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FINDING EQUILIBRIUM: THE
BALANCE BETWEEN PRIVACY AND
PROTECTION IN CHILD ABUSE
INVESTIGATIONS

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Session Outline


- Definitions
- Sample case and procedural history
- Legal issues raised
- Court's disposition of issues
- Other case dispositions
- Impact on future investigations
- Recommendations

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Definitions

Fourth Amendment of the U.S. Constitution


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

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Definitions


14th Amendment

- “Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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Definitions

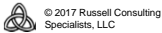
- A “reasonable” search or seizure must be justified at its inception and must be conducted in a manner that is “reasonably related in scope to the circumstances which justified the interference in the first place[.]”
New Jersey v. T.L.O., 469 U.S. 325 (1985)
(quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967))

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Definitions

- “A person has been ‘seized’ within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave.”

Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003)



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The Balancing Act

- Interest of government to protect vulnerable children
 - Especially when caretaker is alleged abuser
- Interest of parents to raise their children without governmental interference
- Interest of children in personal privacy
 - “[I]nvestigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole.” (Baxter, 2012, p. 127)



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Fourth Amendment Case Law



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Overview: *Greene v. Camreta*

- Issue Reviewed by the Court:
 - Was an in-school interview of a suspected child sexual abuse victim, absent a warrant or its equivalent, constitutional?
- Ruling:
 - The 9th Circuit Court of Appeals held “the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional.”

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Factual Summary

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

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Facts: *Greene v. Camreta*

- Nimrod Greene arrested for suspected sexual abuse of 7-year-old boy
- One week after arrest, DHS learns of suspected sexual abuse of Nimrod & wife Sarah's daughters S.G. (9 yrs) and K.G. (5 yrs) by Nimrod
- Nimrod released from jail next day w/ unsupervised contact w/ girls
- Three days after receipt of initial report of sexual abuse (over w/e), DHS worker Bob Camreta, accompanied by uniformed and armed deputy sheriff James Alford, went to S.G.'s school for interview

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Facts: *Greene v. Camreta*

- Camreta requested private office in school to conduct interview
- The interview, alleged by S.G. to last 2 hours and 1 hour by Camreta, was not recorded
- Interview was conducted without notice or consent from mother and no warrant or order from courts
- Camreta concluded that Nimrod sexually abused his daughter

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Facts: *Greene v. Camreta*

- Camreta reported S.G. disclosed attempts to touch her chest & buttocks by Nimrod
- S.G. in court docs recalled hugs and kisses from Nimrod "with fondness"
- S.G. claimed in-school questioning was coercive and disclosure was attempt to end suggestive and stereotyped questions
- Dispute in record between Camreta and Sarah regarding development and adherence to safety plan for children from Nimrod

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Facts: *Greene v. Camreta*

- Camreta filed a petition to have the girls removed from the home and placed in protective custody
- Children removed and ordered for forensic interviews and medical exams at local CAC
- Sarah excluded from interviews and medical exams of both girls, although on site for both
- S.G. denied sexual abuse at interview and reportedly "uncomfortable" during medical
- The findings of the exam were inconclusive


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Facts: *Greene v. Camreta*

- Nimrod indicted on six counts of felony sexual abuse; trial resulted in no verdict
- Nimrod enters *Alford* plea to abuse of 7 yo; charges regarding S.G. dropped


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Procedural History

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Procedural History

- Sarah files suit against Camreta & Alford claiming:
 - In-school seizure of 9 yo S.G. violated her 4th Amendment rights to be free of unreasonable search and seizure when CPS worker and LE took action to interview her without warrant, probable cause, consent or exigent circumstances;
 - CPS worker violated Sarah's 14th Amendment due process rights by presenting false information in court to obtain order to remove girls from home and subsequently removing the girls; and
 - CPS worker violated Sarah's and girls' 14th Amendment due process rights through unreasonable interference with familial right to be together during the medical examinations

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Procedural History

- Federal district court grants summary judgment in favor of CPS and LE investigators
- Greene appeals to 9th Circuit Court of Appeals
- 9th Circuit affirms in part, reverses in part and remands



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In-School Interview:

Violation of 4th Amendment Rights

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What is considered to be a “search and seizure” under the 4th Amendment?

