability to hold that in-school interviews are seizures even while finding the defendants not liable. Camreta v. Greene, 131 S. Ct. 2020, 2030–32 (2011). However, because the Court found that the Fourth Amendment issue in *Camreta* was moot, the Court vacated the Ninth Circuit's decision. *See id.* at 2026–27.

[126] *See* Transcript of Oral Argument, *supra* note 57, at 45–46, 57. Justice Scalia stated:

> I was asking you about whether there has been a seizure.
>
> . . . Now, true in this case it was already conceded, but you're asking us to adopt a rule for future cases, and we can't adopt a rule for future cases until we know what we're talking about when . . . we talk about a seizure.

Id. at 45–46. Justice Sotomayor also remarked, "I'm not quite sure why you stipulated to a seizure in this case, but that was your strategic choice." *Id.* at 57. These comments imply that at least some doubt might exist on the high court as to whether these interviews should, in fact, constitute seizures.

occurred, but the Court questioned why this concession had been made, suggesting that the issue might not have been so easily settled.[127] Second, the Court had concerns about whether warrantless seizure exceptions might apply. Assuming, *arguendo*, that the interview was a seizure, the Court suggested several possible grounds upon which a warrantless interview might be justified, including consent,[128] the exigent circumstances exception,[129] the investigatory detention standard,[130] and the special needs exception.[131] The Court had numerous questions about each of these possibilities and seemed receptive to the notion that at least some of them might apply to in-school seizures.[132]

C. *In-School Interviews in the Lower Courts*

Lower courts confronted with cases involving in-school interviews of suspected child abuse victims have adopted different approaches to address these Fourth Amendment concerns. At least three federal circuit courts have held such interviews to be seizures and offered standards to determine their constitutionality under the Fourth Amendment. Other lower courts have adopted contrary views regarding whether the Fourth Amendment governs these interviews and, if so, what analysis applies.

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[127] *See id.* at 45–46, 57.

[128] *See id.* at 36. For example, Justice Alito asked, "Well, on the issue of consent, do you read the Ninth Circuit's opinion as having an age limit? Suppose that the child is, let's say, 16 years old. Is the child at 16 incapable of consenting to questioning?" *Id.*

[129] *See id.* at 32, 37–38. Justice Ginsburg stated, "I was under the impression that [the Ninth Circuit] did say there's only three ways [to conduct an in-school interview of a child abuse victim]: One is you get a warrant; another is you get parental consent; and a third is exigent circumstances." *Id.* at 32.

[130] *See id.* at 35. Justice Scalia stated, "[Y]ou're asking us to adopt a rule for the future that says if [the interview is] very brief, it's okay, but if it's longer it isn't okay." *Id.*

[131] *See id.* at 38–41. The Court repeatedly inquired whether the presence of various types of individuals at an interview—such as a caseworker, a police officer, a school official, or a school nurse—alone or in tandem, would impact the analysis. *See id.* This questioning suggested a concern regarding the applicability of the special needs exception to seizures that may or may not extend beyond the typical needs of law enforcement. *See id.*

[132] *See id.* at 25, 33–46, 54–55.

In one of the earliest cases to reach the federal circuits on this question, the Seventh Circuit held that an interview of a suspected child abuse victim in a private school constituted an illegal seizure in the absence of a warrant, probable cause, consent, exigent circumstances, and special needs.[133] In this case, two caseworkers went to the school to question the child, John Doe Jr., about allegations that school officials were inflicting corporal punishment on students.[134] The caseworkers did not notify the child's parents prior to going to the child's school.[135] When the caseworkers were finally admitted to the school over the school's protests, John was escorted from his classroom to the nursery of the school and interviewed for twenty minutes about the suspected abuse.[136]

The Seventh Circuit held that John had been illegally seized.[137] The court found that John had a reasonable expectation of privacy on the premises of the private school and that, therefore, the seizure required a warrant and probable cause, unless consent or exigent circumstances—or perhaps special needs—were present.[138] However, the Seventh Circuit expressly predicated its ruling on the fact that the interview took place at a private school, on privately-owned property.[139] The Court noted that a lower standard of Fourth Amendment protection might apply in a public school setting because an intrusion at a public school would probably be more "limited" than one that takes place on private property.[140]

Two years later, the Tenth Circuit similarly held that an in-school interview of a suspected child abuse victim constituted an illegal seizure. In *Jones v. Hunt*, a sixteen-year-old girl notified school authorities that her father and stepmother had struck her repeatedly during a fight.[141] After this disclosure, a police officer removed the child from her school for an interview with a social worker at the sheriff's department.[142] The child's mother then

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[133] Doe v. Heck, 327 F.3d 492, 510, 513–14 (7th Cir. 2003).
[134] *Id.* at 500, 502.
[135] *Id.* at 502.
[136] *Id.* at 502–03.
[137] *Id.* at 510, 513–14.
[138] *Id.* at 511–14.
[139] *Id.* at 511–12, 514.
[140] *Id.* at 513–14.
[141] 410 F.3d 1221, 1223–24 (10th Cir. 2005).
[142] *Id.* at 1224.

filed for—and received—a temporary restraining order against the child's father.[143] However, two child protective workers subsequently told the child that, despite the temporary restraining order, she had to return to live with her father.[144] The same caseworkers came to the child's school and met with her in the guidance counselor's office for approximately three hours, until the child finally agreed to return to her father.[145]

The Tenth Circuit held that the child's encounter with the caseworkers in the guidance counselor's office was an unlawful seizure.[146] The court rejected the relaxed standards applied to seizures under the special needs exception, stating that such standards should not apply where a student was questioned in school by a social worker and a police officer.[147] The court found that the concerns present for school officials in *New Jersey v. T.L.O.*—the interests in maintaining order and discipline within a school—were not present in a child abuse investigation.[148] However, the court did not go further and articulate clear standards for the future.[149] Instead, the court simply found that the conduct of the caseworkers in this case failed even the "most minimal standard" of Fourth Amendment review.[150] In a footnote, the Tenth Circuit noted that the circumstances of this case were unique and that probable cause, a warrant, or exigent circumstances were not necessarily required every time a social worker questioned a child on public school property.[151]

While they may disagree on which exceptions to the warrant requirement apply to in-school interviews of suspected child abuse victims, the circuit courts do seem to agree that at a minimum these interviews are, in fact, seizures. However, at least one lower federal court has held otherwise. In *Cornigans v. Mark Country Day School*, the District Court for the Eastern District of New York found that no Fourth Amendment rights were implicated when a police officer and a child protective caseworker interviewed a six-year-old girl in school about

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[143] *Id.*
[144] *See id.*
[145] *Id.*
[146] *Id.* at 1226–29.
[147] *See id.* at 1228.
[148] *See id.*
[149] *See id.* (quoting Snell v. Tunnell, 920 F.2d 673, 698 (10th Cir. 1990)).
[150] *Id.*
[151] *See id.* at 1228 n.4.

suspected child abuse.[152] The court predicated its finding on the fact that the child had not been physically removed from the school itself.[153]

Still other district courts have assumed that in-school child abuse interviews are seizures, but applied different standards of Fourth Amendment review than those relied on by the circuit courts.[154] In the Eastern District of Wisconsin, for example, a police officer conducted an in-school interview of a young boy who was suspected of being abused by his mother.[155] In finding this seizure to be constitutional, the court seemed to rely on the standards governing investigatory detentions; the court found that the interview was justified at its inception and narrow in scope since it was short and conducted on public school grounds with the permission of school officials.[156] In another case, the District Court of the Western District of Texas adopted a similar approach when it determined that an in-school interview of a six-year-old girl, whose father was suspected of sexually abusing her, was a lawful seizure.[157] The court here noted that the interview was not unreasonable in length and applied a "reasonable suspicion" standard to find that the grounds for the seizure were justified.[158]

D. The Consequences of the Controversy for Child Protective Agencies and Children

The ambiguity surrounding what standards govern in-school interviews of suspected child abuse victims has left child protective agencies in a state of uncertainty and encouraged misuse of this investigative tool.[159] Most agencies have not

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[152] No. CV 03-1414(DLI)(WDW), 2006 WL 3950335, at *1–2, *6 (E.D.N.Y. July 12, 2006).

