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Time for Direction: The Need for a Clear, Uniform Rule Regarding Searches During Child Abuse Investigations

INTRODUCTION

In 1992, police departments and social service agencies in the United States received over 2.9 million reports of child abuse.¹ Each report had to be investigated, usually by a police officer or social worker.² Investigators conclude that, because of a lack of credible evidence or any reason to believe abuse occurred, at least half of all reports of child abuse are without merit.³ Often an investigation of reported child abuse includes a warrantless search of the home of the child's parent or guardian or of the child's person, raising constitutional concerns.⁴ The issue of just how far Fourth Amendment protections extend in searches conducted during child abuse investigations is one of continued contemporary importance.⁵ At stake are not only the personal liberties of families and children, but also the government's interest in protecting families and children from both abuse and invasions of privacy.⁶

¹ Bonnie M. Rubin, *Anti-Abuse Message Misses Young Dads*, CHI. TRIB., Aug. 15, 1994, (Chicagoland), at 3 (examining the problem of curbing child abuse at the hands of young fathers).

² See William Glaberson, *Family Nightmare: A False Report of Child Abuse*, N.Y. TIMES, Dec. 4, 1990, at B1, B12 ("New York State law requires that social-service agencies begin an investigation within 24 hours of an abuse report.").

³ *Id.* at B1 (discussing a zealous social worker's investigation of two non-abused children due to "confusion with another family with a different name in another town").

⁴ See *infra* notes 42-56 and accompanying text.

⁵ 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 10.3(a) (2d ed. Supp. 1995) (discussing Fourth Amendment limitations on searches of private homes with respect to personnel of child protection agencies).

⁶ According to the court in *Darryl H. v. Coler*, 801 F.2d 893, 894-95 (7th Cir. 1986):

A final resolution of this issue will require the reconciliation of very fundamental constitutional values: the privacy rights of the child; the privacy rights of the family in the important area of childrearing; and the obligation and right of responsible government to deal effectively with the stark reality of child abuse

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁷ In order to protect these freedoms, the U.S. Supreme Court requires police officers to obtain a warrant before conducting a search or seizure.⁸ However, the doctrine of qualified immunity for public officials⁹ can diminish the effectiveness of the protection provided by the warrant requirement for searches conducted during investigations of child abuse. Qualified immunity allows a police officer to avoid liability if the court finds that neither constitutional nor statutory law clearly prohibits the search.¹⁰ If this defense is successful, then liability for any damages caused by the search does not attach.¹¹ Recently, the Tenth Circuit, in *Franz v. Lytle*,¹² reviewed the current state of the law regarding warrantless searches during child abuse investigations¹³ and the applicability of the qualified immunity defense in such situations.¹⁴ The court refused to absolve the defendant police officer from the warrant requirement.¹⁵ In so doing, however, the court drew a distinction between social workers and police officers for these types of searches,¹⁶ and held that a social worker would be entitled to qualified immunity.¹⁷

The decision in *Franz*, thus, underscores the need for clearly established warrant requirements in child abuse investigations. These rules need to be not only clear but also uniformly applied. Moreover, although the *Franz* court justified drawing the distinction between a police officer

in our society

⁷ U.S. CONST. amend. IV.

⁸ *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). A search performed without prior approval from a magistrate or judge is considered per se unreasonable, and hence unconstitutional, unless it fits one of a few established exceptions. *Id.* at 390 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

⁹ Public officials are shielded from liability if their discretionary actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁰ *Id.*

¹¹ *Id.*

¹² 997 F.2d 784, 788 (10th Cir. 1993) (recognizing that the absence of a search warrant "can only be overcome by the well-delineated exceptions of consent, exigent circumstances, and administrative searches" (citations omitted)); see *infra* notes 118-55 and accompanying text.

¹³ *Franz*, 997 F.2d at 787-90.

¹⁴ *Id.* at 790-92.

¹⁵ *Id.* at 793.

¹⁶ *Id.* at 791.

¹⁷ *Id.* at 790.

and social worker based on the different motivations behind these two types of child abuse investigators,¹⁸ this Note contends that a distinction between social workers and police officers is unnecessary and unjustified.

This Note, consequently, reviews the current state of warrant requirement law in child abuse investigations and analyzes its effectiveness. Part I describes the doctrine of qualified immunity and its impact on the warrant requirement.¹⁹ Part II analyzes Fourth Amendment issues raised by searches conducted during child abuse investigations; such issues include whether these searches implicate the Fourth Amendment and whether one of the recognized exceptions to the warrant requirement applies.²⁰ Part III analyzes the *Franz* decision, with a focus on the Tenth Circuit's application of the warrant requirement, the qualified immunity defense, and the rationale behind the social worker/police officer distinction.²¹ Part IV describes the reasons a clear statement of the law in this area is essential.²² Finally, this Note concludes that a clear statement of the law regarding warrantless searches in the context of child abuse investigations need not incorporate any new exceptions or recognize a distinction between social workers and police officers.²³

I. QUALIFIED IMMUNITY

Before discussing the application of the Fourth Amendment to searches conducted during child abuse investigations, the importance of the doctrine of qualified immunity must be understood. In the criminal context, a court evaluates a search under the Fourth Amendment to determine whether the search violated the warrant requirement or fell within one of the recognized exceptions to the warrant requirement.²⁴ If the court determines that the government official conducted a search either with a valid warrant or under circumstances which fit one of the exceptions, then the evidence found during or produced from that search will be admissible at trial. If the court determines that the search violated the warrant requirement or did not fit one of the recognized exceptions and was thereby an illegal search, then the court will exclude the

¹⁸ *Id.*

¹⁹ See *infra* notes 24-41 and accompanying text.

²⁰ See *infra* notes 42-117 and accompanying text.

²¹ See *infra* notes 118-58 and accompanying text.

²² See *infra* notes 159-75 and accompanying text.