- Whether an interview is a seizure depends on the totality of the circumstances of the interview
 - One test for determining whether a person has been seized is whether a reasonable person would feel free to leave or otherwise decline the officer’s request and terminate the interview

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Factors to consider to determine whether an interview is a seizure:

- Length of the interview
- Location of the interview
- Who initiated the interview (victim contacts police v. police contacting victim)
- The number of participants
- The attire of the investigators (i.e., uniform, visible firearm)
- The language and tone of the investigator
- Aggressiveness of questioning
- Amount and degree of physical contact between investigator and person being interviewed

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Court's Decision and Reasoning

- In-school interview by LE & CPS investigators violated child's right to be free of unreasonable search and seizure
 - Child was interviewed 3 days after defendant released from jail & returned to parents
 - Interview was conducted without parental permission, probable cause, exigent circumstances, a warrant or a court order
 - Interview was not recorded

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Court's Reasoning

- Court analyzed reasonableness of seizure
 - Family has "right to be free of warrantless searches and seizures in their homes"
 - Greater privacy interest ∴ probable cause applies
 - School officials may "regulate [students'] conduct according to the dictates of reason and common sense" to maintain discipline
 - Reasonable suspicion standard in public schools
 - Probable cause in private schools

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“Reasonableness Standard”

- 9th Circuit applied a “reasonableness” standard that is lower than what is typically required when considering 4th Amendment search and seizure violations
- In *Greene*, CPS and LE investigator argued that the lower standard of “reasonableness” should apply

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Did the Court permit lower “reasonableness” standard to apply to the caseworker?

- No (in this case) – the lower standard applies only to school officials
 - The caseworker was serving a law enforcement purpose and was accompanied by a law enforcement officer
 - Investigators required to have a warrant/court order, parent permission, or exigent circumstances to “seize” the student and conduct the interview

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Court’s Reasoning

- Court distinguished administrative seizures from criminal investigations
 - Special needs doctrine
 - Not applicable if law enforcement “entangled” with child protection investigation (MDTs)
 - Probable cause requirements
 - Not required for social worker if exigent circumstances exist
 - Not required if reasonable suspicion child is in imminent danger of serious bodily injury and seizure will prevent injury

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Do laws permitting CPS to interview children in school override the holding in *Greene*?

- Not in the 9th Circuit. State laws that permit CPS to interview a suspected victim of maltreatment on a school campus during school hours cannot trump the protections of the Fourth Amendment of the United States Constitution against unreasonable search and seizure
- Other circuits are divided on the issue

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Does *Greene* prohibit school staff from talking with a student about suspected abuse?

- No. School staff identified as mandated reporters of child abuse must report abuse when they know or have reason to believe a child is a victim of maltreatment.

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“Primary Purpose” – *Ohio v. Clark*

- Teacher notices injuries on 3 yo child and inquires about possible maltreatment. Primary purpose?
- “There is no indication that the primary purpose of the conversation was to gather evidence for Clark’s prosecution. On the contrary, it is clear that the first objective was to protect L.P. At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom.” *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015)

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Argument before Supreme Court

- 9th Circuit imposed a 4th Amendment standard to child abuse witness, when this standard originated in application to suspected criminals
 - Traditional application to witnesses is less-onerous 'balancing test' standard
 - Level of intrusion
 - Liberty interest of individual
 - Interests of government

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U.S. Supreme Court Decision

- Vacated in part and remanded
- "Because mootness has frustrated Camreta's ability to challenge the Ninth Circuit's ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school, that part of the Ninth Circuit's decision must be vacated."
Camreta v. Greene, 131 S. Ct. 2020, 2025 (2011)

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Qualified Immunity

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Qualified Immunity


- Qualified immunity
 - Shields government officials from liability when
 - they are acting within their discretionary authority and
 - their conduct does not violate clearly established statutory or constitutional law
 - of which a reasonable person would have known

Gates v. Texas Dept. of Protective & Reg. Services, 537 F.3d 404 – Court of Appeals, 5th Circuit 2008 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Wallace v. County of Cornal*, 400 F.3d 284, 289 (5th Cir.2005))

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“Reasonable” Seizures

- Court employed balancing test to determine liability for government officials acting under color of law
 - Reasonableness of seizure
 - Duration of seizure
 - Coercive practices / willingness of seized
 - Safety interests
 - Rights of children to be free from abuse

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Qualified Immunity After *Greene*

- Court indicates a seizure of a child by government officials requires parental consent, exigent circumstances, a court order or a warrant
 - Seizure of child on public property w/o exceptions may require more than reasonable belief
 - Administrative searches and seizures to be limited in time and scope
 - Cannot “entangle” criminal with administrative searches and seizures

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No Qualified Immunity for Fabricated Evidence

- Assertion that CPS worker intentionally misrepresented facts to court
 - Protective custody hearing lacking in documentation of what transpired
 - 9th Circuit holds no qualified immunity

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U.S. Supreme Court's Decision

- The case is moot ∴ vacated and remanded: "we have no live controversy to review."
Camreta v. Greene, 131 S. Ct. 2020, 2034 (2011)
- "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."
Camreta v. Greene, 131 S. Ct. 2020, 2036, note 7 (2011)
(internal citations omitted)