[153] *Id.* at *6.

[154] *See* Lane v. Milwaukee Cnty. Dep't of Soc. Servs. Children & Family Servs. Div., No. 10–CV–297–JPS, 2011 WL 5122615, at *5 & n.5 (E.D. Wis. Oct. 28, 2011); Smith v. Tex. Dep't of Family & Protective Servs. Child Protective Servs., Civil Action No. SA-08-CA-940-XR, 2009 WL 2998202, at *8–9, *11 (W.D. Tex. Sept. 15, 2009).

[155] *Lane*, 2011 WL 5122615, at *4.

[156] *Id.* at *5.

[157] *Smith*, 2009 WL 2998202, at *7, *11.

[158] *Id.* at *11.

[159] *See* Coleman, *supra* note 28, at 466 n.159. While a number of states have implemented policies authorizing in-school interviews of children during abuse and neglect investigations, very few states have provided any—let alone clear—

seemed particularly concerned with establishing clear standards of their own, in part because of the prevalent use of the qualified immunity doctrine in litigation.[160] Under this doctrine, a government actor may be relieved from liability for violating a constitutional right if the right was not "clearly established" at the time of the violation.[161] Ironically, by failing to establish procedures to protect children's Fourth Amendment rights during seizures, agencies might more easily avoid liability when children's rights are violated because these rights are not "clearly established."[162] Without clearly established standards, agencies "can carry out their own changing and idiosyncratic policies regarding searches and seizures, and gain [unfair advantages in subsequent] litigation, when they act unilaterally rather than expose their decision-making to judicial review."[163]

The policies of child protective agencies in Texas and Connecticut illustrate this weakness.[164] Both states' agencies have written policies regarding in-school interviews of

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standards aimed at protecting children's Fourth Amendment rights. *See, e.g.*, CONN. DEP'T OF CHILDREN & FAMILIES, POLICY MANUAL § 34-3-5 (2000), *available at* http://www.ct.gov/dcf/cwp/view.asp?a=2639&Q=393950 (stating that the investigator may meet with the child at his school, and describing the conditions under which these interviews may be conducted); CHILD PROTECTIVE SERVS. ADMIN, D.C. CHILD & FAMILY SERVS. AGENCY, INVESTIGATIONS PRACTICE OPERATIONS MANUAL 41, 65 (2011), *available at* http://cfsa.dc.gov/DC/CFSA/About+CFSA/Who+We+Are/Publications/Investigations+POM (stating that if the family being investigated is not home, the caseworker must go to the child's school to interview the child, and that the child's school is an example of an ideal neutral setting in which to interview a child); CHILDREN & FAMILY SERVS., KAN. DEP'T OF SOC. & REHAB. SERVS., POLICY AND PROCEDURE MANUAL § 2141 (2013), *available at* http://content.dcf.ks.gov/PPS/robohelp/PPMGenerate (instructing schools to cooperate with law enforcement and child protective agencies investigating child abuse, not to notify children's parents of in-school interviews, and to remove children from their classrooms for interviews without disclosing the purpose of the interview); TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK §§ 2361–2361.1 (2012), *available at* http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2360.asp#CPS_2360 (stating that the alleged victim of child abuse may be interviewed at school, and listing steps to access the child in school in the presence or absence of parental consent).

[160] *See* Greene v. Camreta, 588 F.3d 1011, 1030–31, 1033 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Coleman, *supra* note 28, at 466 n.159.

[161] *See Camreta*, 588 F.3d at 1030–31; Coleman, *supra* note 28, at 466 n.159.

[162] *See* Coleman, *supra* note 28, at 466 n.159.

[163] Brief of the Legal Aid Society, *supra* note 53, at 9.

[164] *See* CONN. DEP'T OF CHILDREN & FAMILIES, *supra* note 159; TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 159.

children,[165] but these policies raise serious concerns about whether children's Fourth Amendment rights are being adequately upheld. In Texas, the policies seem to encourage child protective workers to avoid the traditional safeguard of these rights—the warrant requirement.[166] The policy tells caseworkers that they may seek a court order to interview a child in school only if they "cannot obtain entrance" to the school, which suggests that the caseworker must first attempt to enter the school without prior judicial authorization.[167] In Connecticut, school interviews of a child require parental consent—*unless* the parent is the suspected perpetrator.[168] Given that approximately seventy-eight percent of abusers are the biological parents of abused children,[169] this exception swallows the rule. Where the parent *is* the suspected perpetrator, the interview may be conducted as long as a "disinterested adult" is present or exigent circumstances exist when a disinterested adult is not available.[170] However, the policy does not explain what role this "disinterested adult" plays in these interviews,[171] and the mere presence of a disinterested adult does not seem in any way to guarantee that a child's Fourth Amendment rights are being protected.

These deficiencies in agency standards cannot be ignored. Child protective workers deal with Fourth Amendment issues in their investigations on a daily basis—perhaps even more frequently than law enforcement officers do.[172] If child protective agencies are to make use of in-school interviews to protect children while preserving children's Fourth Amendment rights, then a clear rule must be established.

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[165] *See* CONN. DEP'T OF CHILDREN & FAMILIES, *supra* note 159; TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 159.

[166] *See* TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 159, § 2361.

[167] *See id.*

[168] *See* CONN. DEP'T OF CHILDREN & FAMILIES, *supra* note 159.

[169] *See* Hafemeister, *supra* note 29, at 826.

[170] *See* CONN. DEP'T OF CHILDREN & FAMILIES, *supra* note 159.

[171] *See id.*

[172] N. Dickon Reppucci & Carrie S. Fried, *Child Abuse and the Law*, 69 UMKC L. REV. 107, 120 (2000).

III. DEFINING THE RULE: FOURTH AMENDMENT ANALYSIS APPLIED TO IN-SCHOOL INTERVIEWS

This Part proposes clear standards to govern in-school interviews of suspected child abuse victims so that interviews are conducted in a manner consistent with children's Fourth Amendment rights. Part III.A argues that in-school interviews of suspected victims of child abuse constitute seizures. Part III.B discusses how, as seizures, these interviews are generally subject to the requirement of a warrant supported by probable cause. Part III.C analyzes possible exceptions to the warrant requirement and argues that consent or the exigent circumstances exception may justify warrantless interviews, but the investigatory detention standard and special needs exception will not. Part III.D demonstrates how these rules answer the unresolved questions the Supreme Court posed during oral argument in *Camreta*. Part III.E shows how this framework may be incorporated into child protective agencies' policies to provide clearer guidelines for those investigating abuse.