²³ See *infra* notes 176-80 and accompanying text.

²⁴ See *infra* notes 42-117 and accompanying text (discussing Fourth Amendment analysis of a search).

evidence at both the state and federal level.²⁵ This "exclusionary rule" serves as a deterrent with the goal of preventing illegal searches and seizures from recurring.²⁶

Fourth Amendment issues also arise in a civil context. If a person believes he or she was the subject of an illegal search, then that person can seek to recover damages from the government and the official(s) responsible for the search.²⁷ For example, the plaintiffs in *Franz* were parents who claimed that a police officer did not have a warrant and did not act within one of the exceptions to the warrant requirement when he strip-searched their daughter.²⁸ The parents sought damages for the violation of their federal civil rights and for violation of state laws regarding "invasion of privacy, trespass and deprivation of liberty."²⁹ Thus, like the exclusionary rule, civil liability for Fourth Amendment violations acts as a form of deterrence, and it also provides a remedy to those injured by the illegal government action.

The deterrent and remedial effect of this liability, however, is tempered by the doctrine of qualified immunity.³⁰ Government officials receive qualified immunity so they will be protected from "undue interference with their duties and from potentially disabling threats of liability."³¹ This safeguard shields government officials from liability in damages actions if their conduct did not violate clearly established rights.³² "Clearly established" has been defined by the U.S. Supreme Court as follows:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.³³

²⁵ *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding the exclusionary rule applies to the states as well as the federal government).

²⁶ *Id.* at 656 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

²⁷ *See* 42 U.S.C. § 1983 (1988).

²⁸ *Franz v. Lytle*, 791 F. Supp. 827, 828 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993); *see infra* notes 118-55 and accompanying text.

²⁹ *Franz*, 791 F. Supp. at 828.

³⁰ Qualified immunity only impacts the possible civil consequences of a search conducted by a government official.

³¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

³² *Id.* at 818.

³³ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citation omitted).

The plaintiff has the burden to show that the official's conduct violated his or her clearly established rights.³⁴ If the plaintiff can show that the government's action clearly violated the warrant requirement and did not fall into one of its exceptions, then the plaintiff can recover. If the court decides, however, that the government action clearly followed the warrant requirement or fell within one of its exceptions, then the plaintiff cannot recover. Moreover, if the plaintiff cannot show that the government action at the time of the search clearly violated the Fourth Amendment, then the government agent is immune from liability, regardless of whether or not the court later finds the search illegal. Even though the burden is on the plaintiff, a court is not limited in its legal analysis to cases and statutes cited by the plaintiff.³⁵ The court is to take a more active role because the applicability of qualified immunity is a question of law.³⁶

In warrantless search cases, the problem qualified immunity poses for the plaintiff is determining whether the search to which he or she was subjected clearly fell within one of the warrant exceptions. Moreover, any distinction drawn between governmental officials in different branches of the government complicates the plaintiff's burden. For example, the *Franz* court found no qualified immunity for the police officer, but it explained that under the same circumstances a social worker could be granted qualified immunity because social workers do not have the same knowledge of the law as police officers.³⁷ Furthermore, the court noted that social workers focus on protection of the child while police officers look at the possible culpability of the adults involved.³⁸ Thus, if the defendant had been a social worker rather than a police officer, the court may have found that the doctrine of qualified immunity shielded the defendant from civil liability.

If the court determines that the defendant government official is immune from liability, then it can grant summary judgment³⁹ or sustain

³⁴ *Elder v. Holloway*, 114 S. Ct. 1019, 1022 (1994); *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

³⁵ *Elder*, 114 S. Ct. at 1023.

³⁶ *Id.*

³⁷ *Franz v. Lytle*, 997 F.2d 784, 786 (10th Cir. 1993); see *infra* notes 118-55 and accompanying text (discussing the distinction between police and social workers made by both the District Court of Kansas and the Tenth Circuit Court of Appeals).

³⁸ *Franz*, 997 F.2d at 791.

³⁹ *Wildauer v. Frederick County*, 993 F.2d 369, 373-74 (4th Cir. 1993) (affirming summary judgment because entry into home during child abuse investigation did not violate clearly established law).

a motion to dismiss.⁴⁰ As a result, where the law is unclear, the court can grant a government official qualified immunity,⁴¹ and thereby grant summary judgment without ever determining whether or not the Fourth Amendment rights of the plaintiff were truly violated. A clear statement of the application of the Fourth Amendment to child abuse investigatory searches, therefore, will prevent police officers and social workers from escaping liability for harms they cause, strengthen the deterrence effect of civil liability in these searches, and allow those harmed by illegal searches an appropriate remedy.

II. FOURTH AMENDMENT ISSUES

A. *Is the Fourth Amendment Implicated?*

The first step in analyzing the legality of a warrantless investigatory search in a child abuse case is determining whether it is a "search" that implicates the Fourth Amendment.⁴² In his treatise on the Fourth Amendment, Professor Wayne LaFave takes the position that an investigatory search of a home or child clearly implicates the Fourth Amendment.⁴³

At least one court, however, does not share in Professor LaFave's view and fails to see a clear implication of the Fourth Amendment in the search of the home during a child abuse investigation.⁴⁴ In *Donald M. v. Matava*, the district court said that "this question remains, at best, undecided,"⁴⁵ and explained that the U.S. Supreme Court did not find a constitutional violation when a social worker made a warrantless entry into the home of a recipient of funds from the Aid to Families with Dependent Children ("AFDC") program.⁴⁶ The *Donald M.* court's view appears to be in the minority, but the case illuminates the lack of certainty regarding whether a warrantless search in a child abuse investigation implicates the Fourth Amendment.⁴⁷ Unfortunately, the

⁴⁰ *Doe v. Louisiana*, 2 F.3d 1412, 1413, 1423 (5th Cir. 1993) (noting that defendants were entitled to qualified immunity and thus reversing the lower court's denial of defendants' FED. R. CIV. P. 12(b)(6) motion), *cert. denied*, *Doe v. Bennett*, 114 S. Ct. 1189 (1994).