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14th Amendment

Due Process – Interference with Familial Rights

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Parental Exclusion at CAC

- Mother excluded from medical examination of children at CAC
 - Children in temporary foster care
 - CPS worker alleged failure to protect
- *Greene* court ruled rights were violated
 - Children have a right to have parent present during “potentially traumatic event”


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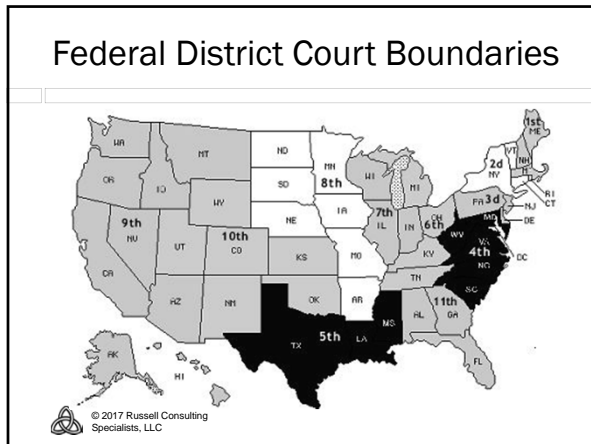
Parental Exclusion at CAC

- Exclusion from medical exam room / medical site permissible if some “valid reason”
 - Parental permission, legitimate basis, medical emergency
- Court distinguishes medical exam from forensic interview if parent could complicate processes

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Additional Circuit Decisions

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Additional Circuit Decisions

- *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999)
 - Finding no special needs in this case, but that the court would “refrain from deciding categorically,” that the special needs exception could never apply to a case in which a child was removed from his or her home during the course of a child abuse investigation
 - Child reported abuse by father to teacher; child removed from school 4 days later for hospital exam

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Additional Circuit Decisions

- *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093–94 (3d Cir. 1989)
 - Holding that a strip search of a child in the home requires a warrant, consent, or exigent circumstances
- *Gates v. Texas Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008)
 - Requiring consent, exigent circumstances, or a “special need” for a warrantless entry into the home
 - Housekeeper admitted CPS & LE into home to interview children

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Additional Circuit Decisions

- *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002)
 - Warrantless strip searches categorically rejected
 - While attending day camp, child was alleged to have been seen touching the “private parts” of another six-year-old girl, kissing the girl on the lips, and dancing in a sexually suggestive manner
 - Court found social worker had permission to enter home, but violated child’s Fourth Amendment rights when she “took pictures of [child’s] vagina and buttocks in a closed position, and then instructed [mother] to spread Jackie’s labia and buttocks, so that she could take pictures of the genital and anal areas” *Id.* at 399

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Additional Circuit Decisions

- *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000)
 - Holding that seizing a child from home requires probable cause or exigent circumstances
- *Doe v. Heck*, 327 F.3d 492, 511–13 (7th Cir. 2003)
 - Holding that probable cause, a warrant, or exigent circumstances is necessary to conduct a search or seizure of a child on private property
 - CPS & LE interviewed child at private school over principal’s objections

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Additional Circuit Decisions

- *Siliven v. Indiana Dep’t of Child Servs.*, 635 F.3d 921, 926 (7th Cir. 2011)
 - Holding that a seizure of a child from his home is reasonable for Fourth Amendment purposes if it is pursuant to a court order, supported by probable cause, or if exigent circumstances exist (Citing *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1010 (7th Cir. 2000))

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Additional Circuit Decisions


- *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)
 - "Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."
- *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003)
 - "We find no special need that renders the warrant requirement impracticable when social workers enter a home to remove a child, absent exigent circumstances."



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Constitutionality of Interviews


Possible Exceptions



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Possible Exceptions


- "Special Needs" Doctrine
 - Does not apply when LE involved or administrative programs perform evidence-gathering for subsequent criminal proceedings
- However,
 - Courts have not addressed whether safety assessment conducted in school by CPS violates court rulings



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Possible Exceptions


- Initial safety assessment by CPS investigator in school
 - Administrative in nature
 - Specific purpose
 - Lacks LE involvement or purpose
 - Time-limited
- Once immediate safety of child is established, CPS may seek parental permission, court order or warrant to “seize” for interview

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Possible Exceptions


- Exigent circumstances
 - “exigent circumstances” exception applies when “the exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”

Mincey v. Arizona, 437 U.S. 385, 394 (1978),
citing *McDonald v. United States*, 335 U.S. 451, 456 (1948) and
Johnson v. United States, 333 U.S. 10, 14–15 (1948)