A. *In-School Interviews Constitute Fourth Amendment Seizures*

The Supreme Court's questioning during oral argument in *Camreta* notwithstanding, substantial circuit court authority supports the proposition that an in-school interview of a child regarding suspected abuse is a seizure. The majority of federal circuits have held that various investigatory techniques applied during child abuse investigations constitute seizures,[173] and at least three circuits have found that in-school interviews of suspected victims specifically are seizures.[174] For example, in *Doe v. Heck*, the Seventh Circuit held that a caseworker's in-school interview of a fourth-grade boy about potential abuse constituted a seizure.[175] The child had been taken from his classroom by the school principal, caseworkers, and a uniformed police officer to the nursery of the school, which was empty at the time.[176] He was questioned there for twenty minutes about

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[173] *See* Coleman, *supra* note 28, at 471.

[174] Greene v. Camreta, 588 F.3d 1011, 1022 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Jones v. Hunt, 410 F.3d 1221, 1226–27 (10th Cir. 2005); Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003).

[175] *Heck*, 327 F.3d at 503, 510.

[176] *Id.* at 510.

whether he had suffered abuse.[177] The Seventh Circuit found that the child had been seized, because no reasonable child would have believed he was free to leave the nursery under those circumstances.[178]

The Tenth Circuit similarly found that a high school student was seized when she was taken to the school counselor's office and questioned by two government officials.[179] In *Jones v. Hunt*, two caseworkers came to the school of a sixteen-year-old girl after telling her that she would have to return home to her abusive father, despite a temporary restraining order against him.[180] They proceeded to interview her for over two hours in the school guidance counselor's office while the counselor was present and then for an additional "hour or two" after the counselor left.[181] Pointing to the girl's emotional vulnerability and her knowledge of the caseworkers' power to affect her custodial arrangements, the Tenth Circuit held that a reasonable sixteen-year-old would not have felt able to leave such a situation.[182] The court also noted that the girl had been sent to the counselor's office by a school official and that "[a] reasonable high school student would not have felt free to flaunt a school official's command, leave an office to which she had been sent, and wander the halls of her high school without permission."[183]

The reasonable belief that one is unable to leave a detention by a state actor is a defining feature of a seizure of one's person.[184] The cases discussed above demonstrate that, under the conditions of an in-school interview regarding abuse, a reasonable child does not feel free to leave such an interview and thus is seized within the meaning of the Fourth Amendment. The Tenth Circuit's decision in *Jones* demonstrates that when authority figures question children in the school setting, children feel they must stay and respond because of the typical rules of authority and discipline that are enforced within a school.[185] Children are afraid not to cooperate with authorities within the

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[177] *See id.*
[178] *Id.*
[179] *Jones*, 410 F.3d at 1226–27.
[180] *Id.* at 1224.
[181] *Id.*
[182] *Id.* at 1226.
[183] *Id.* at 1227.
[184] *See* Terry v. Ohio, 392 U.S. 1, 19 & n.16 (1968).
[185] *See Jones*, 410 F.3d at 1227; ROSSOW & STEFKOVICH, *supra* note 110.

school for a variety of reasons, including school disciplinary procedures.[186] Children in these interviews may feel compelled to answer—and even answer falsely—any questions they are asked, because they believe that giving their questioners the answers they "want" or expect is the only way to exit an intimidating situation.[187]

Even brief detentions of children in this context constitute seizures. During oral argument in *Camreta*, the respondent suggested that the length of an interview might somehow affect the analysis of whether a seizure had occurred.[188] However, even investigatory detentions are seizures; the length of the detention affects the reasonableness of the seizure, not the existence of a seizure.[189] Brief detentions constitute seizures of a person as long as the seized party does not feel free to leave the encounter.[190]

B. A Warrant Requirement for In-School Interviews of Suspected Victims of Abuse

Since these interviews constitute Fourth Amendment seizures, in most cases the general requirement of a warrant supported by probable cause applies. In determining whether probable cause exists in the child abuse context, courts will examine whether there are "reasonable ground[s]" to believe a person has abused or neglected a child.[191] Probable cause can be described, essentially, as "the difference between 'something may have happened' and 'something probably happened.' "[192] Thus, a mere report of abuse will almost always not be enough;

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[186] *See Jones*, 410 F.3d at 1227; ROSSOW & STEFKOVICH, *supra* note 110.

[187] *See* Greene v. Camreta, 588 F.3d 1011, 1017 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); *Jones*, 410 F.3d at 1227; Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003).

[188] Transcript of Oral Argument, *supra* note 57, at 33–35. During the respondent's argument, Justice Alito asked, "What is there in the Ninth Circuit's opinion . . . to suggest that the length of the interrogation was relevant to their decision?" *Id.* at 33. After being pressed further by Justice Scalia, the respondent stated that the length "goes to the question of whether or not there was a seizure." *Id.* at 34–35.

[189] *See* STEPHENS & GLENN, *supra* note 43, at 94–96.

[190] *See* Clancy, *supra* note 35, at 621–22; Hardin, *supra* note 71, at 562.

[191] *See* Wm. Andrew Sharp, *The Prosecutor's Role in Preventing Family Violence*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION 273, 283 (Frank R. Ascione & Phil Arkow eds., 1999).

[192] *Id.*

additional evidence will have to be present, increasing the likelihood of the veracity of the report.[193] Once child protective agencies have sufficient evidence to demonstrate the reliability of the report and the probability of abuse, they may seek—and obtain—a warrant to conduct an in-school interview.[194]

These requirements are not only consistent with Fourth Amendment jurisprudence, but are also particularly beneficial in the context of child abuse investigations. Child protective agencies are typically plagued by—and criticized for—systemic problems that compromise their investigations, including minimal frontline caseworker training, high employee turnover rates, and a lack of clear operating and investigating standards.[195] Thus, important decisions implicating children's Fourth Amendment rights are often left solely to the discretion of inexperienced, undertrained caseworkers and their overworked supervisors.[196] The warrant requirement takes discretion away from these child protective workers and replaces it with a straightforward rule: obtain a warrant before conducting an in-school interview.[197]

Review by a neutral magistrate also ensures that the evidence child protective agencies gather provides sufficient constitutional grounds to conduct the interview.[198] By providing this additional level of review before a caseworker conducts an interview, the warrant requirement "makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State" in child abuse investigations.[199] Ultimately, this requirement encourages improved investigations by mandating that agencies impose safeguards within their procedures that will protect the Fourth Amendment rights of children.[200]

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[193] *Id.*

[194] Michael P. Farris, *The Fourth Amendment's Impact on Child Abuse Investigations*, HSLDA, Apr. 2, 2003, http://www.hslda.org/research/docs/200404020.asp.

[195] *See* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 961–62 (2004); Coleman, *supra* note 28, at 466 n.159.

[196] *See* Brown, *supra* note 195.

[197] *See* Hardin, *supra* note 71, at 561.

[198] *See id.*

[199] Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

[200] *See* Brief of the Legal Aid Society, *supra* note 53, at 14–16.

C. *Proposed Exceptions to the Warrant Requirement for In-School Interviews*

Although a warrant should generally be obtained prior to an in-school interview of a child, there certainly will be some circumstances in which it would be "reasonable" for the seizure to occur in the absence of a warrant. This Section examines four categories of warrantless seizures that have been proposed to justify warrantless in-school interviews of child abuse victims—consent, exigent circumstances, investigatory detentions, and special needs[201]—and evaluates their applicability to these interviews.