⁴¹ See *supra* notes 30-33 and accompanying text.

⁴² 3 LAFAVE, *supra* note 5, at 241.

⁴³ *Id.*

⁴⁴ *Donald M. v. Matava*, 668 F. Supp. 703, 708-09 (D. Mass. 1987).

⁴⁵ *Id.* at 709.

⁴⁶ *Id.* (discussing *Wyman v. James*, 400 U.S. 309, 326 (1971) (holding that a social worker who made a warrantless entry into a house in an attempt to enforce state welfare laws committed no constitutional violation)).

⁴⁷ This lack of clarity can impact recovery by plaintiffs who seek damages for a

Supreme Court has yet to rule on whether an investigatory search clearly implicates the Fourth Amendment.⁴⁸

The search of a child, particularly in circumstances where investigators ask a child to remove his or her clothing, appears to implicate the Fourth Amendment more decidedly than a non-personal search.⁴⁹ In *Darryl H. v. Coler*, the Seventh Circuit stated, "It does not require a constitutional scholar to conclude that a nude search of a . . . child is an invasion of the constitutional rights of some magnitude."⁵⁰ Courts therefore must engage in Fourth Amendment analysis when determining the validity of any search requiring a child to disrobe.⁵¹

When courts engage in Fourth Amendment analysis of a search, they focus on reasonableness. Under the Fourth Amendment, a reasonable search occurs when the investigator can show probable cause that evidence of a crime exists and can be found in the place to be searched.⁵² "While the presence of probable cause permits the issuance of a search warrant by a neutral magistrate, its absence can only be overcome by . . . well-delineated exceptions . . ."⁵³ Other than a consensual search,⁵⁴ these exceptions involve exigent circumstances⁵⁵ and administrative searches.⁵⁶

B. Emergency Rule Exception

Of the recognized exigent circumstances exceptions to the warrant requirement,⁵⁷ investigators most often rely on the "emergency

violation of their Fourth Amendment rights. *See supra* notes 27-41 and accompanying text; *see also infra* notes 159-66 and accompanying text.

⁴⁸ Professor LaFave supports his position by distinguishing a search during a child abuse investigation from a search during an AFDC investigation. 3 LAFAVE, *supra* note 5, at 242.

⁴⁹ *See Darryl H. v. Coler*, 801 F.2d 893, 900 (7th Cir. 1986).

⁵⁰ *Id.* (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1981)).

⁵¹ *See id.*

⁵² *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (holding that since no probable cause existed, the search and seizure were invalid under the Fourth and Fourteenth Amendments).

⁵³ *Franz v. Lytle*, 997 F.2d 784, 788 (10th Cir. 1993) (citations omitted).

⁵⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (upholding the validity of a warrantless search when consent was obtained prior to search).

⁵⁵ *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (recognizing an exception to the warrant requirement in cases of emergency).

⁵⁶ *Camara v. Municipal Court*, 387 U.S. 523, 539-40 (1967) (permitting a search pursuant to a warrant issued on less than probable cause because of reliance on reasonable administrative standards).

⁵⁷ *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (need to preserve evidence);

rule"⁵⁸ in child abuse investigations. In *Mincey v. Arizona*, the U.S. Supreme Court recognized the right of police to respond to emergency situations, finding no Fourth Amendment bar against "warrantless entries or searches when . . . a person . . . is in need of immediate aid."⁵⁹ Investigatory child abuse searches fit readily into the emergency rule exception when a government employee⁶⁰ reasonably believes a child is in imminent danger or in need of medical attention.⁶¹

Although the application of the emergency rule in child abuse cases varies, the emergency rule, nevertheless, is a recognized exception to the warrant requirement.⁶² In *Wooten v. State*, a police officer entered an apartment without a warrant after receiving a report that a child may have been seriously injured in a beating.⁶³ The Florida District Court of Appeal stated that the *Mincey* decision permits warrantless searches of a home in emergency situations, such as where investigators believe abuse is occurring or has occurred. The *Wooten* court consequently held that "the entry by officer Swisher was justified by the 'exigent circumstances' presented by his prior knowledge of the possible abuse of the child, and upon observing the child itself, the need to protect the child, to determine its condition, and to immediately secure whatever medical or other attention might be necessary."⁶⁴

The holding of the Florida court in *Wooten*, then, appears to agree with the holding of the Wisconsin court in *State v. Boggess*; *Boggess* held

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit); United States v. Costa, 356 F. Supp. 606, 611-12 (D.D.C.), *aff'd without op.*, 479 F.2d 921 (D.C. Cir. 1973) (imminent danger).

⁵⁸ See *Mincey*, 437 U.S. at 395 (holding that no automatic "murder scene" exception to the warrant requirement exists but that an exception in cases of emergency does).

⁵⁹ *Id.* at 392.

⁶⁰ A government employee can be either a social worker or a police officer. See *infra* notes 68-69 and accompanying text.

⁶¹ See, e.g., *Wooten v. State*, 398 So. 2d 963, 966 (Fla. Dist. Ct. App. 1981) (explaining that the emergency rule applies when prior knowledge of possible abuse and a need for medical attention exist); *State v. Boggess*, 340 N.W.2d 516, 524-25 (Wis. 1983) (explaining that the emergency rule applies to circumstances where a child is limping but not in grave danger).

⁶² *Boggess*, 340 N.W.2d at 521 (noting that the Fourth Amendment does not bar "a governmental official from making a warrantless intrusion into a home when the official reasonably believes that a person within is in need of immediate aid or assistance").

⁶³ *Wooten*, 398 So. 2d at 965.

