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THE FOURTH AMENDMENT: RELAXING THE RULE IN CHILD ABUSE INVESTIGATIONS

Jillian Grossman*

INTRODUCTION

In 1997, Child Protective Services (“CPS”) received over three million reports of child abuse nationwide.¹ This statistic reflects the unfortunate reality that child abuse is a prevalent and pervasive problem.² A troubling issue that arises when investigating suspected cases of child abuse is under what circumstances a state actor may enter a child’s home and conduct a strip search of the child’s body for physical evidence of abuse. The U.S. Supreme Court, however, has never addressed this issue. Due to the recent rise in reports of child abuse,³ there exists a heightened need to examine the constitutionality of these searches and develop a uniform rule according to which these searches should be conducted.

In light of the unique nature of children and the substantially intrusive nature of a strip search, a nude search of a child’s body

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1. See NATIONAL COMM. TO PREVENT CHILD ABUSE, CHILD ABUSE AND NEGLECT STATISTICS (Apr. 1998) [hereinafter “NATIONAL COMMITTEE REPORT”].

2. See *id.* In 1997, CPS confirmed 1,045,000 reports of child maltreatment. See *id.* This statistic represents 15 out of every 1000 children in the United States. See *id.* The 1997 survey revealed that 22% of the confirmed cases were physical abuse, 8% were sexual abuse, 54% were neglect, 4% were emotional maltreatment and 12% were other forms of maltreatment. See *id.* In 1996, CPS agencies confirmed that 1185 children died as a result of abuse and neglect. See David A. Berger, *Proposed Changes to Rules for Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance With the Child Victims’ and Child Witnesses’ Rights Statute*, ARMY LAW. 19 n.1 (1999) (citing C.T. Wang & D. Daro, *Current Trends in Child Abuse Reporting & Fatalities: The Results of the 1997 Annual Fifty State Survey*, Chicago, IL: National Committee to Prevent Child Abuse (1998)). Each day more than three children die as a result of abuse or neglect. See *id.* Forty-four percent of these children die as a result of neglect, 51% as a result of abuse and 5% as a result of both abuse and neglect. See *id.*

3. The number of reported child abuse and neglect cases confirmed by CPS in 1997 represents a 1.7% increase from the 1996 statistics. See NATIONAL COMMITTEE REPORT, *supra* note 1. Between 1988 and 1997, child abuse reporting levels increased 41%. See *id.* Since 1985, the rate of child abuse fatalities has increased by 34%. See Berger, *supra* note 2.

within his home for signs of abuse clearly raises Fourth Amendment concerns. In *Darryl H. v. Coler*,⁴ the Seventh Circuit stated that “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.”⁵ Furthermore, “a man’s home is, for most purposes, a place where he expects privacy.”⁶ Thus, to conduct a valid strip search inside a home, the State officer must comply with the requirements of the Fourth Amendment. In the context of child abuse investigations, the warrantless search of a child for evidence of abuse is per se unreasonable and violates the Fourth Amendment unless the search falls within one of two well-delineated exceptions: where consent has been given⁷ or where exigent circumstances exist.⁸

This Note proposes a uniform standard according to which strip searches in child abuse investigations should be conducted. Part I discusses the evolution of children’s rights and identifies the interests of the child and the parents in child abuse investigations. This part also explores the process of weighing the interests of the child and the parents against the interests of the State to determine the reasonableness of a strip search in child abuse investigations. Part II analyzes the two possible exceptions under which a State actor may conduct a warrantless search of a child’s nude body during a child abuse investigation: consent and exigent circumstances. In addition, it examines the availability of the qualified immunity defense in child abuse investigations with respect to social workers and police officers. In Part III, this Note argues that a child should possess the authority to consent to a strip search of his or her body during a child abuse investigation. Furthermore, this Note suggests that the evidentiary standard for the exigent circumstances excep-

4. 801 F.2d 893 (7th Cir. 1986) (holding that visual inspections by state social workers of unclothed children for evidence of child abuse are searches under the Fourth Amendment).

5. *Id.* at 900 (citing *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980)). In *Renfrow*, the Seventh Circuit added that a nude search of a child “is a violation of any known principle of human decency.” 631 F.2d at 92.

6. *Katz v. United States*, 389 U.S. 347, 361 (1967) (holding that electronic and physical intrusions into an enclosed telephone booth are searches under the Fourth Amendment and are presumptively unreasonable in the absence of a search warrant).

7. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (concluding that to justify a noncustodial search of a subject on the basis of consent the state must demonstrate that the consent was voluntarily given).

8. *See Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (noting that the Fourth Amendment does not prohibit police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid).

tion to the Fourth Amendment should be lowered from probable cause to reasonable suspicion. Additionally, this Note proposes the creation of a rebuttable presumption that the defense of qualified immunity in child abuse investigations is available to social workers but not to police officers. This Note concludes that by relaxing the current standards governing strip searches in child abuse investigations and affording children a voice in these situations, the law will adequately safeguard the health and well-being of abused children.

I. IDENTIFYING AND WEIGHING THE INTERESTS OF THE CHILD, THE PARENTS AND THE STATE IN CHILD ABUSE INVESTIGATIONS

A. Evolution of Children's Rights

Traditionally, children were not afforded any rights of their own.⁹ Instead, they were treated as chattel controlled by their parents and the State.¹⁰ In *Meyer v. Nebraska*¹¹ and *Pierce v. Society of Sisters*,¹² the Supreme Court held that the State may not interfere with parents' rights to direct the upbringing and education of children under their control. In doing so, the Court established the fundamental constitutional right of family autonomy.¹³ Not surprisingly, however, the Court in both *Meyer* and *Pierce* weighed only the interests and rights of the parents against that of the State. The child was therefore left without a voice to speak on behalf of his own "best interest."¹⁴

9. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that the right to marry, establish a home and rear one's children as one deems fit are among one's basic civil rights guaranteed by the Fourteenth Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (concluding that parents' rights to direct the upbringing and education of children under their control is fundamental); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a parent has a fundamental constitutional right in directing the upbringing and education of her child).

10. See, e.g., *Pierce*, 268 U.S. at 510; *Meyer*, 262 U.S. at 390. See also Curtis C. Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A. J. 719, 720 (1962) ("The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.")

11. 262 U.S. at 390.

12. 268 U.S. at 510.

13. See *id.*; *Meyer*, 262 U.S. at 390.

14. *Meyer*, 262 U.S. at 390; *Pierce*, 268 U.S. at 510.

1. *Rights of Children*

In 1967, the Supreme Court's groundbreaking decision in *In re Gault*¹⁵ transformed the way in which the legal system treated children.¹⁶ The Court concluded that minors have constitutional rights independent from the family.¹⁷ Justice Fortas articulated that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁸ Never before had the Court afforded children a voice in issues concerning themselves. *Gault* served as a "wellspring for the development of the constitutional rights of minors."¹⁹

In 1969, Justice Fortas again spoke for the Court in *Tinker v. Des Moines Independent Community School District*,²⁰ reaffirming its earlier holding that children have rights separate from their parents.²¹ The Court held that the First Amendment protected the wearing of armbands in school by students and teachers to express certain views,²² explaining that this constitutional protection extends to children as well as adults.²³ The Court further held that, in this instance, the children's First Amendment rights trumped the State's interests.²⁴ Justice Fortas emphasized that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁵

15. 387 U.S. 1 (1967) (holding that the safeguards of the Fifth and Sixth Amendments protected a 15-year-old boy accused in juvenile court of a charge that threatened years of imprisonment).

16. *See id.* In *In re Winship*, the Supreme Court held that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of delinquency proceedings as are those constitutional safeguards applied in *Gault*." 397 U.S. 358, 368 (1970). In *Breed v. Jones*, the Supreme Court held that the protections of the double jeopardy clause applied to juveniles. *See* 421 U.S. 519 (1975).

17. *See Gault*, 387 U.S. at 58.

18. *Id.*

19. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 135 (3d ed. 1995).

20. 393 U.S. 503 (1969).

21. *See id.* at 513.

22. *See id.*

23. *See id.* ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.")

24. *See id.*

25. *Id.*

2. Restrictions on Children's Rights

In *Bellotti v. Baird*,²⁶ the Court departed substantially from its continuing trend toward recognizing children's rights.²⁷ In *Bellotti*, the Court invalidated a Massachusetts statute regulating minors' access to abortions.²⁸ In doing so, it acknowledged that children have rights separate from adults but that these rights are not equal to those of adults.²⁹ The Court articulated three reasons to justify this conclusion: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³⁰ Although the Court stated that a child's right with respect to many constitutional claims is coextensive with that of an adult, it illustrated its unwillingness to adopt this conclusion as a uniform standard.³¹ By articulating its three-pronged justification, the Court established an analytical framework for lower courts to apply in evaluating subsequent State regulations on children's rights.³²

In *Ginsberg v. New York*,³³ the Court illustrated its concern regarding the inability of children to make mature and informed choices by placing limitations on their First Amendment rights.³⁴ It explained that "even where there is an invasion of protected freedoms, 'the power of the State to control the conduct of children reaches beyond the scope of its authority over adults.'"³⁵ In other

26. 443 U.S. 622 (1979).

27. *See id.*

28. *See id.* at 649. The statute required parental consent before an abortion could be performed on an unmarried woman under the age of 18. *See id.* If one or both parents refused to consent, however, the abortion could be obtained by order of a judge of the superior court for good cause shown. *See id.*

29. *See id.* at 634. The Court explained that because the status of minors under the law is unique in many respects, children's constitutional rights cannot be equated with those of adults. *See id.*

30. *Id.*

31. *See id.* at 634-35.

32. *See, e.g.,* *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." (citing *Bellotti*, 443 U.S. at 634-39)); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (noting that the state as *parens patriae* may restrict parents' control over minors to guard the general interest in youths' well-being).

33. 390 U.S. 629 (1968) (holding that a New York statute prohibiting the sale of obscene materials to minors under 17 years of age did not invade constitutional rights guaranteed to minors).

34. *See id.* The Court recognized that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Id.* at 640-41.

35. *Id.* at 638 (quoting *Prince*, 321 U.S. at 170).

words, in its role as *parens patriae*,³⁶ the State can limit children's constitutional rights to afford them necessary protections and ensure their safety and well-being.³⁷

By 1979, the realm of children's rights stood in a wholly different place than it had in 1925 with cases like *Pierce*. In the eyes of the law, children were no longer property of their parents.³⁸ With its unprecedented decisions in *Gault* and *Tinker*, the Court made clear that children have rights separate from their parents.³⁹ Although the Court demonstrated its unwillingness to equate children's rights with those of adults, it emphasized the importance of recognizing and protecting the constitutional rights of children.⁴⁰ The tug of war between the State and parent was replaced by the balancing act of the State, parent and child.⁴¹

Despite the Court's tremendous advancements in the realm of children's rights, however, the law remains unsettled.⁴² With each new challenge, the Court continues to shape the body of law that

36. See *id.* The term "*parens patriae*," which literally means "parent of the country," traditionally refers to the:

role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, . . . and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants. In the United States, the *parens patriae* function belongs with the states.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). Under the doctrine of *parens patrie*, "the state has standing to sue as a representative of its citizens only where it can allege injuries to a 'quasi-sovereign interest,' or to put it another way, where it can allege injuries to interests which 'affect her citizens at large.'" *Lucas v. Planning Bd.*, 7 F. Supp.2d 310, 327 (S.D.N.Y. 1998).

37. See *Ginsberg*, 390 U.S. at 640.

38. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967).