1. The Consent Exception and Its Limited Applicability to In-School Interviews

Consent might be a valid ground to justify a warrantless in-school interview of a child, but the exception should only apply under limited circumstances. Parents generally have the ability to consent to warrantless seizures of their children.[202] However, in situations involving suspected parental abuse, caseworkers will generally not seek parental consent, as one of the main rationales for conducting in-school interviews is precisely to avoid parental interference.[203]

In this context, then, the caseworker must obtain the child's consent, but a child's ability to consent in inherently limited.[204] Because of the law's presumption that children are unable to make legal decisions for themselves, in many cases a child's "consent" to answer questions during an interview could be considered invalid.[205] In some instances, "mature" children may be able to validly consent to interviews; however, determining whether a child is sufficiently "mature" is essentially a

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[201] *See, e.g.*, Greene v. Camreta, 588 F.3d 1011, 1030 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Jones v. Hunt, 410 F.3d 1221, 1227–28 (10th Cir. 2005); Doe v. Heck, 327 F.3d 492, 513–14 (7th Cir. 2003); Lane v. Milwaukee Cnty. Dep't of Soc. Servs. Children & Family Servs. Div., No. 10–CV–297–JPS, 2011 WL 5122615, at *5–6 (E.D. Wis. Oct. 28, 2011); Smith v. Tex. Dep't of Family & Protective Servs. Child Protective Servs., Civil Action No. SA-08-CA-940-XR, 2009 WL 2998202, at *9–10 (W.D. Tex. Sept. 15, 2009); Transcript of Oral Argument, *supra* note 57.

[202] *See* Brief of the Legal Aid Society, *supra* note 53, at 21.

[203] *See* Coleman, *supra* note 28, at 438.

[204] *See id.* at 463 n.144.

[205] *See id.*

discretionary call that involves weighing the age, education, and intelligence of a child.[206] If consent to an interview is challenged in court, a judge might plausibly disagree with a caseworker's finding of maturity and hold the consent invalid.[207]

One good indication of consent might be if the child—rather than an outside third party—initiated the investigation. If a child, uninfluenced by others, is the one who initially reports the abuse—thus prompting an interview—there exists a more substantial rationale for concluding that the child wishes to be interviewed about the report.[208] Consent is not so straightforward, however, when the child has not initiated the report, but is instead initially approached by others within the school setting.[209] Children typically have a low expectation of privacy concerning school-related matters because schools are afforded latitude to maintain order and discipline; thus, for example, schools may conduct searches as long as they serve the school's administrative interests.[210] But children are entitled to a higher expectation of privacy with respect to non-school related events, including child abuse in the home, because these interviews are unrelated to the school's administrative interests.[211] Consider the situation from the point of view of a child facing an authority figure's questions—whatever these questions may be about—in a school setting though: The child is unlikely to recognize the difference between these types of inquiries and will usually feel compelled to answer both sets of questions, even if he does not want to answer.[212] Under such circumstances, caseworkers might have difficulty proving that consent was freely and voluntarily given.

2. The Exigent Circumstances Exception: Applicable to Interviews but Only Where Its Strict Requirements Are Met

The exigent circumstances exception may also justify a warrantless interview of a child under very limited circumstances. Courts considering this issue have generally

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[206] *See id.* at 462 & n.144.
[207] *See id.*
[208] *See* Hardin, *supra* note 71, at 552–53.
[209] *See id.*
[210] *See* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring).
[211] *See* Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005).
[212] *See, e.g.*, ROSSOW & STEFKOVICH, *supra* note 110.

agreed that a child may be interviewed without a warrant when exigent circumstances exist, although most courts have not actually found the exception's requirements to be satisfied under the facts of their particular cases.[213] This acceptance of the exception comports with the interests at stake: The State's interest in protecting the welfare of the child and the child's interest in being free from abuse or neglect are greatest when the child's life or safety is in immediate danger.[214]

However, the exigent circumstances exception's strict requirements of probable cause together with a genuine emergency should significantly limit the applicability of this exception to in-school interviews. Demonstrating a true exigency seems particularly challenging in the in-school context because, while the child is at school, she is usually removed from the dangerous situation being investigated.[215] This scenario is unlike that of a home investigation where the child may be facing immediate harm.[216] Perhaps in situations when it is late in the day and close to dismissal time or when the child might be returning to an extremely dangerous situation after school, the argument that an exigency exists might be more compelling. However, the child protective worker would still have to show that it was impracticable to obtain a warrant before the child left the building for the day and that probable cause justified the initial interview.[217] Thus, while this exception may be applicable to cases involving in-school interviews of children, practically it should have only limited application.

3. The Child Interview as an Investigatory Detention: Unreasonable, Harmful, and Impracticable

The standards governing investigatory detentions, originally developed in *Terry v. Ohio*,[218] should not be applied to in-school interviews of child abuse victims, firstly, because the purposes of

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[213] *See, e.g.*, Greene v. Camreta, 588 F.3d 1011, 1030 n.17 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011); Doe v. Heck, 327 F.3d 492, 513 & n.17 (7th Cir. 2003).

[214] *See* Coleman, *supra* note 28, at 464–65.

[215] *See* Hafemeister, *supra* note 29, at 826.

[216] *See id.*

[217] *Cf.* Coleman, *supra* note 28, at 464–65 (describing concerns that officials may wrongfully invoke the exigent circumstances exception in child abuse investigations where the exception's requirements have not been met).

[218] 392 U.S. 1 (1968).

the standards are not served when they are applied to these interviews. The role of the relaxed standards in *Terry* was to permit police officers to detain individuals engaged in suspicious behavior before they could flee the scene or carry out their activities.[219] Similar concerns are not present when child protective workers enter a school to interview a suspected victim of abuse. In those interviews, the caseworker already knows where the child is and what the caseworker is investigating with respect to that child. These interviews are not part of "a dynamic, rapidly developing investigative process" like the one described in *Terry*.[220] Rather, they are "pre-planned seizure[s] that could, and should . . . be[] reviewed by a judge before [they] happen[]."[221] The child is not engaged in an activity that prompts the caseworker's seizure or encourages flight. In *Terry*, relaxed standards of Fourth Amendment protection were reasonable because they were directly related to the legitimate objectives of preventing crime and flight.[222] Applying such standards to in-school interviews where *Terry* concerns are not present overreaches.

Moreover, adopting these standards in the context of in-school interviews of children would incentivize a method of interviewing children that has the potential to harm them. Such standards would encourage caseworkers to conduct interviews in a brief, perfunctory manner in order to avail themselves of lower Fourth Amendment standards. However, questioning a child about such sensitive, embarrassing, personal, and hurtful subjects is an extremely delicate undertaking.[223] Children are often unwilling to speak at all about negative events.[224] Being questioned about such events in any fashion can be an extremely traumatic experience for a child, with both short-term and long-term effects on children's mental and emotional stability.[225] One

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[219] *See id.* at 20, 22–23.

[220] *See* Brief of the Legal Aid Society, *supra* note 53, at 27.

[221] *Id.*

[222] *See Terry*, 392 U.S. at 20, 22–23.