⁶⁴ *Id.* at 966. Interestingly, the court also said the police officer acted within the bounds of the Fourth Amendment when he collected samples of blood stains seen on the carpet while the officers and emergency personnel were rendering assistance to the child. *Id.* at 966-67.

that a situation need not "involve only life or death circumstances in order to constitute an emergency under the emergency rule."⁶⁵ In that case, a social worker and a police officer conducted a warrantless search of a home after receiving a report that two children had been beaten and might be in need of medical attention.⁶⁶ The report also indicated that one child was walking with a limp and that the children's father had a bad temper.⁶⁷

The *Bogges* court stated that the social worker was subject to the same requirements as the police officer because state statutes authorized her to conduct child abuse investigations, and she was therefore an agent of the government.⁶⁸ Thus, the court did not distinguish between the police officer and the social worker, presuming that both had a similar level of knowledge regarding the Fourth Amendment and the restrictions the Fourth Amendment places on them.⁶⁹

In sum, the emergency rule gives police and social workers the ability to enter a home without a warrant in order to prevent further injury or to provide medical attention. Requiring a warrant under emergency circumstances would involve time a victim of child abuse may not have. Absent an emergency, the warrant requirement requires a police officer or social worker to obtain a search warrant based on probable cause or to rely on another exception to the warrant requirement, the administrative search.

C. Administrative Searches

The administrative search exception generally still requires a police officer or social worker to obtain a warrant before conducting a search.⁷⁰ However, the U.S. Supreme Court, in *Camara v. Municipal Court*, allowed entry with a warrant obtained with less than the traditional probable cause.⁷¹ *Camara* did not involve a child abuse investigation; rather, it involved a routine yearly inspection for building code violations.⁷² The Court stated that a search of a structure for code violations was permissible on this lower standard for three reasons: (1) both the judiciary and the public widely accept

⁶⁵ *Bogges*, 340 N.W.2d at 525.

⁶⁶ *Id.* at 524-25.

⁶⁷ *Id.*

⁶⁸ *Id.* at 521 n.9.

⁶⁹ See *id.* at 522 (discussing the objective test of the emergency rule).

⁷⁰ See *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

⁷¹ *Id.* at 534-38. "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. . . . If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

⁷² *Id.* at 526.

this type of search;⁷³ (2) public interest demands abatement of code violations and these inspections are likely to achieve the best results;⁷⁴ and (3) the searches were not personal and did not seek evidence of crime.⁷⁵ Thus, the *Camara* Court held that in order to meet the standard for these types of administrative search warrants, a warrant must be issued based on reasonable legislative or administrative standards.⁷⁶

This exception, moreover, has been expanded in recent years. For example, the U.S. Supreme Court eliminated the warrant requirement and the probable cause standard in regard to searches conducted by school officials.⁷⁷ In *New Jersey v. T.L.O.*, a principal conducted a search of a student's purse after the principal caught the student smoking in a bathroom.⁷⁸ The search revealed evidence of drugs and drug trafficking.⁷⁹ The Court held that the search did not violate the student's Fourth Amendment rights and explained that requiring a warrant would impede the ability of administrators and teachers to maintain discipline.⁸⁰

The Court balanced the student's interest in privacy against the school's need to maintain order and found that the balance tips in favor of the administrators and teachers.⁸¹ The Court said, "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."⁸² In determining reasonableness, the Court required a two-step analysis. First, "one must consider 'whether the . . . action was justified at its inception.'"⁸³ Second, "one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"⁸⁴ This test, consequently, appears to provide a great deal of flexibility for government officials seeking to protect a state interest.

⁷³ *Id.* at 537.

⁷⁴ *Id.* Many types of violations would not be observable from the outside of a structure, like faulty wiring. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 538.

⁷⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985) (holding that "school officials need not obtain a warrant before searching a student who is under their authority" if they have reasonable suspicion that the student may have violated the law and/or school rules).

⁷⁸ *Id.* at 328.

⁷⁹ *Id.*

⁸⁰ *Id.* at 340.

⁸¹ *Id.* at 341.

⁸² *Id.*

⁸³ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁸⁴ *Id.*

Other extensions of the administrative search exception provide further flexibility. Prior to 1987, in cases involving an administrative search exception, the U.S. Supreme Court focused primarily on the character of the investigation that precipitated the search — whether the search was regulatory or criminal.⁸⁵ However, the Court lessened the importance of this distinction with its holding in *New York v. Burger*.⁸⁶ In that case, police officers, pursuant to statutory authority, conducted a warrantless search of a junkyard and found evidence of stolen property.⁸⁷ The statute involved authorized warrantless inspections of vehicle-dismantling businesses to ensure the businesses were not involved in illegal activity, specifically auto theft.⁸⁸ The Court upheld the validity of both the search and the statute,⁸⁹ asserting that a state can constitutionally address “a major social problem *both* by way of an administrative scheme *and* through penal sanctions.”⁹⁰ The Court recognized that “an administrative scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower.”⁹¹

The U.S. Supreme Court also upheld a warrantless search of a probationer’s home based on “reasonable grounds.”⁹² In *Griffin v. Wisconsin*, police searched a probationer’s house after receiving information that guns may be located there.⁹³ A state statute provided the authority for the warrantless search.⁹⁴ The Court noted that a warrant requirement would undermine the probation regime.⁹⁵ Similarly, the Court said that requiring probable cause for a search of this type would “reduce the deterrent effect of the supervisory arrangement.”⁹⁶ The Court

⁸⁵ See *supra* notes 70-80 and accompanying text.

⁸⁶ 482 U.S. 691 (1987).

⁸⁷ *Id.* at 693-95.

⁸⁸ *Id.* at 694 n.1.

⁸⁹ *Id.* at 712.

⁹⁰ *Id.* The New York Court of Appeals had concluded that the administrative scheme allowing warrantless searches was merely a pretext to warrantless criminal investigations. *Id.*

⁹¹ *Id.* at 713.