39. See *Tinker*, 393 U.S. at 506; *Gault*, 387 U.S. at 13.

40. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979).

41. See *id.*; see also *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement.").

42. See, e.g., Peter S. Smith, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825, 831-32 (1997) ("[T]he competing interests created by the complex relationship of child, parent and state are unsettled under current law.").

defines children's rights.⁴³ One unresolved aspect of the law is that which governs in-home strip searches of a child in child abuse investigations.

B. Identifying the Interests of the Child and the Parents

The nude search of a child's body implicates Fourth Amendment concerns.⁴⁴ Therefore, it is necessary to understand the relevant legal standards before evaluating the search's constitutionality. The Fourth Amendment to the U.S. Constitution provides that the Federal Government shall not violate "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁴⁵ To ensure the protection of this liberty, the law generally requires police to obtain a warrant prior to conducting a search and seizure.⁴⁶ The Fourth Amendment,

43. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (recognizing that the constitutionally protected right of privacy encompasses a woman's decision whether to terminate her pregnancy); *Tinker*, 393 U.S. at 503 (holding that the wearing of armbands in school by students and teachers to express certain views is protected by the First Amendment); *Gault*, 387 U.S. at 1 (holding that the safeguards of the Fifth and Sixth Amendments protected a 15-year-old boy accused in juvenile court of a charge that threatened years of imprisonment).

44. See *supra* notes 4-5.

45. U.S. CONST. amend. IV. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

46. *Id.*; see also *Maryland v. Dyson*, 527 U.S. 465 (1999) ("The Fourth Amendment generally requires police to secure a warrant before conducting a search."); *California v. Carney*, 471 U.S. 386, 389 (1985) (noting that the Fourth Amendment protection against unreasonable searches and seizures is preserved by a requirement that searches be conducted pursuant to a warrant issued); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (stating that a search is reasonable only if supported by a judicial warrant based on probable cause); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."); *Texas v. Brown*, 460 U.S. 730, 735 (1983) (noting that the Fourth Amendment requires the existence of probable cause before a warrant is issued); *Payton v. New York*, 445 U.S. 573, 581 (1980) (explaining that the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant); *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."); *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971) (noting that the Fourth Amendment requires searches be conducted pursuant to a warrant).

however, does not operate as an absolute safeguard against invasions of an individual's right to security in person and property.⁴⁷

The ultimate measure of the constitutionality of a search is reasonableness.⁴⁸ The reasonableness of a search is determined by considering whether the search was justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place.⁴⁹ This balancing test requires weighing "its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests."⁵⁰ Thus, in the context of strip searches in child abuse investigations, the privacy interests of the child and the parents as well as the parents' interest in family integrity and parental authority must be balanced against the State's interest in keeping children free from harm.

1. *Interests of the Child*

On one hand, to determine whether a nude search of a child's body during a child abuse investigation is reasonable, courts must consider the child's constitutionally protected right to privacy. Although the Constitution does not explicitly recognize any privacy right, the Fourth Amendment protects an individual's privacy interests in his home.⁵¹ Furthermore, as the Supreme Court concluded in *Gault*,⁵² the Fourteenth Amendment and the Bill of Rights provide the same protections to children as they do to adults.⁵³ In *New Jersey v. T.L.O.*,⁵⁴ the Court emphasized that "a search of a child's person . . . no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective ex-

47. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665 (1995) (holding that a public school district's student athlete drug policy did not violate student's federal or state constitutional right to be free from unreasonable searches).

48. See *id.* at 652.

49. See *T.L.O.*, 469 U.S. at 341 (holding that the search of a student's purse by public school officials was reasonable and that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).

50. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). In *Skinner*, the Court held that the Fourth Amendment was applicable to drug and alcohol testing mandated or authorized by Federal Railroad Administration regulations. See *id.* Furthermore, the Court concluded that the tests were reasonable under the Fourth Amendment. See *id.* at 634.

51. See U.S. CONST. amend. IV.

52. 387 U.S. 1 (1967).

53. See *id.* at 13.

54. 469 U.S. 325 (1985).

pectations of privacy.”⁵⁵ Similarly, in *Doe v. Renfrow*,⁵⁶ the District Court of the Northern District of Indiana stated that “subjecting a student to a nude search is . . . an intrusion into an individual’s basic justifiable expectation of privacy.”⁵⁷ Thus, merely on account of his age, a child is not outside the boundaries of protection afforded by the Constitution.⁵⁸

Courts also carefully consider the nature of this invasion of privacy. In *Terry v. Ohio*,⁵⁹ the Supreme Court held that even a limited search of outer clothing “constitutes a severe . . . intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”⁶⁰ More recently, the Court in *T.L.O.* recognized that “even a limited search of the person is a substantial invasion of privacy.”⁶¹ In *Bell v. Wolfish*,⁶² Justice Stevens described the body cavity search as “clearly the greatest personal indignity.”⁶³

A strip search is a traumatic experience and a significant invasion of a child’s privacy.⁶⁴ A nude search of a child’s body not only causes a child to be embarrassed and uncomfortable, but may also cause long-term negative psychological effects.⁶⁵ Moreover, the

55. *Id.* at 337-38.

56. 475 F. Supp. 1012 (N.D. Ind. 1979) (holding that nude search of student solely upon continued alert of trained drug-detecting canine after she emptied her pockets was unreasonable).

57. *Id.* at 1024.

58. *See id.*

59. 392 U.S. 1 (1968).

60. *Id.* at 24-25.

61. 469 U.S. 325, 337 (1985).

62. 441 U.S. 520 (1979) (ruling that the practice of visual body-cavity searches of inmates following contact visits does not violate the Fourth Amendment).

63. *Id.* at 594 (Stevens, J., dissenting); *see also* *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (describing strip searches as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission”).

64. *See, e.g., Terry*, 392 U.S. at 24-25; *T.L.O.*, 469 U.S. at 337-38; *Bell*, 441 U.S. at 520.

65. *See* Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921 (1997). Gartner states that:

many children subjected to strip searches at school undergo treatment by child psychologists and psychiatrists, who predict that some of their patients will have lasting emotional scars as a result of the search. . . . In fact, the risk of emotional harm leads one vocal opponent to declare: “Strip searches by school officials are tantamount to child abuse and are ethically and constitutionally unacceptable.” A strip search certainly is frightening, degrading, and often unconscionable in light of the circumstances that gave rise to it. A child may well remember a strip search forever, and the emotional scars can endure equally long.

strip search of a child implicates concerns that are not associated with strip searches of adults and that magnify the severity of trauma to the child.⁶⁶ As children approach adolescence, they begin to be aware of their developing and changing bodies.⁶⁷ Accordingly, they develop a greater expectation of privacy with respect to their nude bodies than they have at a younger age.⁶⁸ In addition, they tend to be more self-conscious about their bodies, making a nude search even more humiliating.⁶⁹

Furthermore, in assessing the reasonableness of a strip search during a child abuse investigation, courts must consider the child's right to personal privacy. The right to personal privacy includes the ability to make certain kinds of important decisions privately and free from unwarranted governmental intrusion.⁷⁰ The Supreme Court has considered this aspect of privacy when evaluating minors' freedom to make significant decisions regarding their bodies.⁷¹ These decisions include whether to have an abortion⁷²

Id. at 930-31.

66. See, e.g., *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993). In *Meese*, the District Court of California recognized that "[c]hildren are especially susceptible to possible traumas from strip searches." *Id.* at 667. Furthermore, it stated that "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); see also Gartner, *supra* note 65, at 930. Gartner explains that:

[y]oung people may find the experience more traumatic than adults for a number of reasons: First, "as children approach adolescence, privacy becomes important as a marker of independence and self-differentiation. Threats to the privacy of school-aged children may be reasonably hypothesized to . . . threats to self-esteem." Second, adolescents tend to be more self-conscious about their bodies than other age groups, making a strip search all the more humiliating.

Gartner, *supra* note 65, at 930 (citing Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488 (1983)).

67. See *supra* note 66 and accompanying text.

68. See Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998). Marrus notes that "[c]hildren have a strong need for privacy in adolescence. During this time, children begin to explore their own identity and get a sense of who they are as individuals. This builds within them a need to protect and insure their right to privacy." *Id.* at 542 (citations omitted).

69. See *supra* notes 65-66 and accompanying text.

70. See *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977) (noting that the right to privacy encompasses the right of an individual to be free in action, thought, experience, and belief from governmental compulsion (citing Kurland, *The Private I*, U. CHI. MAG., Autumn 1976, at 8)).

71. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (recognizing that the constitutionally protected right of privacy encompasses a woman's decision whether to terminate her pregnancy).

and whether to use contraception.⁷³ Thus, it follows that this constitutionally-protected zone of privacy encompasses a child's choice to allow his body to be stripped and searched.

Courts also must consider a child's right to be free from harm. In *B.H. v. Johnson*,⁷⁴ the District Court of the Northern District of Illinois held that a child in foster care has substantive due process rights to be free from unreasonable and unnecessary intrusions on both her physical and emotional well-being.⁷⁵ The court articulated that "children are by their nature in a developmental phase of their lives, and their exposure to traumatic experiences can have an indelible effect upon their emotional and psychological development."⁷⁶ While the court's decision in *B.H.* was limited to children in the context of foster care,⁷⁷ it illustrates that children have a right to be free from harm in general.

72. *See id.*; *see also* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right of privacy encompasses a woman's decision whether to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the right of privacy encompasses an individual's right to be free from unwarranted governmental intrusion regarding the decision whether to bear or beget a child).

73. *See Eisenstadt*, 405 U.S. at 438.

74. 715 F. Supp. 1387 (N.D. Ill. 1989). In *B.H.*, children who had been removed from their families and placed in custody of a state social services agency brought a class action against the director of the state agency. *See id.* at 1395. The District Court of the Northern District of Illinois held that the children had a Fourteenth Amendment substantive due process claim to be free from arbitrary intrusions on their physical and emotional well-being while directly or indirectly in state custody and to be provided with adequate food, shelter, clothing, medical care and minimally adequate training to secure these basic constitutional rights. *See id.* at 1396. It also concluded, however, that the children did not have other substantive due process claims, such as a right to placement in the least restrictive setting and sibling visitation. *See id.* at 1397-98.

75. *See id.* at 1395.

76. *Id.*; *see also* DAVID A. WOLFE, PREVENTING PHYSICAL & EMOTIONAL ABUSE OF CHILDREN 31 (1991). Abused children have been reported to be developmentally delayed, behaviorally disordered, and recognizably different from their age peers. *See id.* at 32. Studies indicate that abused children have higher rates of externalizing disorders (e.g. higher rates of aggression, acting out, and hyperactivity). *See id.* Studies also describe abused children as being delayed in language development. *See id.* Furthermore, these children are more likely to show signs of failure in normal adaptation. *See id.* at 35. The National Child Abuse and Neglect Data System reports that physical neglect can severely impact a child's development by causing failure to thrive, malnutrition, serious illness, physical harm resulting from lack of supervision, and a lifetime of low self-esteem. *See* National Center on Child Abuse and Neglect of the U.S. Department of Health and Human Services, *Answers to Common Questions About Child Abuse and Neglect* (visited Feb. 2, 2000) <<http://www.americanhumane.org/children/factsheets/emot-abuse.html>>. Emotional abuse can lead to poor self-image, alcohol and drug abuse, destructive behavior and even suicide. *See id.*

77. *See B.H.*, 715 F. Supp. at 1395.