[223] *See* Sharron Docherty & Margarete Sandelowski, *Focus on Qualitative Methods: Interviewing Children*, 22 RES. NURSING & HEALTH 177, 180–81 (1999).

[224] *See* Maggie Bruck et al., *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice*, 53 AM. PSYCHOLOGIST 136, 143 (1998); Docherty & Sandelowski, *supra* note 223, at 177, 180–81.

[225] *See* Coleman, *supra* note 28, at 417–19.

can only imagine how this harm might be exacerbated if a stranger approaches a child and begins questioning her in a direct, rushed fashion about whether she has been abused.

Seizures conducted in this fashion fail the test of reasonableness. As Justice Scalia seemed to suggest during oral argument in *Camreta*, it would be absurd to expect a child protective worker to obtain reliable information regarding subject matter as sensitive as abuse through a brief detention.[226] Interviewing a child effectively, especially about a topic as painful as abuse, requires the interviewer to build rapport with the child, earn the child's trust, and allow the child to open up on his or her own terms.[227] Without such communication, the child will be far less likely to offer information, and the information he volunteers will likely be less accurate.[228] Given the significant harm a child might suffer in exchange for this relatively minor gain of information, such seizures are not reasonable and thus fail to satisfy Fourth Amendment requirements.[229]

4. The Special Needs Exception: Inapplicable Due to Child Protective Agencies' Entanglement with Law Enforcement

The special needs exception must also be rejected as a basis for a warrantless in-school interview of a child because of the large degree of entanglement between the needs of child protective agencies and those of law enforcement in child abuse investigations. Child abuse investigations usually do not exist in a vacuum; rather, they frequently involve multidisciplinary teams of "[s]ocial workers, physicians, therapists, prosecutors, judges, and police officers."[230] Law enforcement typically first becomes involved in these investigations when abuse is reported, either by referral from an outside third party or agency or by a direct call from an involved party.[231] Since the emergence of

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[226] *See* Transcript of Oral Argument, *supra* note 57, at 34 ("It seems like a very strange rule to me. You mean it's okay for a child protection worker to just ask the child . . . [c]ome into this room, I have a question for you: Has your father been abusing you?").

[227] *See* Sara Harris, *Toward a Better Way To Interview Child Victims of Sexual Abuse*, NAT'L INST. JUST. J., Winter 2010, at 12, 12–14.

[228] *See id.*

[229] *See* Transcript of Oral Argument, *supra* note 57, at 44–45.

[230] OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 3 (1997) [hereinafter U.S. DEP'T OF JUSTICE].

[231] *Id.* at 2.

mandatory reporting laws, reporting of child abuse has increased, and thus law enforcement agencies have taken on an even greater role to meet the challenges of investigating these many reports.[232]

Once involved, law enforcement often becomes an integral part of the investigation process. Law enforcement agencies take on roles such as developing intake procedures with child protective agencies,[233] providing accompaniment of child protective workers in the field,[234] interviewing children,[235] and conducting criminal investigations of suspected abusers.[236] Some states require child protective agencies to "share all child maltreatment reports with law enforcement,"[237] and "most if not all states contemplate that the evidence-gathering function may be conducted by officials from either agency, or both working together, and that relevant evidence will be shared between the agencies for eventual use in both civil and penal proceedings."[238] When conducting an investigation, law enforcement and child protective agencies are expected to work together and be aware of each other's concerns.[239]

The overlapping involvement of child protective agencies and law enforcement indicates that the needs of child protective agencies are not beyond the normal needs of law enforcement; rather, they are inextricably entangled with these needs, such that the special needs exception cannot apply to child protective agencies' investigations.[240] If courts accepted the special needs exception as a basis for conducting these investigations without a warrant, there would be a serious risk that law enforcement would obtain information from child protective agencies' seizures that law enforcement would not be able to otherwise obtain due

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[232] *See id.*

[233] *See* Coleman, *supra* note 28, at 492–93.

[234] *See* Greene v. Camreta, 588 F.3d 1011, 1017 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

[235] *See* U.S. DEP'T OF JUSTICE, *supra* note 230, at 2.

[236] David Finkelhor & Richard Ormrod, *Child Abuse Reported to the Police*, JUV. JUST. BULL. (Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), May 2001, at 1.

[237] *Id.* at 2.

[238] Coleman, *supra* note 28, at 493–95 (footnote omitted).

[239] *See* U.S. DEP'T OF JUSTICE, *supra* note 230.

[240] *See* Coleman, *supra* note 28, at 491–97.

to Fourth Amendment protections.[241] For this reason, child protective agencies should be subject to the same standards that law enforcement agencies would be subject to when conducting child abuse investigations.[242] Undeniably, law enforcement agencies and child protective agencies play extremely important roles in investigating child abuse, but the importance of these roles alone does not mean that the agencies have "special needs" that allow them to circumvent the constitutional requirements governing seizures.[243]

The analysis of whether the special needs exception applies to an in-school interview of a child should not hinge on whether or not law enforcement is present for the interview; law enforcement still potentially benefits from the information gained by the child protective worker's interview, whether or not law enforcement was in the room when the information was obtained. In *Camreta*, the Ninth Circuit declined to answer the question of whether the special needs exception would have applied had the caseworker been acting alone, without a police officer present.[244] Given the likelihood of police involvement at some stage of child abuse investigations, whether at the interview of the child or at another point,[245] the risk that law enforcement will gain information that it would not otherwise have been able to obtain calls for a blanket rejection of the exception.

In addition, although these interviews take place in schools like the search in *New Jersey v. T.L.O.* did, interviews during child abuse investigations are distinguishable such that the special needs exception that applied in *T.L.O.* should not apply here.[246] In *T.L.O.*, the search of a student's purse was considered reasonable because it served the school's special needs of

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[241] *See* Greene v. Camreta, 588 F.3d 1011, 1027 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

[242] *See* Brief of the Legal Aid Society, *supra* note 53, at 14 ("[T]he need for judicial review is compelling no matter who is taking action.").

[243] *See* Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999) ("[I]f CWA caseworkers have 'special needs,' we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from *'whenever practicable*, obtain[ing] advance judicial approval of searches and seizures.' " (second alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968))).

[244] *Camreta*, 588 F.3d at 1027 n.12.

[245] *See* Finkelhor & Ormrod, *supra* note 236.

[246] *See* New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985); Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005).

maintaining order and discipline.[247] However, in child abuse investigations, a different set of goals—unrelated to the school's overall administrative scheme—is present.[248] The purpose of conducting a child abuse investigation inside a school is to determine whether children are in danger of abuse once back outside of school; if so, agencies can act to protect these children from that external danger.[249] The school's interests underlying the rationale of *T.L.O.* are not present in a caseworker's investigation of child abuse that occurred outside of school.

For the same reason, even if a school official—rather than an outside caseworker—conducted an interview of a child regarding abuse, the *T.L.O.* standards would still not apply. Although school officials may have reporting requirements under state law if they suspect a child is being abused,[250] their specific administrative roles do not include undertaking investigations of this abuse; rather, "[p]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including [child protective services], and the children with whom they deal."[251] The school's goals of maintaining order and an appropriate educational environment are not achieved when the school seizes a child for an interview regarding suspected child abuse.[252] School officials conducting such interviews would essentially take on the role of the child protective agency, and the same concerns about law enforcement wrongfully obtaining this information would be present. Thus, the "special needs" of schools do not include the need to conduct these interviews, and the exception should not apply in these situations.