⁹² *Griffin v. Wisconsin*, 483 U.S. 868, 871, 878 (1987) (citing WIS. ADMIN. CODE §§ HSS 328.21(4), (7), 328.16(1) (Dec. 1981)).

⁹³ *Id.* at 871.

⁹⁴ *Id.* at 870-71 (examining Wisconsin’s State Department of Health and Social Services Regulation, WIS. ADMIN. CODE §§ HSS 328.21(4), 328.16(1) (1981), which allows “any probation officer to search a probationer’s home without a warrant as long as his supervisor approves and as long as there are ‘reasonable grounds’ to believe the presence of contraband”).

⁹⁵ *Id.* at 878.

⁹⁶ *Id.*

held that the special need for this type of search identified by the state was reasonable, given the need for assurance the probationer would continue his rehabilitation.⁹⁷

The administrative search exception, thus, should fit into child abuse investigations quite readily. Courts appear willing to allow this exception to the warrant requirement in a child abuse case if a satisfactory regulatory scheme is in place; however, administrative schemes are rarely in place, and thus the administrative exception has not been applied often. *Darryl H. v. Coler*⁹⁸ provides an illustration of how courts can apply this exception when regulatory schemes are in place.

In *Darryl H.*, the petitioners appealed the district court's denial of a preliminary injunction prohibiting the use of an Illinois Department of Children and Family Services ("D.C.F.S.") policy which permitted caseworkers to physically examine a child for evidence of abuse.⁹⁹ The petitioners also asked the court to review the trial court's summary judgment, based on the qualified immunity of the D.C.F.S. and its employees, on the issue of liability for a Fourth Amendment violation.¹⁰⁰

The court said the D.C.F.S. policy outlined "hot-line criteria" for determining whether to investigate a child abuse report.¹⁰¹ The *Darryl H.* court balanced the "obvious"¹⁰² intrusion of disrobing the child against the state's interests in protecting the public, particularly children, from death or serious injury.¹⁰³ The court recognized the urgency of action in child abuse cases where life and limb may be in danger;¹⁰⁴ however, the court also recognized that over sixty percent of child abuse

⁹⁷ *Id.* at 875.

⁹⁸ 801 F.2d 893 (7th Cir. 1986).

⁹⁹ *Id.* at 894.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 895. The D.C.F.S. requires that the following information be received before proceeding:

(1) a child less than eighteen years old is involved; (2) the child was either harmed or in danger of harm; (3) a specific incident of abuse is identified; (4) a parent, caretaker, sibling or [babysitter] is the alleged perpetrator of neglect; or (5) a parent, caretaker, adult family member, adult individual residing in the child's home, parent's paramour, sibling or babysitter is the alleged perpetrator of abuse.

Id. at 895 (citing Memorandum from Gregory L. Coler, Director of D.C.F.S., to Administrative and Service Staff 10-11 (1983)).

¹⁰² *Id.* at 901.

¹⁰³ *Id.* at 902.

¹⁰⁴ *Id.*

reports in Illinois are unfounded.¹⁰⁵ The court determined that D.C.F.S. investigators do not violate the Fourth Amendment's warrant requirement solely because they fail to obtain a warrant or have probable cause before conducting a search of a child in an abuse case.¹⁰⁶ According to the court, the administrative scheme outlined in the D.C.F.S. policy sufficiently removed discretion from the social workers.¹⁰⁷ Yet, the court was unable to conclude that the administrative scheme itself was sufficient to ensure a reasonable search.¹⁰⁸ Recognizing the uncertainty in the state of the law, the court decided that the D.C.F.S. was entitled to qualified immunity and the injunction did not have to be granted.¹⁰⁹

The *Darryl H.* case, consequently, did little to clarify the applicability of the warrant requirement or the administrative exception to searches during child abuse investigations.¹¹⁰ However, another court has permitted a warrantless search of a child during an abuse investigation conducted by a police officer.¹¹¹ In *Wildberger v. State*, a police officer searched a girl's body without a warrant after finding scratches and other marks on her brother.¹¹² The court said that the statutory scheme, requiring child abuse investigators to determine the condition of any other child in the household when a case of abuse is suspected, satisfied the Fourth Amendment's requirement of reasonableness.¹¹³

It is unclear, however, why the court in *Wildberger* concluded no Fourth Amendment violation occurred, while the court in *Darryl H.* did not reach the same conclusion. In both cases, agencies suspected child abuse, a statutory scheme designed to remove discretion from the investigator was in place, the investigator proceeded in accordance with the statutory scheme, and the investigator conducted a visual search of the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 904.

¹⁰⁷ *Id.* at 903.

¹⁰⁸ *Id.* at 904. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 902 (quoting *Bell v. Wolfish*, 441 U.S. 520, 599 (1979)).

¹⁰⁹ *Id.* at 908.

¹¹⁰ See, e.g., *Landstrom v. Illinois Dep't of Children & Family Servs.*, 699 F. Supp. 1270, 1274 (N.D. Ill. 1988) (stating that the *Darryl H.* court was unable to find a rule that all nude inspections of children were violative of constitutional rights), *aff'd*, 892 F.2d 670 (7th Cir. 1990); *Donald M. v. Matava*, 668 F. Supp. 703, 709-12 (D. Mass. 1987) (concluding that a substantial question remains as to whether warrantless home visits by social workers violate the constitution).

¹¹¹ *Wildberger v. State*, 536 A.2d 718, 723 (Md. Ct. Spec. App. 1988).

¹¹² *Id.* at 721.