2. *Interests of the Parents*

In determining the constitutionality of strip searches in child abuse investigations, courts must also consider the parents' right to privacy and family integrity. The Supreme Court has long recognized and protected a family's fundamental right to exercise parental autonomy and to be free from unwarranted governmental intrusion into family privacy.⁷⁸ It has articulated that "the family has a privacy interest in its children's upbringing and education which is constitutionally protected against undue State interference."⁷⁹ According to the Court, the Constitution protects family sanctity because the institution of the family is deeply rooted in the nation's history and tradition.⁸⁰

As early as 1923, in *Meyer v. Nebraska*,⁸¹ the Court recognized the "essential" right of parents to direct the upbringing and education of children under their control.⁸² In *Griswold v. Connecticut*,⁸³ the Court first recognized a fundamental right to familial privacy.⁸⁴

78. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to freedom of privacy in family life is fundamental whether derived from the First, Ninth or Fourteenth Amendments); *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing the fundamental right to family integrity as guaranteed by the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (stating that the right to marry, establish a home, and rear one's children as one deems fit are among one's basic civil rights guaranteed by the Fourteenth Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that a parent has a fundamental constitutional right to direct the upbringing and education of its child); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a parent has a fundamental constitutional right in directing the upbringing and education of his/her child); *In re Phillip B.*, 92 Cal. App. 3d 796 (1979) (recognizing that parental autonomy is a fundamental constitutional right).

79. *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (invalidating the provision of a Minnesota statute requiring two-parent notification of a minor's abortion decision and upholding the provision requiring two-parent notification unless pregnant minor obtains judicial bypass).

80. See, e.g., *Meyer*, 262 U.S. at 390.

81. *Id.*

82. See *id.* In *Meyer*, the Court invalidated a Nebraska statute that banned the teaching of any subject in any language other than English because it deprived parents and teachers of liberty without due process of law in violation of the Fourteenth Amendment. See *id.* at 403. The Court based its decision in large part on the right of parents to control the education of their children. See *id.* at 401.

83. 381 U.S. 479 (1965) (holding that the Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy).

84. See *id.* In his concurring opinion, Justice Goldberg stated that, without doubt, personal liberty "denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children." *Id.* at 488 (Goldberg, J., concurring) (citing *Meyer*, 262 U.S. at 399). Furthermore, Justice Goldberg noted, "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific

The Court in *Moore v. City of Cleveland*⁸⁵ emphasized that “freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”⁸⁶ Courts have afforded these rights protection under the Due Process and Equal Protection clauses of the Fourteenth Amendment as well as the Ninth Amendment.⁸⁷ In determining the reasonableness of a search in child abuse investigations, courts carefully weigh these rights against those of the child and the State.

C. Balancing the Interests of the Child and the Parents against the Interests of the State

While it is well established that the child’s right to privacy and the parents’ rights to family autonomy and privacy are fundamental, they are not absolute.⁸⁸ The State may invade these constitu-

guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.” *Id.* at 495.

85. 431 U.S. 494 (1977) (holding that a city ordinance limiting occupancy of any dwelling unit to members of the same “family” where the ordinance narrowly defined family as including only a few categories of related individuals violated the Due Process Clause of the Fourteenth Amendment).

86. *Id.* at 499 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)). See also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold*, 381 U.S. at 495-96; *Poe v. Ullman*, 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer*, 262 U.S. at 399-401.

87. See, e.g., *Griswold*, 381 U.S. at 484 (finding the right to privacy in the penumbra that emanate from the guarantees of the Bill of Rights). The Fourteenth Amendment provides “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.” U.S. CONST. amend. XIV. In *Griswold*, Justice Harlan found the right to privacy in the Due Process Clause of the Fourteenth Amendment because it is a basic value implicit in the concept of ordered liberty. See 381 U.S. at 479. The Supreme Court has construed the concept of ordered liberty to mean a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Ninth Amendment provides that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. In *Griswold*, Justice Goldberg stated that the concept of marital privacy is found in the Ninth Amendment, which revealed that the framers of the Constitution believed there are fundamental rights protected from governmental intrusion but not enumerated in the text. See 381 U.S. at 487 (Goldberg, J., concurring).

88. See, e.g., *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (holding that visual inspections by state social workers of unclothed children for evidence of child abuse are searches under the Fourth Amendment); see also *Moore*, 431 U.S. at 499 (citing

tionally-protected arenas if there exists a compelling interest and the means of doing so are narrowly tailored.⁸⁹ On many occasions, the Supreme Court has deferred to the State's interest in placing limitations on the rights of children and families.⁹⁰

For example, in assessing the constitutionality of statutes restricting a minor's access to abortion, the Court illustrates its concern for the health and well-being of children by upholding restrictions on a child's right to privacy.⁹¹ In *Hodgson v. Minnesota*,⁹² the Court articulated that "the state has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely."⁹³ Based on this reasoning, the Court upheld a two-parent notification provision that required both parents' involvement in their minor daughter's decision whether to terminate her pregnancy.⁹⁴ The Court explained that a child's right

Prince, 321 U.S. at 166) (cautioning that while the Constitution protects a family's right to privacy, the family is not beyond regulation). In *Moore*, the Court noted, however, that when the government intrudes on choices concerning family living arrangements, the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. *See id.* (citing *Poe*, 367 U.S. at 554 (Harlan, J., dissenting)).

89. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring). In *Glucksberg*, the Court explained that "[t]he dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called 'compelling interest test,' under which regulations that substantially burden a constitutionally protected (or 'fundamental') liberty may be sustained only if 'narrowly tailored to serve a compelling state interest.'" *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *see also, e.g.*, *Roe*, 410 U.S. at 155; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (holding that regulations imposing a burden on decision as fundamental as whether to bear or beget a child may be justified only by compelling state interest and must be narrowly drawn to express only those interests). "How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it." *Glucksberg*, 521 U.S. at 772 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 871-74 (1992)).

90. *See, e.g.*, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *H.L. v. Matheson*, 450 U.S. 398 (1981).

91. *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (upholding an Ohio abortion statute requiring that parental notice be given by physician performing abortion and requiring minor to prove maturity or best interest by clear and convincing evidence when using judicial bypass); *Matheson*, 450 U.S. at 398.

92. 497 U.S. 417 (1990).

93. *Id.* at 444 (citations omitted).

94. *See id.* The Minnesota statute provided, with certain exceptions, that no abortion could be performed on a woman under 18 years of age until at least 48 hours after both of her parents had been notified. *See MINN. STAT. ANN.* § 144.343 (West 1981). The notice was mandatory unless (1) the attending physician certified that an immediate abortion was necessary to prevent the woman's death and there was insufficient time to provide the required notice; (2) both of her parents had consented in

to privacy is not absolute and may be limited by State regulation to adequately safeguard a child's unique vulnerability and needs.⁹⁵

Similarly, in *Vernonia School District v. Acton*,⁹⁶ the Court concluded that the State's legitimate interest in deterring drug abuse among children justified its random urinalysis requirement for student athletes and the accompanying invasion of privacy.⁹⁷ It again recognized that children's constitutional rights are often subject to limitations.⁹⁸ The Court explained that, while children have a decreased expectation of privacy in the schoolhouse,⁹⁹ student athletes have an even less legitimate privacy expectation.¹⁰⁰ The Court's decision illustrated its willingness to permit an invasion of constitutionally-protected rights to further a legitimate State goal.

writing; or, (3) the woman declared that she was a victim of parental abuse or neglect, in which event notice of her declaration must have been given to the proper authorities. *See id.*

95. *See Hodgson*, 497 U.S. at 444; *see also Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (holding that children's rights were not equal to those of adults because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

96. 515 U.S. 646 (1995).

97. *See id.* at 664-65.

98. *See id.* at 654.

99. *See id.* at 656-57. In *Vernonia*, the Court articulated that a child's constitutional rights are different in public schools than elsewhere. *See id.* It explained that the "reasonableness" inquiry must account for the schools' custodial and tutelary responsibility for children. *See id.* For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. *See id.* Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

100. *See id.* at 657. The Court in *Vernonia* went on to explain that student athletes have an even lesser expectation of privacy. *See id.* It stated that:

[s]chool sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in *Vernonia* are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of communal undress inherent in athletic participation."

Id. (citing *Schaell v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)). Furthermore, the Court explained that another reason why student athletes have a reduced expectation of privacy is that by choosing to join a team, "they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* Thus, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.* (citations omitted).

Like the interest defined in *Hodgson* and *Vernonia*, the State's interests in conducting a strip search in child abuse investigations is weighty. Courts have long held that the State has a legitimate interest in keeping children free from physical and emotional harm.¹⁰¹ In *B.H. v. Johnson*,¹⁰² the District Court of the Northern District of Illinois stated that "a child's physical and emotional well-being are equally important."¹⁰³ As the Supreme Court articulated in *Wyman v. James*,¹⁰⁴ "there is no more worthy object of the public's concern."¹⁰⁵ At the core of this interest is the State's perception of children as vulnerable, immature, and needy of protection.¹⁰⁶ The Court's line of reasoning from *Bellotti* to *Vernonia* illustrates that the State may place limitations on children's constitutional rights to account for their "peculiar vulnerability" and afford them necessary protections.

In addition, federal and state statutes demonstrate the State's interest in safeguarding children from harm. For example, in 1974,

101. See, e.g., *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (recognizing the state interest in protecting children from psychological, emotional, and mental harm). In *Bykofsky v. Borough of Middletown*, the District Court of Pennsylvania emphasized that in situations where "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare is demonstrated, these legitimate state interests may override the parents' qualified right to control the upbringing of their children." 401 F. Supp. 1242, 1264 (M.D. Pa. 1975) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Application of President and Dirs. of Georgetown College, Inc.*, 118 U.S.App.D.C. 80 (1964); *In re Sampson*, 29 N.Y.2d 900 (1972); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952); *Raleigh Fitkin-Paul Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964); *In re Clark*, 185 N.E.2d 128 (Ohio 1962)).

102. 715 F. Supp. 1387 (N.D. Ill. 1989).

103. *Id.* at 1395 ("Children are by their nature in a developmental phase of their lives and their exposure to traumatic experiences can have an indelible effect upon their emotional and psychological development and cause more lasting damage than many strictly physical injuries.").

104. 400 U.S. 309 (1971). In *Wyman*, recipients of state aid to families with dependent children brought an action for declaratory and injunctive relief preventing termination of benefits for failure to consent to a welfare official's entry into the recipient's home. See *id.* The Court held that the home visitation, as structured by the New York statutes and regulations, was a reasonable administrative tool and served a valid and proper administrative purpose for the dispensation of the AFDC program. See *id.* at 325. Furthermore, it concluded that the home visits were not unwarranted invasions of personal privacy and violated no right guaranteed by the Fourth Amendment. See *id.*

105. *Id.* at 318. The Court further stated that "[t]he dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." *Id.*

106. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding that children's rights were not equal to those of adults because of children's vulnerability and immaturity and the importance of the parental role in child rearing).

Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA" or the "Act").¹⁰⁷ CAPTA allocated money to the States for the identification, treatment, and prevention of child abuse.¹⁰⁸ To be eligible for funds, each state had to provide for the reporting of known or suspected child abuse, immunity to reporters from civil and criminal liability, investigation of reports by the proper state authority, and insurance of the health and welfare of any children in a household where abuse was detected.¹⁰⁹

CAPTA's express purpose was to help states implement programs to deal with the problem of child abuse.¹¹⁰ The Act reflected Congress's realization that, despite already existing reporting and immunity laws, underreporting still hindered efforts to aid abused children.¹¹¹ The legislative history of the Act also illustrates Congress's concern that not all states had laws requiring further investigation or treatment of reported cases.¹¹² Thus, an important aspect of the Act was its focus on intervention.¹¹³ By passing this federal legislation, Congress demonstrated its significant interest in keeping children free from harm and its hope that states would enact similar legislation.¹¹⁴

Although prior to CAPTA most states already complied with many of its requirements, the federal statute had substantial influence on subsequent state reporting statutes.¹¹⁵ In particular, by bringing the immunity provisions to the public's attention, CAPTA led to an increase in the number of reported cases of child abuse.¹¹⁶

107. 42 U.S.C. § 5101 (1976). The Act was an attempt by Congress to encourage reporting of suspected child abuse. See Eric P. Gifford, Comment, 42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied, 26 TEX. TECH. L. REV. 1013, 1025 (1995) (citing Richard A. Gardner, *Apparatchiks Turn "Child Abuse" into "Witch Hunt"*, N.J. L.J., Mar. 1993, at A17).

108. See 42 U.S.C. § 5103(b)(1) (1994), *repealed by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066.

109. See *id.* § 5103(b)(2).

110. See H.R. REP. NO. 93-685 at 2-4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763, 2765-66 (concluding that the federal government needed to take an increased role in supporting state and local child welfare agencies).

111. See *id.*

112. See *id.* at 2765 (stating that most state laws did not "require any followup or treatment once a case of abuse had been reported").

113. See Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 193-94 (1998).

114. See *id.*

115. See Brian G. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 649 (1978).

116. See *Child Welfare: Where Should Our Priorities Be? Hearings Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and*

The Act also facilitated states' efforts to organize child protective systems designed to respond to reports of suspected abuse and neglect and may have increased states' awareness of the need to fund these programs.¹¹⁷

By articulating national policy, the Act guided state legislatures in formulating policy at the local level.¹¹⁸ Many states enacted statutes aimed at prevention and investigation of child abuse.¹¹⁹ These statutes mandate criminal penalties for convictions of child abuse and neglect.¹²⁰ Some of the state legislation also include provisions requiring the state to fund programs to prevent child abuse and neglect.¹²¹ Like federal laws, these statutes illustrate the significant State interest in protecting children from harm.

Educational Opportunities, 104th Cong. (1995) (testimony of Anne Cohn Donnelly, Executive Director, National Committee on the Prevention of Child Abuse), 1995 WL 35279 (F.D.C.H. Jan. 31, 1995). An estimated 60,000 reports were made in 1974. *See id.* In 1993 there were just under 3,000,000. *See id.*

117. *See* Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 48 (1967) (complaining that in 1967 too few states had appropriated additional funds for extending services to new cases revealed by mandatory reporting).

118. *See* Fraser, *supra* note 115, at 651; *see also* Trost, *supra* note 113, at 193.

119. The New York Family Court Act states that "[w]here there is probable cause to believe that an abused or neglected child may be found on premises, an order under this section may authorize a person conducting the child protective investigation, accompanied by a police officer, to enter the premises to determine whether such a child is present." N.Y. FAM. CT. ACT § 1034 (McKinney 1999). Alabama's Child Abuse Act provides that "[a] responsible person, as defined in Section 26-15-2, who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years shall, on conviction, be punished by imprisonment in the penitentiary for not less than one year nor more than 10 years." ALA. CODE § 26-15-3 (1975). Mississippi's state law provides that:

Any parent, guardian or other person who willfully commits any act or omits the performance of any duty, which act or omission contributes to or tends to contribute to the neglect or delinquency of any child or which act or omission results in the abuse and/or battering of any child, as defined in Section 43-21-105(m) of the Youth Court Law . . . upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment not to exceed one (1) year in jail, or by both such fine and imprisonment.

MISS. CODE ANN. § 97-5-39 (1999). South Carolina's Domestic Relations Law states that:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

S.C. CODE ANN. § 20-7-50 (1985).

120. *See, e.g.*, ALA. CODE § 26-15-3 (1975).

121. Arizona's law states that:

Federal case law also demonstrates the State's interest in safeguarding children from danger. In *Darryl H. v. Coler*,¹²² two families brought a Fourth Amendment challenge against the Illinois Department of Children and Family Services for allowing social workers to conduct nude searches of their children for evidence of child abuse where certain "hot-line" criteria were met.¹²³ The Seventh Circuit held that visual inspections conducted by State officials of unclothed children for evidence of child abuse implicated

Subject to legislative appropriation, the director shall expend monies in the fund to provide financial assistance to community child abuse and neglect prevention programs and family resource programs that, in the judgment of the director, offer prevention services and family resource programs to children and their parents or guardians and that comply with departmental accounting and auditing rules for the receipt of public monies.

ARIZ. REV. STAT. ANN. § 8-550.01.B (West 1999). California's state law provides:

There is hereby created in the State Treasury a fund which shall be known as the State Children's Trust Fund. The fund shall consist of . . . money appropriated to the fund for this purpose by the Legislature. [M]oney in the State Children's Trust Fund is . . . for the purpose of funding child abuse and neglect prevention and intervention programs.

CAL. WELF. & INST. CODE § 18969 (West 1991 & Supp. 1999). The District of Columbia's statute states:

There is established in the District of Columbia a private nonprofit corporation which shall be known as the Child Abuse and Neglect Prevention Children's Trust Fund ("Trust Fund"). The sole purpose of the Trust Fund is to encourage child abuse and child neglect prevention programs. The Trust Fund shall accept federal funds granted by Congress or Executive Order.

D.C. CODE ANN. § 6-2132 (1981).

122. 801 F.2d 893 (7th Cir. 1986) (holding that visual inspection that occurred four months after the initial report of child abuse did not constitute exigent circumstances).

123. See *id.* at 903.

The [Illinois Department of Children and Family Services ["DCFS"], Child Abuse and Neglect Investigation Decisions] Handbook [of 1982] establishes five criteria (hot-line criteria) which must be met before the DCFS will investigate allegations of abuse or neglect. To constitute a report which requires further investigation, the DCFS must receive information that:

- (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.

A report which meets the hot-line criteria receives a priority ranking based on the risk to the child, and a DCFS caseworker is assigned to investigate the allegations. Following the procedures outlined in the Handbook and the Memorandum, the caseworker begins a fact-finding process which is designed to determine if credible evidence of abuse or neglect exists.

Id. at 895.

Fourth Amendment concerns.¹²⁴ The court concluded, however, that the search was constitutional because the State's compelling interest in safeguarding children from injury and death outweighed the substantial intrusion into a child's right to privacy.¹²⁵

II. EXCEPTIONS TO THE FOURTH AMENDMENT WARRANT REQUIREMENT: CONSENT AND EXIGENT CIRCUMSTANCES

A. The Consent Exception

In formulating a uniform standard according to which strip searches in child abuse investigations should be conducted, it is necessary to establish whether children have a right to consent to the entrance into their home and search by State officials of their body for evidence of child abuse. Generally, only individuals with "common authority"¹²⁶ can consent to entrance into a residence.¹²⁷ Courts have held that determining who possesses this authority depends upon whether the person, as a practical matter, has joint access or control over the area.¹²⁸ Despite the general rule that children do not exercise "common authority"¹²⁹ and thus cannot validly consent to entry, some authorities believe that older children possess the authority to give valid consent.¹³⁰ This viewpoint,

124. *See id.* at 900.

125. *See id.* at 906.

126. *United States v. Matlock*, 415 U.S. 164 (1974) (holding that consent to a warrantless search by one who possesses common authority over the premises is valid as against "absent, nonconsenting person with whom that authority is shared"). The Court stated that:

[c]ommon authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7 (citations omitted); *see also Stoner v. California*, 376 U.S. 483 (1964) (holding that a night hotel clerk could not validly consent to the search of a customer's room); *Chapman v. United States*, 365 U.S. 610 (1961) (holding that a landlord could not validly consent to the search of a house that he had rented to another).

127. *See Matlock*, 415 U.S. at 170.

128. *See id.* at 170-71.

129. *Id.*

130. *See, e.g., W. LaFAVE, SEARCH AND SEIZURE* § 8.4, at 728 (1978 & Supp. 1986). LaFave argues that:

teenagers may have authority to grant permission to police to look around generally, but not to make an intrusive search throughout the house. By contrast, an eight-year-old may only have authority to permit an adult to

in contrast to the rationale in *Bellotti*,¹³¹ suggests that mere minority status cannot justly be equated with the inability to make informed and mature decisions.¹³² Although only a minority of courts adopt this viewpoint,¹³³ the lack of a uniform rule of law indicates the uncertainty that remains regarding consent in child abuse investigations.

Because the strip search in child abuse investigations involves the health and safety of the child, deciding who should have the authority to consent to the search raises concerns similar to those in children's medical treatment. Currently, the law does not afford children a constitutional right to make their own medical decisions.¹³⁴ The doctrine of informed consent requires that three conditions be met for a treatment decision to be legally valid:¹³⁵ "the decision must be informed (i.e., the patient must be provided with adequate information about the proposed and alternative treatments), voluntary (i.e., the patient must make the treatment decision free from coercion or unfair inducements), and competent."¹³⁶ Additionally, this legal standard demands that the individual consenting to medical treatment have a mature appreciation of the treatment and its potential consequences.¹³⁷ Many courts hold that a child under the age of eighteen does not possess the intellectual

step into the entry way of the home because this is often done with regard to visitors or salespersons.

Id.

131. *See supra* note 29 and accompanying text.

132. *See supra* note 29 and accompanying text.

133. *See supra* note 29 and accompanying text.

134. *See, e.g., In re Phillip B.*, 92 Cal. App. 3d 796 (1979). In *Phillip B.*, a petition was filed in juvenile court alleging that a 12-year-old boy was not provided with the necessities of life and requesting that he be declared a dependent of the court for the purposes of insuring that he receive cardiac surgery for a congenital defect. *See id.* The boy also suffered from Down's Syndrome and had been in a residential care facility since birth. *See id.* Medical testimony noted the risk of cardiac surgery, the higher-than-average risk of postoperative complications for Down's Syndrome children, and the presence of pulmonary vascular changes in the boy, further increasing the risk. *See id.* The boy's parents had refused consent. *See id.* The Court of Appeals for the First District of California held that, although parental autonomy is constitutionally protected by Fourteenth Amendment, the state has the right to protect children. *See id.* The court set forth factors to be considered before a state insists on medical treatment rejected by parents: "the seriousness of the harm to the child, professional medical evaluations, the risks involved in treatment, the child's preference, and, underlying all, the best interests of the child." *Id.*

135. *See* LOIS A. WEITHORN, CHILDREN'S CAPACITIES IN LEGAL CONTEXTS, CHILDREN, MENTAL HEALTH, AND THE LAW 35-39 (1984).

136. *Id.* (citing A. Meisel et al., *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. OF PSYCHIATRY 285-89 (1977)).