D. Camreta*: What the Court Did Not Hold*

As the preceding section demonstrates, a thorough Fourth Amendment analysis of in-school interviews of children conducted by child protective workers, whether or not they are accompanied by law enforcement, indicates that such interviews

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[247] *See T.L.O.*, 469 U.S. at 339–42.

[248] *See Jones*, 410 F.3d at 1228.

[249] *See* Coleman, *supra* note 28, at 433–34.

[250] Rebecca Aviel, *Restoring Equipoise to Child Welfare*, 62 HASTINGS L.J. 401, 420 (2010).

[251] Tenenbaum v. Williams, 193 F.3d 581, 607 (2d Cir. 1999).

[252] *See Jones*, 410 F.3d at 1228.

are illegal seizures unless justified by a warrant, consent, or exigent circumstances. This section examines the specific inquiries articulated by the individual justices during oral argument in *Camreta v. Greene*[253] concerning (1) whether in-school interviews are seizures, (2) what standards might apply if such interviews are seizures, (3) how the factual details of an interview—such as its length and the person conducting the interview—might affect its reasonableness, and (4) how these standards might apply in other types of interviews with children.[254] This Part addresses each of these areas of inquiry in turn.

1. The Court's Concern with Whether In-School Interviews Are Seizures

During oral argument on March 1, 2011, the Court, from many directions, repeatedly returned to the issue of whether S.G. had, in fact, been seized at all.[255] This Note applied the traditional Fourth Amendment tests—whether a person had a reasonable expectation of privacy and whether the person would feel free to leave the situation, given the circumstances—to the particular circumstances of a child questioned about abuse in a school setting.[256] This Note concluded that a child would be entitled to a reasonable expectation of privacy with respect to such an interview, but that the child would not feel free to leave or terminate the interview; thus, the interview would constitute a seizure.[257]

The rule proposed in this Note distinguishes, though, between child abuse interviews—which constitute seizures—and other types of detentions that occur in schools. During oral argument, Justice Kennedy asked the petitioner to consider the following example:

> Justice Kennedy: . . . [W]hat happens if the teacher tells—the student is misbehaving on the playground: Go back in the classroom. You can't—you sit there by yourself. You can't be part of recess.
> Is that a seizure?

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[253] 131 S. Ct. 2020 (2011).
[254] *See generally* Transcript of Oral Argument, *supra* note 57.
[255] *See id.* at 1, 16, 44–46.
[256] *See supra* Part III.A.
[257] *See id.*

> Mr. Kroger [Petitioner]: No, Your Honor, I—I disagree that that would be a seizure, because—
> Justice Kennedy: What made this a seizure?[258]

Under the rule this Note advocates, such actions would not constitute seizures. Although children have substantial expectations of privacy with respect to interviews regarding child abuse,[259] children have lesser expectations of privacy in matters related to order and discipline in schools.[260] The child who acts up on the playground, as Justice Kennedy described, would reasonably expect her school to take disciplinary measures to address her misbehavior.[261] Similarly, actions like those mentioned by Justice Breyer, in which a child is sent to the principal after "push[ing] [another] child at recess," or where students are kept for "5 minutes after class" for talking too much,[262] also would not constitute seizures. The child's reasonable expectations of privacy in these common schoolyard disciplinary situations distinguish them from in-school child abuse interviews when analyzing whether a seizure has taken place.

2. Providing Clear Standards To Govern the Constitutionality of In-School Interviews

This Note also provides a practical response to the Court's second area of inquiry: what standards should apply to govern the constitutionality of in-school interviews.[263] Since in-school interviews of suspected child abuse victims constitute seizures, courts should require child protective agencies to obtain warrants supported by probable cause prior to conducting these interviews in most circumstances.[264] In the absence of a warrant, the

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[258] Transcript of Oral Argument, *supra* note 57, at 16.

[259] *See supra* text accompanying note 211.

[260] *See* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring).

[261] *Cf. id.* (describing children's lesser expectations of privacy regarding school disciplinary matters).

[262] *See* Transcript of Oral Argument, *supra* note 57, at 41–42.

[263] *See id.* at 11, 25.

[264] Justices Alito and Sotomayor questioned what standard neutral magistrates should apply when granting prior judicial authorization for in-school interviews of children. *Id.* at 52–53, 57. This Note maintains that traditional Fourth Amendment jurisprudence requires a showing of probable cause to obtain a warrant.

reasonableness of the interview must be considered, as Justices Ginsburg, Kennedy, and Sotomayor suggested during oral argument in *Camreta*:

> Justice Ginsburg: . . . [A]nd this case presents the question about was this [seizure] unreasonable?
>
> . . . .
>
> Justice Kennedy: Well, but I'm—I'm asking for your view of the proper category to apply in these cases, and if it is a seizure, then—then it's just a question of reasonableness, and we'd look at all the circumstances.
>
> . . . .
>
> Justice Sotomayor: . . . What's the test? Is it a question of whether the seizure is reasonable or not?[265]

This Note has set out clear standards of what constitutes a reasonable seizure in this context by analyzing what exceptions to the warrant requirement might apply. Applicable exceptions include interviews conducted with valid consent of the child herself and interviews conducted under exigent circumstances. The other two main exceptions—investigatory detentions and the special needs exception—should not apply to in-school child abuse investigations, as the elements justifying their application and usefulness in other investigations are not present in child abuse investigations. Thus, Justice Sotomayor's concern about whether it would be reasonable for a caseworker to talk to a child against the child's protests[266] would be answered in the negative; the child would not have consented to the interview, and—unless there was parental consent or exigent circumstances—conducting the interview without a warrant would be unreasonable. Justice Alito's inquiries regarding what age would be required for a child to consent to an interview would be guided by the factors traditionally used to analyze the validity of a minor's consent, including age, experience, and education.[267]

3. Increasing Certainty Through a Bright-Line Rule

By rejecting investigatory detention standards and the special needs exception and relying instead on the bright-line rule articulated above, this Note also purports to diminish the

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[265] *Id.* at 11, 17, 25.

[266] *Id.* at 25 ("[W]hat if a child is called in and says, I don't want to talk to you without my mom; and they continue to speak to the child? Is that reasonable?").

[267] *See id.* at 36; Coleman, *supra* note 28, at 462 & n.144.

confusion resulting from the application of "soft" factors, such as how long an interview lasts, upon a Fourth Amendment analysis of in-school interviews. During oral argument in *Camreta*, the Court expressed discomfort with the notion that such soft factors might ultimately determine the constitutionality of an interview:

> Justice Alito: What is there in the Ninth Circuit's opinion, which—which generally requires a warrant, to suggest that the length of the interrogation was relevant to their decision? I mean, at least the child protective services need to decide whether they need a warrant before they begin the questioning, no matter how long it's going to last.
>
> Where does it say that the length is relevant to the—to the issue that they decided?
>
> Ms. Kubitschek [Respondent]: Well, Your Honor, the—the length of the questioning has been historically important to this Court's jurisprudence. It distinguishes, for example, between a Terry stop and a seizure. . . .
>
> Justice Scalia: I don't understand. It seems like a very strange rule to me. You mean it's okay for a child protection worker to just ask the child passing in the hall, you know, has your—or not passing in the hall. Come into this room, I have a question for you: Has your father been abusing you? And if the child says yes, thank you, and the child goes, then that's okay?
>
> Ms. Kubitschek: We would—
>
> Justice Scalia: Because it was a short interview?[268]

Under the narrow, but clear, rule this Note advocates, these factual circumstances would have minimal—if any—impact on the constitutionality of the interview.