¹¹³ *Id.* at 723.

child's body.¹¹⁴ Ultimately, the sufficiency of the statutory schemes in each case may have been the determining factor; however, it should be noted that *Wildberger* involved a police officer and *Darryl H.* involved a social worker. Yet, the rationale in the *Franz* decision suggests that making any distinction between police officers and social workers should lead to opposite results in the aforementioned decisions.¹¹⁵

In conclusion, the exigent circumstances and administrative search exceptions to the warrant requirement offer some flexibility for child abuse investigations. State statutory schemes designed to permit warrantless searches of children and their homes may give rise to an administrative exception. However, the differing results in *Darryl H.* and *Wildberger* point to the existing uncertainty in the state of law regarding the warrant requirement in child abuse investigations. In addition to this uncertainty, before 1993, confusion also existed over whether warrantless searches in child abuse investigations even implicated the Fourth Amendment.¹¹⁶ This confusion in the state of the law laid the groundwork for *Franz v. Lytle*.¹¹⁷

III. *FRANZ V. LYTLE*: THE POLICE OFFICER/SOCIAL WORKER DISTINCTION

Franz v. Lytle was an appeal from a district court decision which denied in part the defendant's motion for summary judgment.¹¹⁸ In a lawsuit by parents who claimed violations of their Fourth Amendment rights during a child abuse investigation, the district court denied the defendant police officer's affirmative defense of qualified immunity.¹¹⁹ The defendant police officer, Officer Lytle, argued that any administrative exception for social workers in child abuse investigations should also apply to police officers.¹²⁰

¹¹⁴ See *supra* notes 98-109, 111-13 and accompanying text.

¹¹⁵ The *Franz* court held that a social worker would more readily fit into the administrative exception than a police officer because the police officer's primary concern was a criminal investigation while the social worker's primary concern was protecting the child. *Franz v. Lytle*, 997 F.2d 784, 790-92 (10th Cir. 1993); see *infra* notes 140-45 and accompanying text.

¹¹⁶ See *supra* notes 42-56 and accompanying text.

¹¹⁷ 997 F.2d 784 (10th Cir. 1993).

¹¹⁸ *Franz v. Lytle*, 791 F. Supp. 827, 834 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

¹¹⁹ *Id.* at 832; see also *supra* notes 24-41 and accompanying text.

¹²⁰ *Franz*, 997 F.2d at 786.

The city police department dispatched Officer Lytle "to investigate a report of a child who was possibly in need of care."¹²¹ Officer Lytle went to the house of the child's neighbor where the child was playing.¹²² The neighbor told Officer Lytle that the child smelled like urine and was suffering from a bad diaper rash.¹²³ Without contacting the child's mother, Officer Lytle asked the neighbor to remove the child's diaper. The officer then observed the child's vaginal area and took five or six pictures of what he described as a rash. He later told the child's parents that they would be contacted by Social and Rehabilitative Services ("S.R.S."), which evidenced his suspicion of child abuse. Officer Lytle also told his superior officer he was investigating a possible molestation.¹²⁴

The next day, Officer Lytle and a female officer, both armed, returned to the house and conducted another visual inspection of the child's vaginal area with the consent of Mrs. Franz, the child's mother. Officer Lytle pressed specific places in the vaginal area, checking the child's reaction to determine soreness.¹²⁵ At the conclusion of the inspection, he asked Mrs. Franz to voluntarily take the child to a local hospital so that a doctor might examine her; he told her that if she did not, then S.R.S. would come and take the girl.¹²⁶ The doctor at the hospital concluded that no abuse had occurred.¹²⁷ The parents then brought a civil action seeking damages resulting from the violation of their constitutional rights.¹²⁸

In denying Officer Lytle's motion for summary judgment, the district court inquired into whether the law regarding visual inspections of children clearly permitted or prohibited this particular search at the time the defendant acted.¹²⁹ The district court ruled that the Fourth Amendment unequivocally prohibited Officer Lytle's actions because the search did not fit into one of the recognized exceptions and a reasonable officer in his position would have known the searches were illegal.¹³⁰ The

¹²¹ *Id.* at 785.

¹²² *Id.* The neighbor had called in the report. *Id.* The neighbor called Social and Rehabilitative Services, but she was told to call the police because no caseworker was available. *Id.* at 785 n.1.

¹²³ *Id.* at 785.

¹²⁴ *Id.* at 985.

¹²⁵ *Id.*

¹²⁶ *Id.* at 785-86.

¹²⁷ *Id.* at 786.

¹²⁸ *Id.* at 784.

¹²⁹ *Id.* at 786 (citing *Franz v. Lytle*, 791 F. Supp. 827, 830 (D. Kan. 1992)).

¹³⁰ *Id.* (citing *Franz*, 791 F. Supp. at 831-32).

court stated that a trained police officer is "expected to know the subtleties of the probable cause and warrant requirements"¹³¹ and added that social workers do not have this fluency.¹³²

On appeal, the Tenth Circuit affirmed the district court's denial of the motion for summary judgment.¹³³ The court recognized that this type of search implicates the Fourth Amendment.¹³⁴ However, the appellate court focused its inquiry somewhat differently than the district court:

[W]e must then decide to sustain a claim of the lawful exercise of authority based on qualified immunity if, upon examining the information defendant possessed, we can conclude a reasonable officer in the same position in 1988, schooled in the governing principles of the Fourth Amendment, believed he was acting in accord with those principles.¹³⁵

This inquiry required analysis of the specific requirements of the Fourth Amendment in these circumstances.

Officer Lytle argued that no clearly established law existed in regard to visual inspections of children in abuse investigations.¹³⁶ The court said that Officer Lytle's reliance on the *Darryl H. v. Coler* decision was unfounded.¹³⁷ The court in *Darryl H.* did not go as far as to determine whether the administrative exception extended to cover child abuse investigations,¹³⁸ but the *Franz* court said Officer Lytle's conduct would not fit such an exception if it existed.¹³⁹

According to the court, administrative search exceptions require a balancing of "the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."¹⁴⁰ Officer Lytle argued that his primary focus was the safety of the

¹³¹ *Franz v. Lytle*, 791 F. Supp. 827, 831 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

¹³² *Id.*

¹³³ *Franz*, 997 F.2d at 793.