137. *See id.*

and emotional capacities necessary to develop this higher level of understanding.¹³⁸ Thus, parents have discretion to consent to or refuse medical treatment for their children without regard to their children's wishes.¹³⁹

In assessing a child's ability to consent to a strip search during a child abuse investigation, however, one must consider that studies concerning the competency of minors to consent to treatment indicate that children are capable of making decisions with almost the same degree of competency as adults.¹⁴⁰ This research demonstrates that "the capacity of children to weigh benefits and risks to requests to participate in research or treatment decisions has revealed much of what common sense would suggest - namely, that older teenagers still legally defined as minors are no less capable than are adults."¹⁴¹ The studies show that minors fifteen years old and older make decisions regarding medical treatment in generally the same way as adults.¹⁴² In addition, these studies reveal that children as young as nine or ten will choose some of the same outcomes as adults in certain situations despite differences in their reasoning.¹⁴³ These findings suggest that a higher level of understanding and sophisticated reasoning is not a prerequisite for reaching a mature, rational decision.¹⁴⁴

Some courts have established a "mature minor" doctrine allowing minors to consent to health care where the minor is near

138. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979). "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id.*

139. See *id.* "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 193 F.3d 1054, 1069 (9th Cir. 1999) (citing *Parham*, 442 U.S. at 602 (holding that it is in the interest of both parents and children that parents have ultimate authority to make medical decisions for their children unless a "neutral fact finder" determines, through a due process hearing, that the parent is not acting in the child's best interests)).

140. See G. KOOCHEER & P. KEITH-SPIEGEL, *CHILDREN, ETHICS & THE LAW* (1990); see also Grant, *Consent in Pediatrics: A Complex Teaching Assignment*, 17 J. MED. ETHICS 199, 202 (1991) (concluding that the cognitive development of a fourteen-year-old was sufficient to weigh the advantages and disadvantages of obtaining a pregnancy and AIDS test).

141. Koocher, *supra* note 140, at 111.

142. See *id.*

143. See *id.*

144. The studies provide statistical data about the competency of healthy children. To address the capacities of mentally disabled minors to give consent to medical treatment, further research would be necessary. For the purposes of this Note, however, it is sufficient to consider the reasoning abilities and understanding of only healthy children.

the age of majority, the treatment is less than "major" or "serious," and the treatment is for the minor's benefit rather than for that of a third party.¹⁴⁵ Under this principle, the minor may also refuse medical treatment.¹⁴⁶ Only a minority of courts, however, have adopted the "mature minor" doctrine.¹⁴⁷ Furthermore, the jurisdictions that use the doctrine do so solely with regard to less important medical decisions.¹⁴⁸

At the core of the rule of law affording parents discretion to make medical decisions for their children is the presumption that the parents will act in the best interest of their child. It is important, however, in determining whether children should have the authority to consent in child abuse investigations, to consider that the Supreme Court has carved out exceptions for situations in which parents' motives are suspect.¹⁴⁹ In *Planned Parenthood v. Danforth*,¹⁵⁰ the Court held that "the unique nature and consequences

145. See, e.g., *In re E.G.*, 549 N.E.2d 322 (Ill. 1989) (holding that a minor whom the court has determined by clear and convincing evidence to possess the requisite degree of maturity has limited right to refuse life-sustaining medical treatment and that a parent who acquiesces in mature minor's decision to reject life-sustaining medical treatment is not guilty of neglect).

146. See, e.g., Jennifer Fouts Skeels, *In re E.G.: The Right of Mature Minors in Illinois to Refuse Lifesaving Medical Treatment*, 21 LOY. U. CHI. L.J. 1199 (1990) (discussing the effect of the Illinois Supreme Court's ruling in *E.G.* that a "mature minor" has the right to refuse lifesaving medical treatment); *E.G.*, 549 N.E.2d at 322. But see *Hughson v. St. Francis Hosp. of Port Jervis*, 459 N.Y.S.2d 814 (1983) (discussing the common-law rule that a minor is not legally competent to give binding consent to any medical services rendered to him or herself).

147. See, e.g., *In re A.M.P.*, 708 N.E.2d 1235 (Ill. 1999) (holding that employing the mature minor doctrine was proper in determining whether a minor is capable of making independent decisions about medical treatment); *In re Petition of Anonymous 1*, 558 N.W.2d 784 (Neb. 1997) (accepting the mature minor doctrine as proper procedure for determining whether a minor is capable of making independent decisions about medical treatment); *Planned Parenthood v. Miller*, 860 F. Supp. 1409 (D.S.D. 1994) ("State and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents."); *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1987) (holding that mature minors have the capacity to consent in medical malpractice cases). But see *O.G. v. Baum*, 790 S.W.2d 839, 842 (Tex. 1990) (noting that Texas has never adopted or recognized the "mature minor" doctrine).

148. See, e.g., *A.M.P.*, 708 N.E.2d at 1238 (employing the mature minor doctrine to determine if a minor is mature enough to consent to electroconvulsive therapy). But see *E.G.*, 549 N.E.2d at 328 (explaining that under Illinois law, if a 17-year-old firmly expressed the desire to follow her religious beliefs to the exclusion of the life-saving operation the court must respect the mature minor's decision).

149. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (recognizing that the constitutionally protected right of privacy encompasses a woman's decision whether to terminate her pregnancy).

150. *Id.*

of the abortion decision make it inappropriate to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent."¹⁵¹ In doing so, the Court recognized the possibility that when parents veto the decision of their daughter to have an abortion, they may not be acting in the best interest of their child.¹⁵² Abortion may be contrary to the parents' religious beliefs.¹⁵³ Alternatively, parents may fear that they will be marked by shame if others discover that their daughter has terminated her pregnancy.¹⁵⁴ By affording the minor the right to decide whether to have an abortion, the Court protects against arbitrary decisions by parents that may be inconsistent with the child's welfare and motivated by suspect reasoning.¹⁵⁵

Regarding contraception, the law also recognizes a minor's right to privacy and affords her the power to decide whether to bear a child. In *Doe v. Irwin*,¹⁵⁶ the Sixth Circuit held that a publicly operated family planning clinic could distribute contraceptives to minors without notifying the minor's parents.¹⁵⁷ The court explained that a minor's right to privacy includes her right to obtain contraceptives.¹⁵⁸ As the Supreme Court recognized in *Danforth*,¹⁵⁹ the court here acknowledged the possibility that parents' involvement may interfere with the minor's constitutional rights.¹⁶⁰ The use of contraception may be inconsistent with the parents' religious convictions.¹⁶¹ Parents may believe that making contraceptives readily available encourages or condones sexual activity and may not

151. *Id.* at 74.

152. *See id.* The Court pointed out that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75. "[I]t is far from uncommon for parents to seek treatment of a minor, in part, because of concern about behavior, sexual orientation, or opinions contrary to the parents' moral or religious beliefs." Jan C. Costello, *Making Kids Take Their Medicine: The Privacy and Due Process Rights of De Facto Competent Minors*, 31 *LOY. L.A. L. REV.* 907, 918 (1998).

153. *See id.*

154. *See id.*

155. *See id.*

156. 615 F.2d 1162 (6th Cir. 1980) (holding that a publicly operated family planning center's practice of distributing contraceptives to unemancipated minors without notice to their parents did not infringe upon a constitutional right of the parents).

157. *See id.* at 1169.

158. *See id.* at 1166.

159. 428 U.S. 52 (1976) (recognizing that the constitutionally protected right of privacy encompasses a woman's decision whether to terminate her pregnancy).

160. *See Irwin*, 615 F.2d at 1168-69.

161. *See Costello*, *supra* note 152 and accompanying text.

want to instill such values in their children.¹⁶² The court's protection of a minor's decision to choose whether to obtain contraception diminishes the opportunity for parents to make arbitrary decisions that may not be in their child's best interest.

Similarly, in *Curtis v. School Committee*,¹⁶³ the Supreme Judicial Court of Massachusetts upheld a school sponsored program of condom availability that lacked opt-out and parental notification provisions.¹⁶⁴ The parents of students in the Falmouth public school system challenged the program claiming that the absence of the provisions violated their constitutional right to direct the upbringing of their children as they deemed fit.¹⁶⁵ The court, however, recognized that the inclusion of the provisions would arm parents with the power to arbitrarily veto their child's decision to obtain birth control.¹⁶⁶ As the Sixth Circuit noted in *Irwin*, the fact that the program may offend the moral and religious sensibilities of parents does not legitimize infringement on their child's constitutional zone of privacy.¹⁶⁷ In upholding the program, the court emphasized the importance of safeguarding a minor's right to choose whether to obtain contraceptives.¹⁶⁸

In assessing whether children should have authority to consent to strip searches in child abuse investigations, it is necessary to recognize that many state legislatures have also carved out exceptions for situations in which parents do not act in the best interest of their children.¹⁶⁹ By doing so, the legislatures recognize the importance of protecting a minor's health and well-being from the ill motives of their parents. In particular, many state legislatures have created exceptions permitting minors to consent to the testing and treatment of sexually transmitted diseases.¹⁷⁰ Minors often refuse

162. *See id.*

163. 420 Mass. 749 (1995) (holding that a program distributing condoms at junior and senior high schools did not violate either the fundamental liberty interest of parents to be free from unnecessary governmental intrusion in rearing of children or the free exercise of religion).

164. *See id.* at 763.

165. *See id.* at 752.

166. *See id.* at 757.

167. *See id.*

168. *See id.*; *Curtis v. School Committee*, No. 92518, 1993 WL 818795, at *3 (Mass. Super. Oct. 7, 1993) ("Among these privacy interests is a minor's right to make decisions affecting procreation, including a right to access contraception." (citing *Carey v. Populations Servs. Int'l*, 431 U.S. 678, 693-94 (1977))).

169. *See, e.g.*, ALA. CODE § 22-11A-19 (1975).

170. *See id.* Alabama's statute provides that:

[A] minor 12 years of age or older who may have come into contact with any sexually transmitted disease as designated by the State Board of Health may

give consent to the furnishing of medical care related to the diagnosis or treatment of such disease, provided a duly licensed practitioner of medicine in Alabama authorizes such diagnosis and treatment. The consent of the minor shall be as valid and binding as if the minor had achieved his or her majority. Such consent shall not be voidable nor subject to later disaffirmance because of minority.

Id. California's statute states that:

[A] minor who is 12 years of age or older and who may have come into contact with an infectious, contagious, or communicable disease may consent to medical care related to the diagnosis or treatment of the disease, if the disease or condition is one that is required by law or regulation adopted pursuant to law to be reported to the local health officer, or is a related sexually transmitted disease, as may be determined by the State Director of Health Services.

CAL. FAM. CODE § 6926 (West 1992). "A minor who is 12 years of age or older and who is alleged to have been raped may consent to medical care related to the diagnosis or treatment of the condition and the collection of medical evidence with regard to the alleged rape." *Id.* § 6927. "A minor who is alleged to have been sexually assaulted may consent to medical care related to the diagnosis and treatment of the condition, and the collection of medical evidence with regard to the alleged sexual assault." *Id.* § 6928. Illinois's statute provides that "a minor 12 years of age or older who may have come into contact with any sexually transmitted disease . . . may give consent to the furnishing of medical care or counseling related to the diagnosis or treatment of the disease." 410 ILL. COMP. STAT. ANN. 210/4 (West 1961). Iowa's statute states that a minor who has personally made an application for services, screening, or treatment of a sexually transmitted disease may give written consent to these procedures. See IOWA CODE ANN. § 141.22 (West 1988). "Such consent is not subject to later disaffirmance by reason of minority." *Id.* Nevada's statute provides that "the consent of the parent, parents or legal guardian of a minor is not necessary in order to authorize a local or state health officer, licensed physician or clinic to examine or treat, or both, any minor who is suspected of being infected or is found to be infected with any sexually transmitted disease." NEV. REV. STAT. § 129.060 (1971). New Hampshire's statute states that:

Any minor 14 years of age or older may voluntarily submit himself to medical diagnosis and treatment for a sexually transmitted disease and a licensed physician may diagnose, treat or prescribe for the treatment of a sexually transmitted disease in a minor 14 years of age or older, without the knowledge or consent of the parent or legal guardian or such minor.