For example, the length of the interview is not a prominent consideration once the standards governing investigatory detentions have been removed.[269] In a situation like the one Justice Scalia described, in which a child protective worker pulled a child aside briefly to ask her whether she had been abused,[270] a court would not inquire whether this questioning

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[268] *See* Transcript of Oral Argument, *supra* note 57, at 33–34.

[269] The length of an interview might still play some part in the analysis of whether an in-school interview of a child is reasonable; for example, if a child originally consented to an interview or if the interview were conducted under exigent circumstances, there may come a point when the interview ceases to be "reasonable" because it has continued for an exorbitant amount of time. Such determinations of reasonableness would probably be conducted on a case-by-case basis.

[270] *See* Transcript of Oral Argument, *supra* note 57, at 34.

was subject to the reasonable suspicion standard applied in investigatory detentions. Rather, under the bright-line rule this Note proposes, the court would consider this questioning to be unlawful—regardless of length—absent a warrant, consent, or exigent circumstances. Justice Sotomayor proposed a similar hypothetical:

> Child walks into the room—is taken out of their classroom, walks into the room. The officer says: We've heard that your mommy and daddy are doing some things to your private parts; is that true? And the child says—9-year-old child says: I wish somebody had asked me before. I'm so afraid of my daddy. He does these horrible things to me.[271]

Under the rule of this Note, the police officer's initial question would also be an unlawful seizure; merely limiting the interview to a single question would not transform it into a *Terry* stop and subject it to a lower standard of Fourth Amendment review.

Importantly, the outcome in either situation described above might have turned out differently if the caseworker or police officer had focused on fleshing out the details of valid consent first, instead of trying to conduct the interview like a *Terry* stop. In Justice Sotomayor's hypothetical, since the child chose to answer the police officer's question in a welcoming and forthcoming manner, an interview which otherwise would probably be ruled illegal might have been transformed, through the child's consent, into a legal one. The question would turn on traditional consent factors, including the child's maturity and understanding of the situation.[272] Under circumstances in which a child appears to be injured or in distress, a professional in contact with the child—such as a caseworker, police officer, or teacher—should be able to invite the child to talk about the cause of this harm or distress. Asking the child whether he would like to talk about what is wrong, while making it clear that he does not have to do so and is free to return to his classroom activities, might be a plausible way for these professionals to invite the child to consent to the seizure. For the consent to be valid, the

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[271] *Id.* at 37.

[272] *See* Coleman, *supra* note 28, at 462 & n.144.

professional would have to be careful to approach the child in a non-coercive manner, and the child would have to be sufficiently mature to understand the implications of consent.

In addition to minimizing the importance of the length of the interview, the rule this Note advocates also minimizes the impact of the particular type of interviewer on the Fourth Amendment analysis. It does so by rejecting the special needs exception. For example, during the respondent's argument, Justice Ginsburg questioned how the presence and actions of the police officer during the interview in *Camreta* might have affected the outcome:

> [T]his is initially a social worker's investigation. And you said, when stating what the Ninth Circuit's rule was, that police are in combination with the caseworker.
>
> Suppose we took out—out of the picture. He didn't utter a word in the interview. 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 department of health?[273]

Under the rule of this Note, it would not matter whether the police officer in *Camreta* had been present at the interview with the caseworker; child protective workers and law enforcement officers would be held to the same Fourth Amendment standards. Otherwise, as Justice Alito pointed out, there would be a danger that the child protective worker—conducting an interview alone—could simply tape his conversation and turn it over to the police afterwards, thus allowing law enforcement agencies to reap the benefits of information obtained under the special needs exception, which law enforcement would not ordinarily be entitled to.[274]

Furthermore, the analysis would not change if the interviewer were a school employee. Following Justice Ginsburg's inquiry above, Justice Alito asked, "[S]uppose it was

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[273] Transcript of Oral Argument, *supra* note 57, at 38–39. Justice Scalia also questioned what analysis would apply if a social worker entered a school to question "the child about something else that is going to very much harm that child[.]" *Id.* at 43–44. However, what that "something else" is could potentially affect the special needs analysis; without knowing the degree of entanglement of law enforcement with the activities of social workers in investigating the "something else," this Note cannot comment upon what the outcome of such a case would be.

[274] *See id.* at 40.

the school nurse, would the answer be the same?"[275] The interview would still not fall within the special needs exception because the purpose of such an interview would extend beyond the school's administrative interests in maintaining order and discipline within the school.[276] The information obtained from this seizure could also be passed right along to law enforcement officials—since school officials are mandatory reporters[277]—raising the same entanglement concerns already discussed above. Justice Scalia also questioned whether the analysis would change if the school nurse were brought in from outside the school.[278] The same considerations would apply here as well because the school nurse would still be acting on behalf of the school.

4. Analyzing In-School Interviews of Children in Other Contexts

The rule this Note advocates is limited to interviews that involve questioning suspected victims about abuse; interviews involving different subject matter would probably undergo a separate analysis. Chief Justice Roberts questioned whether the same standards that apply when children are questioned about third-party abusers would apply to interviews that focused on a student's own activities—particularly criminal activities:

> Chief Justice Roberts: —do you think that the same approach you're following here would apply if the investigation focused on the student rather than a third party? Would in those cases a warrant have to be obtained?
>
> Mr. Kroger [Petitioner]: Your Honor, I think in—in those cases, because parental consent is a viable alternative where the allegation is a child is being abused by another child—
>
> Chief Justice Roberts: No, no, not another child. It could be anything. We think the child is, you know, selling drugs, obviously not a 7-year-old, but someone else in the school is involved in legal activity, him- or herself.[279]

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[275] *Id.*

[276] *See supra* Part III.C.4.

[277] *See* Hafemeister, *supra* note 29, at 851.

[278] *See* Transcript of Oral Argument, *supra* note 57, at 43 ("If you send her to the school nurse, it's not a seizure, but if the school doesn't have a nurse and it brings in a nurse from the outside . . . then it becomes a seizure?").

[279] *See id.* at 14–15.

While this Note did not discuss the precise standards governing criminal investigations of children, the specific factual circumstances of interviews in that context might govern whether they are treated similarly to those involving child abuse. For instance, if students were suspected of engaging in criminal activity on school grounds during school hours, these activities might reasonably be expected to threaten the order of the school; under such circumstances, the special needs exception would probably apply as it did in *T.L.O.*[280] If, on the other hand, the child was questioned in school about criminal activities outside of school, there might be more reason for the standards governing in-school child abuse interviews to apply, since the child's expectations of privacy would be greater regarding matters unrelated to school order and discipline.

E. Guidance for Those Conducting In-School Investigations of Child Abuse Victims

The previous analysis demonstrates that clear standards are crucial to ensure that child abuse investigations can take place without violating children's Fourth Amendment rights. Several states sought to establish standards in the wake of the Ninth Circuit's decision in *Greene v. Camreta*.[281] For example, following *Camreta*, Oregon child protective workers were advised not to conduct any interviews that could potentially be viewed as seizures.[282] They were instructed to obtain parental consent before interviewing children in non-emergency situations.[283]

In Washington, a new in-school interview procedure was also implemented, which focused on obtaining a child's voluntary consent.[284] Under the Washington procedure, caseworkers were directed to ask children if they were willing to talk at the start of the interview and then again at various points during the interview.[285] Caseworkers were also told to ask school staff—in

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[280] *See* New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985).