¹³⁴ *Id.* at 786.

¹³⁵ *Id.* at 787.

¹³⁶ *Id.* at 786.

¹³⁷ *Id.* at 788 (discussing *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986)); *see also supra* notes 98-109 and accompanying text.

¹³⁸ *See Darryl H.*, 801 F.2d at 903.

¹³⁹ *See Franz*, 997 F.2d at 793.

¹⁴⁰ *Id.* at 788 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

child,¹⁴¹ but the court found that his actions were not entitled to the same analysis as those of a social worker.¹⁴² The court said the statutory scheme outlined in the *Darryl H.* case incorporated the state's interests in protecting children and did not focus on a criminal investigation.¹⁴³ In this case, Officer Lytle wore a police uniform and carried a gun during the searches, recorded his conversation with the girl's mother, and informed his superior he was involved in a child molestation investigation.¹⁴⁴ The court said these factors demonstrated that his primary concern was a criminal investigation.¹⁴⁵

The court thus concluded that Officer Lytle's actions could not fit into an administrative search exception, and therefore he had to either obtain a warrant or fall within the exigent circumstances exception.¹⁴⁶ The court held that no exigent circumstances were present because the child was not in immediate danger, and no reasonable officer in those circumstances would have thought the search was legal.¹⁴⁷ Although the court did not develop a clear exception to the warrant requirement for social workers, the court determined that a social worker should be entitled to qualified immunity in this type of search.¹⁴⁸

The *Franz* court's focus on the distinction between police officers and social workers shows that it did not consider the extension to the administrative search exception described in *New York v. Burger*.¹⁴⁹ The *Burger* decision specifically stated that an "administrative scheme may have the same ultimate purpose as penal laws,"¹⁵⁰ and the Court "fail[ed] to see any constitutional significance in the fact that police officers, rather than 'administrative' agents, are permitted to conduct the . . . inspection."¹⁵¹ In *Burger*, the junkyard owner unsuccessfully argued that a police officer's role was to enforce penal laws, not inspect for regulatory violations, and that therefore a warrant based upon full

¹⁴¹ *Id.* at 786.

¹⁴² *Id.* at 791.

¹⁴³ *Id.* at 790.

¹⁴⁴ *Id.* at 791.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 792.

¹⁴⁸ *Id.* at 790. Qualified immunity rather than absolute immunity would be granted because the *Darryl H.* case did not clearly answer whether a warrantless search by a social worker in accordance with a statutory scheme fit within the administrative search exception. *Darryl H. v. Coler*, 801 F.2d 893, 908 (7th Cir. 1986).

¹⁴⁹ 482 U.S. 691 (1987); see *supra* notes 86-91 and accompanying text.

¹⁵⁰ *Burger*, 482 U.S. at 713.

¹⁵¹ *Id.* at 717.

probable cause was required.¹⁵² Likewise, the *Franz* court should have recognized that an administrative scheme does not violate the Fourth Amendment solely because "the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself."¹⁵³ Officer Lytle in the *Franz* case argued that he was looking out for the best interests of the child and was following a legislative scheme requiring him to do so.¹⁵⁴ Not unlike the officer in *Burger*, Officer Lytle was conducting a search pursuant to an administrative scheme and had the power to arrest at the same time.¹⁵⁵

Burger can be distinguished from *Franz*, though, because *Burger* involved "closely regulated" industries with reduced privacy expectations,¹⁵⁶ while *Franz* involved an invasion into a home followed by a strip-search.¹⁵⁷ This Note does not stand for the proposition that police officers should be permitted to enter a house and strip-search a child as easily as they can search a junkyard. However, if the courts do not draw a distinction between police officers and administrative agents in the warrantless searches of junkyards, then the same should be true for searches during child abuse investigations. It is difficult to see how a social worker/police officer distinction is necessary when an administrative agent/police officer distinction is not.¹⁵⁸

IV. THE NEED FOR CLEARLY ESTABLISHED LAW

Because the law regarding warrantless searches in child abuse investigations is unclear, qualified immunity is a viable defense for investigators.¹⁵⁹ Individuals may be given qualified immunity, which

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Franz v. Lytle*, 997 F.2d 784, 786-87 (10th Cir. 1993).

¹⁵⁵ *Franz v. Lytle*, 791 F. Supp. 827, 830 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

¹⁵⁶ *Burger*, 482 U.S. at 700.

¹⁵⁷ *Franz*, 997 F.2d at 785.

¹⁵⁸ See *State v. Boggess*, 340 N.W.2d 516, 521 (Wis. 1983) (finding a social worker was a government official and therefore subject to the same Fourth Amendment requirements as a police officer); see also *supra* notes 68-69 and accompanying text (discussing the *Boggess* court's treatment of the social worker/police officer distinction).

¹⁵⁹ See, e.g., *Darryl H. v. Coler*, 801 F.2d 893, 908 (7th Cir. 1986) (granting motion for summary judgment based on the qualified immunity of the social worker and the school official); *Landstrom v. Illinois Dep't of Children & Family Servs.*, 699 F. Supp. 1270, 1275 (N.D. Ill. 1988) (granting qualified immunity to school district employees involved in the search of a suspected child abuse victim), *aff'd*, 892 F.2d 670 (7th Cir. 1990); *Donald M. v. Matava*, 668 F. Supp. 703, 706-07, 713 (D. Mass. 1987) (granting

allows them to escape liability, in cases where a court later determines a violation of the Fourth Amendment has occurred.¹⁶⁰ "Violation of a clearly established right requires *ex ante* knowledge that such conduct is prohibited"¹⁶¹