N.H. STAT. ANN. § 141-C:18 (1986). Ohio's statute provides that "a minor may give consent for the diagnosis or treatment of any venereal disease by a licensed physician. Such consent is not subject to disaffirmance because of minority. The consent of the parent, parents, or guardian of a minor is not required for such diagnosis or treatment." OHIO REV. CODE ANN. § 3709.241 (West 1971). Rhode Island's statute states that "persons under 18 years of age may give legal consent for examination and treatment for any sexually transmitted disease." R.I. GEN. LAWS § 23-11-11 (1965). Washington's statute provides that:

A minor fourteen years of age or older who may have come in contact with any sexually transmitted disease or suspected sexually transmitted disease may give consent to the furnishing of hospital, medical and surgical care related to the diagnosis or treatment of such disease. Such consent shall not be subject to disaffirmance because of the minority. The consent of the parent, parents, or legal guardian of such minor shall not be necessary to authorize hospital, medical and surgical care related to such disease.

to inform their parents of medical needs arising from sexual activity.¹⁷¹ This unfortunate reality frequently stems from the fear that parents will look shamefully upon their child's behavior. As a result, minors that choose not to tell their parents about a health problem may fail to seek medical care if parental consent is required.¹⁷²

Similar state statutes allow minors to obtain medical care without parental consent or judicial authorization for drug or alcohol related problems.¹⁷³ Because drug use and underage drinking are both illegal and detrimental to one's health, minors who engage in

WASH. REV. CODE ANN. § 70.24.110 (West 1969). Wisconsin's statute provides that "[a] physician may treat a minor infected with a sexually transmitted disease or examine and diagnose a minor for the presence of such a disease without obtaining the consent of the minor's parents or guardian." WIS. STAT. ANN. § 252.11 (West 1975).

171. See, e.g., Jennifer R. Kramer, *Adolescents, Abortions and Amendments: Choices After American Academy of Pediatrics v. Lungren*, 33 U.S.F. L. REV. 133, 142 (1998) (noting that the health of minors is best promoted by allowing minors to obtain medical care that relates to sexual activity without parental consent because minors have an aversion to discussing the medical consequences of their sexual activities with their parents); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (noting that the California Legislature has enacted a series of statutes authorizing minors, without parental consent, to obtain medical care related to the diagnosis or treatment of sexually transmitted diseases, rape, and sexual assault). The court in *Lungren* explains that these statutes demonstrate a

long-standing legislative recognition that (1) minors frequently are reluctant to disclose to their parents medical needs arising out of the minor's involvement in sexual activity and may postpone or avoid seeking such care if parental consent is required, and (2) as a consequence, the health of minors generally will be protected best in this setting by authorizing minors to obtain medical care relating to such activity without parental consent.

Id.; see also Walter Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 119 (1973) (stating that jurisdictions, which have dropped all age restrictions for consent to medical care related to drug use or early sexual activity, are motivated by the fear that minors will forgo care if forced to consult with parents in these situations).

172. See Jessica A. Penkower, *The Potential Right of Chronically Ill Adolescents To Refuse Life-Saving Medical Treatment: Fatal Misuse of The Mature Minor Doctrine*, 45 DEPAUL L. REV. 1165, 1206 (1996) ("[M]inor treatment statutes were enacted in response to society's fear that minors would rather suffer from sexually transmitted diseases, alcohol and substance abuse, and mental disorders than risk the consequences of consulting their parents, who may be angry, accusative, or unsupportive.").

173. Illinois's statute provides that:

The consent of the parent, parents, or legal guardian of a minor shall not be necessary to authorize medical care or counseling related to . . . drug use or alcohol consumption by the minor. . . . The consent of the minor shall be valid and binding as if the minor had achieved his or her majority. The consent shall not be voidable nor subject to later disaffirmance because of minority.

410 ILL. COMP. STAT. ANN. 210/4 (West 1961). Indiana's statute states that "a minor who voluntarily seeks treatment for alcoholism, alcohol abuse, or drug abuse . . . may receive treatment without notification or consent of the parents, guardian, or person

such activities are less likely to inform their parents of any need for help. As a result, if the legislature requires parental consent for

having control or custody of the minor." *IND. CODE ANN.* § 12-23-12-1 (1992). Kansas's statute states that a licensed physician may:

examine and treat such minor for drug abuse, misuse or addiction if such physician has secured the prior consent of such minor to the examination and treatment. All such examinations and treatment may be performed without the consent of any parent, guardian or other person having custody of such minor, and all minors are hereby granted the right to give consent to such examination and treatment.

KAN. STAT. ANN. § 65-2892a (1971). Kentucky's statute provides that:

Any physician, upon consultation by a minor as a patient, with the consent of such minor may make a diagnostic examination for . . . alcohol or other drug abuse or addiction and may advise, prescribe for, and treat such minor regarding . . . alcohol and other drug abuse or addiction without the consent of or notification to the parent, parents, or guardian of such minor patient, or to any other person having custody of such minor patient.

KY. REV. STAT. ANN. § 214.185 (Banks-Baldwin 1988). Louisiana's statute provides that:

Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be addicted to a narcotic or other drug, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

LA. REV. STAT. ANN. § 40:1096 (West 1972). Nevada's statute states that:

Any minor who is under the influence of, or suspected of being under the influence of, a controlled substance may give express consent . . . to the furnishing of hospital, medical, surgical or other care for the treatment of abuse of drugs or related illnesses . . . and the consent of the minor is not subject to disaffirmance because of minority.

NEV. REV. STAT. § 129.050 (1971). The New Jersey statute provides that:

When a minor believes that he is suffering from the use of drugs or is a drug dependent person . . . his consent to treatment . . . shall be binding as if the minor had achieved his or her own majority. Any such consent shall not be subject to later disaffirmance by reason of minority.

N.J. STAT. ANN. § 9:17A-4 (West 1975). North Dakota's statute provides that "[a]ny person of the age of fourteen years or older may contract for and receive examination, care, or treatment for . . . alcoholism or drug abuse without permission, authority, or consent of a parent or guardian." *N.D. CENT. CODE* § 14-10-17 (1971). Pennsylvania's statute states that:

a minor who suffers from the use of a controlled or harmful substance may give consent to furnishing of medical care or counseling related to diagnosis or treatment. The consent of the parents or legal guardian of the minor shall not be deemed necessary to authorize medical care or counseling related to such diagnosis or treatment. The consent of the minor shall be valid and binding as if the minor had achieved his majority. Such consent shall not be voidable nor subject to later disaffirmance because of his minority.

71 *PA. CONS. STAT. ANN.* §1690.112 (West 1972). Wisconsin's statute provides that "a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient, provided that the minor is 12 years of age or over." *WIS. STAT. ANN.* § 51.47 (West 1979).

drug and alcohol abuse treatment, a minor who refuses to inform his parents of his medical needs may threaten his own health and safety.¹⁷⁴

With regard to child abuse and neglect, courts also have adjusted the law to protect the health and well-being of children where parents' actions and motives might be suspect.¹⁷⁵ The Supreme Court has held that a state official must investigate reports of child abuse or neglect and remove the child from the home against the wishes of the parents if the State finds that the child is in danger.¹⁷⁶ This State usurpation of parental prerogative illustrates the State's concern that parents may not be acting in the child's best interest.¹⁷⁷ Furthermore, it indicates that in abusive situations the State must retain a certain degree of authority to ensure the safety of the children.¹⁷⁸

B. Exigent Circumstances and the Emergency Doctrine

Where a State actor has not obtained a warrant or consent, he can conduct a warrantless search if exigent circumstances exist.¹⁷⁹

174. See Penkower, *supra* note 172 and accompanying text.

175. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that a state may terminate parental rights upon finding by clear and convincing evidence that the child is permanently neglected).

176. See *id.*

177. See Multnomah County Violence Prevention Community Resource Directory (visited Feb. 3, 2000) <<http://www.multnomah.lib.or.us/health/opd/violprev/manual/child.html>> (noting that in the context of child abuse there exists the strong likelihood that the parent is the abuser). The National Center on Child Abuse and Neglect compiled information from over forty states for 1990 and 1991, finding that of 514,665 cases reported, 79.9% (1990) and 80.1% (1991) of the alleged abusers were parents. See THE CHILD WELFARE STAT BOOK 1993, CHILD WELFARE LEAGUE OF AMERICA 64-65 (1993); see also Steven F. Shatz, *The Strip Search of Children and The Fourth Amendment*, 26 U.S.F. L. REV. 1, 33 (1991) ("[I]t is often a parent or guardian who is suspected of the abuse.").

178. See, e.g., *White v. Pierce County*, 797 F.2d 812, 815-17 (9th Cir. 1986) (holding that where a parent refused to admit police to his residence to investigate a child abuse report, became violent and abusive, and instructed his son, who was about to turn around to show policemen his back, to leave the room, police could reasonably conclude that the parent might abuse the child again or flee with him if the police left to get a court order).

179. See *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (holding that police officers' entry into a private home in pursuit of a robbery suspect who had been seen entering the home was justified by the need to protect the home's occupants); see also *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). The Court noted:

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

In the context of child abuse investigations, a State actor may enter a child's home and search the child's body for evidence of child abuse if he has "reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat."¹⁸⁰ In *Mincey v. Arizona*,¹⁸¹ the Supreme Court established the emergency doctrine holding that the Fourth Amendment did not bar against "warrantless entries or searches when . . . a person . . . is in need of immediate aid."¹⁸² The Court explained that obtaining a warrant can require an extended amount of time, time that a person in danger cannot spare.¹⁸³ Most warrantless entries and searches in the context of child abuse investigations are conducted in accordance with the emergency doctrine.¹⁸⁴

Id. "The right of the police to enter and investigate in an emergency . . . is inherent in the very nature of their duties as peace officers, and derives from the common law." *Good v. Dauphin County Soc. Servs. for Children and Youth*, 891 F.2d 1087, 1091 (3d Cir. 1989) (citing *United States v. Barone*, 330 F.2d 543, 545 (2d Cir. 1964)); *see also* *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J., concurring) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."). "Unlike cases involving other 'exigent circumstances' exceptions, these cases do not require probable cause to believe a person is subject to arrest or that the tools, fruits or evidence of a crime will be found on the premises to be searched." *Good*, 891 F.2d at 1093 (citing *United States v. Booth*, 455 A.2d 1351, 1354 (D.C. App. 1983)).

180. *Good*, 891 F.2d at 1094 (citing *People v. Smith*, 7 Cal.3d 282, 286 (1972)). The court in *Good*, however, emphasized that "the exception must not be permitted to swallow the rule: in the absence of a showing of true necessity — that is, an imminent and substantial threat to life, health, or property — the constitutionally guaranteed right to privacy must prevail." *Id.*; *see also* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 508 (1988) ("Where a child is in imminent danger within a residence, the emergency doctrine may justify a warrantless entry and rescue of the child.").

181. 437 U.S. at 385.

182. *Id.* at 392.