[281] 588 F.3d 1011 (9th Cir. 2009), *vacated as moot*, 131 S. Ct. 2020 (2011).

[282] *See* Transcript of Oral Argument, *supra* note 57, at 14.

[283] *See id.*

[284] Memorandum from Tammy Cordova, Interim Dir. of Policy & Practice Improvement, Children's Admin., to Children's Admin. CPS Staff, Reg'l Adm'rs & Deputy Reg'l Adm'rs 2 (Jan. 7, 2010) [hereinafter Memorandum], http://www.pattersonbuchanan.com/assets/files/resources-limbo/CA%20CPS%20Child%20Abuse%20Interviews%20Policy%20Update%201-07-10%20Final.pdf.

[285] *Id.*

the presence of the child—where a staff member would be in the event that the child wanted to leave, wanted to have a third party present, or wanted to ask a question.[286] Caseworkers were directed to carefully note exactly what questions they asked, who was present, and where the interview occurred.[287] The Washington Association of Prosecuting Attorneys also provided guidelines to law enforcement officers and child protective workers to help them determine (1) whether an interview might be a seizure and (2) whether exigent circumstances might exist to justify a seizure in the absence of judicial authorization or parental consent.[288]

While these policies were a step in the right direction toward protecting children's rights, they still raise certain Fourth Amendment concerns. For example, in Oregon, it is still official policy to allow in-school interviews whenever "the worker believes [the school] will be the best environment in which to assure a child's safety."[289] Despite its cautionary warning to caseworkers following the Ninth Circuit's decision in *Camreta*, the Oregon Department of Human Services has not included any written requirements regarding a warrant, the child's consent, or exigent circumstances in its Child Welfare Policies.[290] In Washington, although the policies are more clearly defined, the Children's Administration has stated that it does not expect the Ninth Circuit's holding to apply to interviews of children "where law enforcement is not present and a crime is not suspected."[291] Thus, Washington's policies seem to operate on the assumption that when a caseworker acts alone, the strict standards of *Camreta* do not govern the interview.[292]

This Note's analysis of the Fourth Amendment concerns raised by in-school interviews lends itself to a clear, workable set of standards that child protective agencies can adopt to ensure that children's rights are adequately protected. The first standard would require agencies to acknowledge that every in-school interview of a child regarding suspected abuse is a seizure.

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[286] *Id.*
[287] *Id.*
[288] *Id.* at 4–5.
[289] OR. ADMIN. R. 413-015-0415(5)(b)(H) (2011).
[290] *See id.*
[291] *See* Memorandum, *supra* note 284.
[292] *See id.*

Recognizing that these interviews are seizures, agencies would have to act carefully to ensure that they conducted interviews in a manner consistent with children's Fourth Amendment rights.

The next policy standard would require a child protective worker to obtain prior judicial authorization in the form of a warrant before conducting an in-school interview, if the worker wished to avoid or was unable to procure parental consent. The worker would have to be prepared to present the evidence he had already gathered to the court in order to demonstrate that there was probable cause justifying the interview. If the court granted the warrant, then the worker could conduct the interview within the parameters of the warrant.

However, without a warrant, the caseworker could only conduct the in-school interview if (1) the child was mature—based on age, education, and intelligence—and voluntarily consented to the interview[293] or (2) the caseworker had probable cause to conduct the interview and exigent circumstances existed—specifically, the child was in such imminent danger that there was not sufficient time to obtain a warrant before intervening.[294] In the absence of these circumstances, the child protective worker could not interview the child in school.

Because determining whether valid consent exists is such a fact-sensitive inquiry, professionals who may conduct these interviews in schools—including caseworkers, police officers, teachers, and other school officials—should also receive training to aid them in determining what constitutes valid consent. In this respect, turning to the assistance of experts in child development and psychology could be particularly useful. For instance, many school districts in the United States employ school psychologists,[295] and every state has a school psychologist association.[296] These professionals could aid school districts in promulgating guidelines defining how to determine whether a child is mature enough to consent and how to ask for a child's consent in a non-coercive, non-suggestive manner. They could

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[293] *See supra* Part III.C.1.

[294] *See supra* Part III.C.2.

[295] *See* Jeffrey L. Charvat, *NASP Study: How Many School Psychologists Are There?*, 33 NASP *COMMUNIQUÉ*, Mar. 2005, http://www.nasponline.org/publications/cq/cq336numsp.aspx.

[296] *See State Associations*, NAT'L ASS'N SCH. PSYCHOLOGISTS, http://www.nasponline.org/about_nasp/links_state_orgs.aspx (last visited Feb. 27, 2013).

also help train school officials and employees in implementing these guidelines within their schools. Child protective agencies and law enforcement officers could similarly turn to the aid of social workers and child psychologists—with whom child protective agencies regularly interact during their investigations[297]—to establish interviewing guidelines, perhaps similar to those Washington implemented,[298] to ensure that an interview, for its entire duration, is based on valid consent.

These proposed policies should rein in the abuse of in-school interviews and assist child protective agencies in carrying out more consistent—and constitutional—investigations. Since only consent and exigent circumstances may justify a seizure in the absence of a warrant, and only in very limited circumstances, child protective workers will be encouraged to err on the side of caution and seek a warrant before potentially invading a child's Fourth Amendment rights. Increased prior judicial authorization will be key in reducing error as important questions of constitutional rights—questions that involve balancing the interests of the child, the parents, and the State—are decided.[299] At the same time, requiring prior judicial authorization will also pose "no additional risk to children's safety" because, when the child is in imminent danger, the exigent circumstances exception will allow agencies to conduct warrantless seizures to intervene to protect the child.[300] Through these policies, the State can achieve its goal of keeping children safe without sacrificing their Fourth Amendment rights in the process.

CONCLUSION

This Note has argued that in-school interviews of suspected victims of child abuse constitute Fourth Amendment seizures. Accordingly, such interviews generally should not be conducted unless the interviewer has obtained a warrant prior to the interview. In the absence of a warrant or parental consent, there are only two scenarios in which a child may be interviewed in school about abuse: (1) when the child gives valid consent or

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[297] *See* U.S. DEP'T OF JUSTICE, *supra* note 230.

[298] *See supra* text accompanying notes 284–87.

[299] *See* Brief of the Legal Aid Society, *supra* note 53, at 13 (citing Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999)).

[300] *See id.*

(2) when exigent circumstances and probable cause exist. However, the application of these two exceptions will be extremely limited, given the unique concerns surrounding in-school interviews of children. This Note has also rejected the standards applied to investigatory detentions and "special needs" seizures in this context, as their application may violate children's reasonable expectations of privacy and allow law enforcement to obtain information that would normally require a warrant to obtain. It has applied these rules to answer the questions the Supreme Court posed during oral argument in *Camreta v. Greene* and to offer clear guidelines that child protective agencies may adopt in order to ensure that their investigations—which are meant to protect children—neither intentionally nor inadvertently trounce on children's Fourth Amendment rights.