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Possible Exceptions

- Imminent risk of harm
 - If CPS has reasonable belief that child is at imminent risk of harm, exceptions to 4th Amendment requirements may apply
 - See *Barragan v. Landry*, No. 08-16790, 2010 U.S. App. LEXIS 483, at *5 (9th Cir. Nev. Jan. 8, 2010) (citing *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)).
- Reasonable belief
 - Based on first-hand observation
 - Anonymous report w/ significant indicia of reliability

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Reasonable v. Probable Cause

- Reasonable cause in family court proceedings is equivalent to probable cause in criminal proceedings
Tenenbaum v. Williams, 862 F. Supp. 962, 975 & n.9 (E.D.N.Y. 1994)
- Searches in schools require “a careful balancing of governmental and private interests [and] suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.”
New Jersey v. T.L.O., 469 U.S. 325 (1985)

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Considerations

Administrative

- Requires:
 - Reasonable suspicion
- Exception:
 - Special needs
- Purpose:
 - Protection of children


Criminal

- Requires:
 - Probable cause and warrant
- Exception:
 - Exigent circumstances
- Purpose:
 - Investigation of criminal acts

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Possible Exceptions

- Alternative / differential response
 - Administrative in nature
 - Lacks LE “entanglement”
 - May switch to traditional investigation including LE with out penalty
 - Duration may be a determinative factor
 - Immediacy of need a likely factor
- Caveats:
 - Generally not permitted for CSA / serious PA cases
 - May not be used to circumvent constitutional rights

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Possible Exceptions

- Consent of child
 - Interviews with juveniles guided by “totality of circumstances approach”
 - Juvenile’s competency to waive right to counsel
 - *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)
 - Includes juvenile’s age, experience, education, background, and intelligence, and capacity to understand and waive constitutional rights
 - **Some** jurisdictions find child may consent to search of home – especially “public” areas



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Recommendations



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Recommendations


- Limit initial safety assessments of child abuse allegations in public schools to brief interactions with alleged child victims
- Interviews conducted in schools by MDT investigators should be conducted only when access to a CAC is not available, and only under the authority of parental permission, a court order, a warrant or exigent circumstances
- In-school interviews conducted by CPS workers should be purely administrative in nature, limited in time and scope, and not conducted under the guise of evading constitutional requirements for reasonable search and seizure



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Recommendations

- Electronically record all interviews conducted with alleged child victims of abuse to ensure transparency and demonstrate a lack of coercive or intimidating techniques
- Non-offending parents should be restricted from attending a non-emergency medical examination only with parental consent, a court order or other clearly defined "legitimate" reasons

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A Call for a 4-Prong Balancing Test

- Location where child is searched or seized
- Nature of the search or seizure
- Degree of law enforcement involvement
- Stringency of the regulation curbing the discretion of person performing search or seizure

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Location

- Where special needs doctrine **MAY** apply:
 - Public school
 - Foster home
 - Authorize hospital examinations
- Where special needs doctrine **DOES NOT** apply:
 - Child's home (requires exigent circumstances)
 - Private schools
 - Areas with heightened privacy interests

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Intrusiveness of Investigation

- Requires “balancing ... the of rights of the individual in light of the intrusiveness of the government’s investigation and the information on which the government bases its suspicion.” (p. 608)

- Timing of search / seizure
- Age of child also factor to consider

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Role of Law Enforcement

- Joint CPS-LE child abuse investigations implicate more restrictive 4th Amendment rights
 - Dual-purpose investigations require more than “special needs” doctrine
- Police referral or information-sharing (post-seizure) should not trigger dual-purpose concerns

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CPS Regulations

- State should promulgate specific guidelines limiting the discretion of the caseworker
 - Establish limits on initial assessments of CAN
 - Focused on initial allegations
 - Identify preferred location for forensic interviews
 - Prohibit strip searches w/o order, warrant, permission
 - Establish training requirements for interviewers
- Better allows courts to evaluate the state’s interest

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CPS Regulations

- Guidelines should clearly articulate investigation is for best interest of the child
 - ▣ **Primary purpose** of CPS intervention: Assess health, welfare and safety of the child
 - ▣ Clearly identify the importance of comprehensive assessment / investigation, citing ACEs research
- Guidelines may establish “reasonable” involvement of LE at preliminary/safety assessments
 - ▣ Safety of CPS investigator
 - ▣ Limited participation in process

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CPS Regulations

- Emphasize the civil role of CPS
 - ▣ “CPS staff ‘must not act as law enforcement agents ... by gathering evidence or talking to parents, children, or collaterals for the sole purpose of criminal investigation.’” (Baxter, 2012, p. 141)
- Outline and distinguish cross-reporting requirements with LE and purpose for assessment and timing of information-sharing
- Note: SCOTUS unlikely to require **complete** separation of CPS & LE for purposes of protecting children (see *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015))

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Questions and Comments

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