183. *See id.*

184. *See* Laure Ashley Culbertson, *Article 613 of the Louisiana Children's Code: Child Abuse Investigations in the Twilight of the Fourth Amendment*, 55 LA. L. REV. 361 (1994). *See, e.g.*, *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (holding that visual inspection that occurred four months after the initial report of child abuse did not constitute exigent circumstances); *State v. Bittner*, 359 N.W.2d 121 (S.D. 1984) (holding that emergency doctrine justified the warrantless search of a residence where defendant was lawfully arrested and police received report of a baby in the home); *State v. Boggess*, 115 Wis.2d 443 (1983) (holding that exigent circumstances existed where an anonymous caller provided detailed information regarding the existence of child abuse and a potential emergency situation); *Wooten v. State*, 398 So.2d 963 (Fla. Dist. Ct. App. 1981) (holding that the emergency doctrine permitted a policeman to enter the residence to protect a child and secure medical attention after receiving report of a 13-month-old baby being shaken and struck and observing the child's lifeless condition); *Nelson v. State*, 609 P.2d 717 (Nev. 1980) (holding that where a mother was arrested without probable cause, entry to protect unattended three-year-old was not permitted by the emergency doctrine because police created the emer-

A relevant issue left unresolved regarding searches that fall within the emergency exception is the evidentiary standard applicable to these searches.¹⁸⁵ Generally, an officer must have probable cause to believe he will discover evidence before conducting a reasonable search.¹⁸⁶ Courts have indicated, however, that probable cause may not be the appropriate standard to measure the reasonableness of a search in the context of child abuse investigations.¹⁸⁷ Instead, some courts assert that an officer needs only a reasonable suspicion that a child is in danger of death or serious injury.¹⁸⁸

gency situation); *State v. Jones*, 45 Or. App. 617 (Ct. App. 1980) (holding that exigent circumstances existed where, after receiving an anonymous call that infants and small child had been left alone, police observed the children crying at home with no adult present); *State v. Frink*, 42 Or. App. 171 (Ct. App. 1979) (holding that the emergency doctrine justified a warrantless search where the police received an anonymous tip that a child was being injected with drugs and, upon approaching apartment, observed drugs in plain view); *In re C.E.*, 283 N.W.2d 554 (S.D. 1979) (holding that the emergency doctrine justified a warrantless search of a home for the protection of the child where state agency had previously removed the children from their home for maltreatment and 11 days after their return received a report of disturbance and discovered the parents intoxicated on the porch and the child screaming inside); *People v. Draper*, 196 Colo. 450 (1978) (holding that the emergency doctrine did not permit warrantless search of home in response to a call for emergency assistance where, upon arrival, baby was already dead); *In re Dawn O.* 58 Cal. App. 3d 160 (1976) (holding that exigent circumstances existed where a five-year-old informed a policeman that her younger sister was alone in the home); *People v. Sutton*, 65 Cal. App.3d 341 (1976) (holding that the emergency doctrine permitted a warrantless entry where the police received a report concerning an unattended child, observed an intoxicated woman enter the home, and saw, in plain view, trash and dirty clothing in the apartment); *J.D. v. State*, 558 P.2d 402 (Okla. Crim. App. 1976) (holding the emergency doctrine inapplicable where true motive of search was not to protect the child but to uncover evidence of possible truancy); *People v. Smith*, 7 Cal.3d 282 (1972) (holding that no true emergency existed where a neighbor had taken in a crying child and called the police one hour later).

185. See *Hardin*, *supra* note 180, at 513.

186. See U.S. CONST. amend. IV. Some authorities believe that probable cause should also apply in emergency situations. See W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.6(f), at 272-73; see also *Sutton*, 65 Cal. App. 3d at 341 (applying the probable cause standard to a warrantless search in an emergency situation).

187. See, e.g., *Jones*, 45 Or. App. at 617 (rejecting the application of the probable cause standard in emergency situations); see also *Culbertson*, *supra* note 184, at 380. The Supreme Court has abandoned the probable cause requirement in certain emergency situations. See *Culbertson*, *supra* note 184, at 380 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). *Culbertson* contends that the Court's willingness to adopt the reasonable suspicion standard where exigent circumstances exist supports the proposition that reasonable suspicion is the appropriate standard in child abuse investigations. See *id.* Entry into the home during a child abuse investigation should be permitted when the officer "has a reasonable belief, based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the worker's belief the child in the premises has been abused or neglected." *Id.*

188. See *Jones*, 45 Or. App. at 617.

Courts have defined reasonable suspicion as “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”¹⁸⁹ A mere subjective belief will not suffice.¹⁹⁰ In contrast, the Supreme Court has defined probable cause as a “flexible, common sense standard” requiring only a “practical, nontechnical probability that incriminating evidence is involved.”¹⁹¹ Although the probable cause standard is not easily reduced into a clear rule of law, it at least requires the probability that evidence of child abuse exists.¹⁹²

In determining whether a probable cause or reasonable suspicion standard should apply to searches in child abuse investigations, it is necessary for one to understand the practical differences

189. *United States v. Cortez*, 449 U.S. 411, 417-418 (1981); *see also Metcalf v. Long*, 615 F. Supp. 1108, 1115 (D. Del. 1985) (noting that “[i]n the final analysis, it is the totality of circumstances confronting the officers at the time that presents the objective basis for determining whether there was a basis for reasonable suspicion”).

190. *See Long*, 615 F. Supp. at 1115; *see also In re Hector R.*, 695 N.Y.S.2d 359 (1999) (holding that a school official’s reasonable suspicion that juvenile had gun in his possession was sufficient to justify search of juvenile’s bag taking into account and balancing juvenile’s legitimate expectations of privacy and school’s need to protect its students against violence); *People v. Coleman*, 626 N.Y.S.2d 560 (1995) (affirming the lower court’s holding denying the suppression of a gun recovered by police during search of defendant’s “knap-sac” since it was discovered in a lawful search of the defendant conducted with reasonable suspicion that the defendant was armed).

191. *Texas v. Brown*, 460 U.S. 730, 742 (1983). The probable cause standard requires:

that the facts available to the officer would “warrant a man of reasonable caution in the belief,” that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

Id. (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)). *See also People v. Potter*, 697 N.Y.S.2d 798 (1999) (holding that a trooper had probable cause to arrest the defendant, impound his vehicle, and conduct an inventory search of vehicle, where the vehicle had no front license plate, the rear license plate was covered by snow, the license plates had been reported lost or stolen, and the defendant’s license had been revoked); *People v. Park*, 697 N.Y.S.2d 795 (1999) (concluding that probable cause existed to issue a search warrant for the upper and lower apartments of the defendant’s residence where an informant testified that he had purchased marijuana from the defendant’s apartment over course of 18 years and had seen a marijuana plant in the defendant’s second-floor apartment, and the recent electricity bill for the unoccupied second-floor apartment showed double electric consumption of occupied lower apartment); *People v. Morla*, 699 N.Y.S.2d 628 (1999) (ruling that confidential informant involved in underlying drug transactions, electronic monitoring of drug transactions by police officer affiant, application that the defendant was in possession of suspected cocaine immediately after leaving premises on three occasions and that the defendant was in control of premises gave officer probable cause to search premises for cocaine, drug paraphernalia, records and items demonstrating ownership of the premises).

192. *See Brown*, 460 U.S. at 742. “The process does not deal with hard certainties, but with probabilities.” *Id.*

between the two standards. Although a strip search is highly intrusive upon the privacy of the child and his family, the potential consequences of failing to intervene may be grave.¹⁹³ If the law requires officers to meet a more demanding evidentiary standard, the possibility remains that the officer will fail to meet these requirements in situations where death or severe and permanent physical injury might occur.¹⁹⁴ Moreover, often child abuse is present but does not threaten physical injuries severe enough to create probable cause for intervention.¹⁹⁵ In these situations, while employing the stricter standard may avoid interventions based on unsubstantiated reports of child abuse, it may also produce an increased likelihood that actual cases of child abuse remain undetected.¹⁹⁶

C. The Qualified Immunity Defense: Distinguishing between Police Officers and Social Workers

Because warrantless strip searches of children in child abuse investigations implicate Fourth Amendment concerns, in determining the appropriate rule, it is necessary for one to decide how the law should treat police officers and social workers when they are accused of conducting a search in violation of the Fourth Amendment. To reach this conclusion, one must first take into account the qualified immunity defense as applied to these State officials in the context of child abuse investigations.

The doctrine of qualified immunity absolves a State actor of liability where the court finds that neither constitutional nor statutory law clearly prohibits the search.¹⁹⁷ In *Franz v. Lytle*,¹⁹⁸ the Tenth

193. See Hardin, *supra* note 180, at 513; see also Gifford, *supra* note 107, at 1027 (“[S]ocial workers are forced to make difficult decisions which could result in either a violation of parental rights should they decide to intercede, or substantial harm or even death to children should they instead decide not to interfere with the parent-child relationship.”); *State v. Bittner*, 359 N.W.2d 121, 127 (S.D. 1984) (noting that if police officers had failed to search the home, an unattended infant child may have been seriously harmed); *State v. Boggess*, 340 N.W.2d 516, 524 (Wis. 1983) (holding that warrantless entry into home was necessary to protect children from serious injury or death).

194. See Hardin, *supra* note 180, at 513.

195. See Culbertson, *supra* note 184, at 366. “[A]buse and neglect too often go undetected until they become ‘serious’ or fatal. A procedure that allows an effective investigation when abuse is indicated by evidence that does not yet rise to the level of probable cause is very desirable.” *Id.*

196. See *id.*

197. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987) (holding that qualified immunity was available as a defense where at the time the defendants acted, it was not clearly established law that a child abuse investi-

Circuit reviewed the current state of the law regarding warrantless searches in child abuse investigations and the applicability of the qualified immunity defense.¹⁹⁹ In *Franz*, parents and their child brought suit against a police officer and social worker for conducting a warrantless search of the child during a child abuse investigation.²⁰⁰ The officer moved for summary judgment based on qualified immunity.²⁰¹ He argued that the administrative exception for social workers in child abuse investigations should also apply to police officers.²⁰²

In rejecting the officer's contention,²⁰³ the court in *Franz* held that the qualified immunity defense applied to social workers but

gation conducted by police officers was subject to the probable cause or warrant requirements). Qualified immunity shields government officials from liability in damages actions if their conduct did not violate clearly established rights. See *Anderson*, 483 U.S. at 640. In *Anderson*, the Supreme Court defined "clearly established" 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 preexisting law the unlawfulness must be apparent.

Id. (citations omitted).

198. 997 F.2d 784 (10th Cir. 1993) (holding that a child's rash and urine soaked diaper did not justify a police officers' warrantless search of the home, inspection of child's vaginal area and forcible removal of child for medical examination during child abuse and neglect investigation).

199. See *id.* at 793 (holding that the more liberal standard of probable cause for social workers did not apply to police officer investigating criminal sexual abuse).

200. See *id.*

201. See *id.*

202. See *id.* Prior to *Franz*, the state of the law regarding the warrant requirement in child abuse investigations was unclear. See Patrick E. O'Neill, *Time for Direction: The Need for a Clear, Uniform Rule Regarding Searches During Child Abuse Investigations*, 83 KY. L.J. 529, 541 (1995). Courts were willing to allow the administrative exception to the warrant requirement in a child abuse investigation if a satisfactory regulatory scheme was in place; however, administrative schemes were rarely in place, and thus the administrative exception was not applied often. See *id.* In *Darryl H. v. Coler*, the Seventh Circuit held that the administrative scheme in place was not sufficient to ensure a reasonable search. See 801 F.2d 893, 904 (7th Cir. 1986). Recognizing the uncertainty in the state of the law, however, the court decided that the D.C.F.S. was entitled to qualified immunity. See O'Neill, *supra*, at 541. In contrast, in *Wildberger v. State*, the Court of Special Appeals of Maryland 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. See 536 A.2d 718, 723 (Md. Ct. Spec. App. 1988). It is unclear why the courts in *Darryl H.* and *Wildberger* reached different conclusions on the constitutionality of the searches in each case. See O'Neill, *supra*, at 541.