In *Landstrom v. Illinois Department of Children & Family Services*,¹⁶² four school district employees restrained students and then physically examined and interrogated them because school officials suspected the children were victims of child abuse.¹⁶³ The court found that the employees were immune from liability in the lawsuit which alleged violations of the girls' Fourth Amendment rights.¹⁶⁴ A clear ruling on the application of the Fourth Amendment in these circumstances would have prevented these defendants from escaping liability without a determination of the case on its merits. Then, the only way the school officials could have escaped liability would have been if the court, after analyzing their actions under the Fourth Amendment, had determined that their conduct was reasonable. However, because the law on this subject was unclear, the court granted the school officials qualified immunity and dismissed the complaint.¹⁶⁵ Other similar cases have been resolved, before a hearing on the merits, by motions for summary judgment.¹⁶⁶

Clearly established law also would help prevent an increase in "overzealous investigations."¹⁶⁷ A family in Westchester County, New York, found themselves the target of a child abuse investigation after a social worker confused their name with that of another family in another town.¹⁶⁸ As part of her investigation, the social worker pulled the children out of class at school, visually inspected them in a state of partial undress in front of others, and caused the children to believe they would not see their parents again.¹⁶⁹ The judge expressed some concern over whether the conduct of the social worker violated the Fourth Amendment.¹⁷⁰ However,

qualified, but not absolute, immunity to social workers).

¹⁶⁰ *Landstrom*, 699 F. Supp. at 1275.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1273.

¹⁶⁴ *Id.* at 1275.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *Darryl H. v. Coler*, 801 F.2d 893, 908 (7th Cir. 1986); *Donald M. v. Matava*, 668 F. Supp. 703, 706-07, 713 (D. Mass. 1987).

¹⁶⁷ Glaberson, *supra* note 2, at B1.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at B1, B12.

the parties settled the case prior to trial,¹⁷¹ leaving these concerns undressed.

According to a former director of the National Center on Child Abuse, situations like the one above occur because many inadequately trained social workers are afraid of misdiagnosing an actual abusive environment and therefore tend to be overly aggressive in their investigations.¹⁷² Consequently, clear guidelines in this area would prevent overly aggressive inspections from being protected by the doctrine of qualified immunity.

A U.S. Supreme Court decision on this issue need not dramatically change the current warrant requirements. The Fourth Amendment's warrant requirement and its recognized exceptions serve the needs of child abuse investigations. In cases where investigators believe a child is in need of immediate medical attention or is likely to suffer serious injury, they can forgo the warrant because the emergency rule exception applies.¹⁷³ In cases where investigators suspect parents are abusing their child, police and social workers should be able to rely on reasonable administrative standards to conduct a search within the administrative search exception. The administrative standards need to reflect the state's interest in protecting children and courts seem to recognize that interest already.¹⁷⁴ States may vary as to degree of protection they are willing to provide families. Courts will have to define how much of an infringement on a child's or family's privacy interest the Constitution will permit. But this would amount to a clarification of an existing exception, not the creation of a new one.¹⁷⁵

CONCLUSION

The need for clearly established law in the area of searches during child abuse investigations is great. Because of the exceptions to the warrant requirement carved out in cases like *New Jersey v. T.L.O.*,¹⁷⁶ *New York v. Burger*,¹⁷⁷ *Griffin v. Wisconsin*¹⁷⁸ and the exigent cir-

¹⁷¹ William Glaberson, *Westchester Pledges New Rules in Child-Abuse Inquiries*, N.Y. TIMES, Oct. 12, 1991, at A31.

¹⁷² Glaberson, *supra* note 2, at B12.

¹⁷³ See *supra* notes 57-69 and accompanying text.

¹⁷⁴ See *supra* notes 70-115 and accompanying text.

¹⁷⁵ See *supra* notes 70-115 and accompanying text.

¹⁷⁶ 469 U.S. 325 (1985) (allowing administrators and teachers to search students without a warrant where reasonable suspicion exists); see *supra* notes 77-84 and accompanying text.

¹⁷⁷ 482 U.S. 691 (1987) (upholding a warrantless search of a junkyard because the state had an administrative scheme in place); see *supra* notes 86-91 and accompanying text.

¹⁷⁸ 483 U.S. 868 (1987) (affirming an administrative scheme which allowed a warrantless search of a probationer's home); see *supra* notes 92-97 and accompanying text.

cumstances cases, the groundwork exists for a clear statement of their applicability to child abuse investigations. Once the courts clearly establish the law, then defendant government officials cannot utilize qualified immunity to escape liability.¹⁷⁹ Lack of the qualified immunity defense will cause investigators to be aware of the rights of children and their families and help prevent infringement of those rights. Avoiding the qualified immunity defense also will mean that courts will be able to decide these types of Fourth Amendment cases on the merits and further develop the contours of the law; summary judgments based on qualified immunity do little to develop Fourth Amendment law.

A clear statement of the law, moreover, needs to treat police officers and social workers equally. No reason exists to assume a police officer is better versed in Fourth Amendment law regarding child abuse cases than a social worker. Social workers deal with child abuse investigations on a day-to-day basis, while a police officer may not see these cases as regularly. Moreover, any distinction need not be made on the basis that police seek evidence of a crime while social workers seek to stabilize the family; the U.S. Supreme Court has recognized that administrative schemes can have the same goals as penal codes and still allow these warrantless searches within the bounds of the Fourth Amendment.¹⁸⁰ There is no reason the Supreme Court's ruling should not also apply to child abuse cases.

Lastly, the Court has clearly stated the law regarding warrantless searches of junkyards, purses, and buildings for building code violations. Surely society has enough at stake in its children to compel a clear ruling in child abuse investigations and thus prevent government officials from escaping liability through the doctrine of qualified immunity.

Patrick E. O'Neill

¹⁷⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (granting qualified immunity to public officials when the law is not clearly established).

¹⁸⁰ *See Burger*, 482 U.S. at 713; *see supra* notes 86-91; *see also supra* notes 70-115 and accompanying text.