203. See *Franz*, 997 F.2d at 788. The court in *Franz* stated:

not police officers.²⁰⁴ It reasoned that the officer was trained to know the probable cause and warrant requirements and, thus, should have known that the search was illegal.²⁰⁵ As a result, the court concluded that the officer's search did not fall within one of the recognized exceptions.²⁰⁶ The court explained that the police officer was conducting a criminal investigation in search of evidence of abuse by one or more of the parents.²⁰⁷ It held that this conduct was "circumscribed by the Fourth Amendment which 'clearly prohibited police officers from conducting warrantless searches of a home and a child's body for evidence of criminal sexual abuse absent consent or exigent circumstances or any of the recognized exceptions to the warrant requirement.'"²⁰⁸ In contrast, a social worker is not trained to know the subtleties of the probable cause and warrant requirements and, thus, would "have no such fluency of the legal standards."²⁰⁹ Therefore, the court found that only the social worker was entitled to qualified immunity.²¹⁰

Proponents of the qualified immunity defense contend that to best protect the health and well-being of children, social workers'

[i]n crafting a separate analysis for deciding the legality of administrative searches based on "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance," the Court has developed a balancing test. "[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance 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."

Id. at 788 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618-24 (1989)).

204. *See id.* at 793 ("Deciding that police officers, functioning as police officers, must conduct themselves by the constitutional norms that embrace their training, should not deter their concern for the well-being of children and families, but heighten their awareness of their proper role within these boundaries."). The court in *Franz* stated that it must:

decide to sustain a claim of the lawful exercise of authority based on qualified immunity if, upon examining the information defendant possessed, [it] 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.

Id. at 787.

205. *See id.* at 788.

206. *See id.*

207. *See id.*

208. *Id.* at 786 (quoting *Franz v. Lytle*, 791 F. Supp. 827, 831-32 (D. Kan. 1992)).

209. *Id.*

210. *See id.*

investigations must not be hindered by undue restrictions.²¹¹ Courts that adhere to this viewpoint explain that the public's interest in preventing child abuse can only be served if social workers are afforded latitude in making decisions regarding the safety of children in abusive situations.²¹²

Furthermore, supporters of the qualified immunity defense note that it balances the child's right to be free from physical abuse against the fundamental right of the family to remain intact and free from unwarranted government intrusion.²¹³ Courts that grant qualified immunity explain that judicial review is necessary to prevent social workers' unwarranted intrusions into the family's zone of privacy.²¹⁴ While the law in these situations treats the untrained leniently, it is also careful to ensure that social workers do not abuse this privilege.²¹⁵ Thus, proponents of the qualified immunity defense argue that it strikes an equitable balance between the conflicting interests of protecting the private citizens and ensuring that agency officials function effectively.²¹⁶

211. See Gifford, *supra* note 107, at 1021. "For social workers, the potential exposure to 'large damage awards for the consequences of their decisions will serve to chill the exercise of their professional judgment in determining how to respond most effectively to cases of suspected abuse.'" *Id.* at 1030 (quoting Timothy J. Courville, Note, *Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 27 B.C.L. REV. 949, 985 (1986)); see also Jack M. Beermann, *A Critical Approach to Section 1983 With Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 83 (1989) ("[T]he more damages liability an official is threatened with, the greater the tendency toward timidity.").

212. See Gifford, *supra* note 107, at 1021; see also *Whelehan v. County of Monroe*, 558 F. Supp. 1093, 1098 (W.D.N.Y. 1983) (recognizing the "great importance of the child-protective function" of social workers and the "detriment to society" if social workers were subjected to liability under § 1983).

213. See Gifford, *supra* note 107, at 1021.

214. See *id.*

215. See *id.*

216. See *id.* "A number of other federal circuits have followed this approach, holding that the defense of qualified or good faith immunity achieves a more desirable balance between parental rights and the interest in protecting children from abuse." *Id.* at 1021; see also *Fittanto v. Klein*, 788 F. Supp. 1451, 1458 (N.D. Ill. 1992) (holding that because the "law concerning child abuse . . . is no clearer today than it was in 1984 and 1985" the social workers were entitled to qualified immunity); *Weller v. Department of Soc. Servs.*, 901 F.2d 387, 398 (4th Cir. 1990) (holding a social worker entitled to qualified immunity as long as conduct did not violate clearly established statutory or constitutional rights that a reasonable person would know); *Baker v. Racansky*, 887 F.2d 183, 190 (9th Cir. 1989) (holding that social workers' conduct in removing children from parents suspected of abusing them did not violate clearly established law, thus entitling the workers to qualified immunity); *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989) (holding that social workers' investigatory or administrative decisions are entitled to qualified immunity).

In determining whether a uniform law should be established, the court in *Franz* also considered the practical differences between searches by police officers and searches by social workers.²¹⁷ On one hand, during a child abuse investigation, a police officer focuses on the presence of potential criminal activity.²¹⁸ Moreover, a police officer often conducts a search clothed in his uniform and carrying a gun.²¹⁹ In contrast, a social worker investigating alleged incidents of child abuse focuses on the safety and well-being of the child.²²⁰ In addition, a social worker is dressed in plain clothes and is trained to deal with families in crisis situations.²²¹

In light of the potential psychological and emotional trauma caused by strip searches in child abuse investigations,²²² it is crucial to consider these distinctions when formulating the appropriate standard. When a police officer, dressed in uniform and armed, approaches a child in the privacy of the child's own home and asks him to remove his clothing, the child may become frightened and embarrassed.²²³ The officer's intimidating presence may suggest to the child that he has done something wrong.²²⁴

217. See *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1983).

218. See *id.* (“[D]efendant’s focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation.”); see also Interagency Council of the Maricopa County Children’s Justice Project, Multidisciplinary Protocol for the Investigation of Child Abuse 1 (July 1999) (on file with the Scottsdale, Ariz. Police Department) (“The purpose of law enforcement’s response to incidents of physical and sexual abuse involving children is to determine if a crime has been committed and to bring to light those facts and circumstances necessary to bring the perpetrators into the Criminal Justice System.”) [hereinafter “Multidisciplinary Protocol”].

219. See *Franz*, 997 F.2d at 791.

220. See *id.* (“[A] social worker’s principal focus is the welfare of the child.”); see also Family-Centered Child Protective Services, Ariz. Dep’t of Econ. Sec.: Admin. of Children, Youth, and Families, Social Workers’ Training Manual (Dec. 1995) (on file with Ariz. Admin. of Children, Youth, and Families) [hereinafter “Family-Centered Child Protective Services”].

Child welfare values, philosophy, and law are ultimately guided by the best interest of the child and this may at times require that parental rights be compromised, when that is the only way to meet the best interest of the child. [W]hen the child cannot be protected without restricting parental rights, in spite of all attempts to do so, we are always legally and ethically mandated to protect children.

Family-Centered Child Protective Services, *supra*, at 28.

221. See *Franz*, 997 F.2d at 791.

222. See *supra* notes 65-66 and accompanying text.

223. See *Franz*, 997 F.2d at 791.

224. See, e.g., *Doe v. Renfrow*, 635 F.2d 582, 583 (7th Cir. 1980) (“The accusing finger of the police may well remain for a lifetime upon these young, impressionable minds.”); see also Dave Mann, *E. Dundee Police Fish for Closer Kid Ties*, CHI. DAILY HERALD, August 13, 1999, at 1 (“A police officer - standing tall in a dark blue uni-

On the other hand, social workers are trained in dealing with domestic issues.²²⁵ They deal regularly with abusive situations and are accustomed to conducting non-criminal investigations for evidence of child abuse.²²⁶ When a social worker approaches a child in his home to conduct a strip search for evidence of child abuse, his presence will most likely not create the same troubling reaction by the child as that of the police officer.²²⁷ In addition, because the social worker is not conducting a criminal investigation, it would be unreasonable to expect him to be aware of subtleties of the warrant and probable cause requirements and conduct his search accordingly.²²⁸

In determining whether a uniform law should be established, it is necessary to consider the difference between training protocol for police officers and social workers. Training protocol for police officers ensures that the officers are fluent in the subtleties of the Fourth Amendment.²²⁹ For example, the Multidisciplinary Protocol for the Investigation of Child Abuse, used in training police officers in Maricopa County, Arizona, requires that the officers be well-versed in the relevant legal standards and conduct their searches accordingly.²³⁰ By instructing the police officers to assess the need for a search warrant on the second page of its over 200 page manual, this district emphasizes the importance of complying with the Fourth Amendment's warrant requirement when investigating abusive situations.²³¹

form, a pistol and nightstick hanging from a black leather belt - can be an imposing figure to a child."); *Bay Area Datelines*, SAN FRANCISCO EXAMINER, May 17, 1999, at 4 ("A lot of times, children get scared when they see the guns and the blue uniform and all that stuff.").

225. See *Franz*, 997 F.2d at 791.

226. See *id.*

227. See *id.*

228. See *Franz v. Lytle*, 791 F. Supp. 827, 831 (D. Kan. 1983). Because neither courts nor Congress have established a uniform rule specifying situations in which a social worker can conduct a constitutional strip search of a child in abuse investigations, there is no mandate to educate social workers in order to remedy the "have no such fluency of the legal standards," as represented by the Fourth Amendment or by "clearly established" fundamental rights. Michael Compitello, Note and Comment, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, 183 (1997).

229. See, e.g., Multidisciplinary Protocol, *supra* note 218.

230. See *id.*

231. See *id.* at 2. The manual requires that, after a police officer determines that a crime has been committed, the officer must "[a]ssess the need for a search warrant. If a search warrant is needed, *immediately* contact a Detective. Investigators should contact the County Attorney's Office in regards to sealing the affidavit of the search warrant." *Id.* (emphasis added).

By contrast, training protocol for social workers does not typically mandate learning the warrant or probable cause requirements of the Fourth Amendment.²³² For example, the Arizona Administration of Children, Youth, and Families (“ACYF”), responsible for training Arizona’s one thousand social workers in child abuse investigative procedures, does not dedicate any of its twenty-three day training seminar to teaching the constitutional requirements of conducting a search during a child abuse investigation.²³³ In the ACYF’s 275 page training manual, there is no mention of the Fourth Amendment, the warrant requirement, or the probable cause standard.²³⁴

Recognizing the distinction between police officers and social workers, state courts have granted qualified immunity to social workers in child abuse investigations.²³⁵ In *Chayo v. Kaladjian*,²³⁶ the Southern District of New York afforded qualified immunity to social workers where they believed that allegations of abuse were serious enough to waive the consent and warrant requirements.²³⁷ The court reasoned that “if [social workers] err in interrupting parental custody, they may be accused of infringing the parents’ constitutional rights. If they err in not removing the child, they risk injury to the child.”²³⁸ The court further explained that, for this reason, caseworkers need not “believe” the abuse is ongoing and the danger is imminent, but rather, be presented with evidence of abuse and “have reason to fear” that danger is imminent.²³⁹

232. See, e.g., Family-Centered Child Protective Services, *supra* note 220.

233. See *id.* The ACYF’s supplement to the training manual states “[i]n responding to reports of abuse and neglect, the department shall respect the legal rights of the parents, guardians or custodians while ensuring the safety of the child.” See Chapter 5: Investigation and Assessment- Responding to Reports of Abuse and Neglect. This sentence is the extent to which the ACYF expresses its concern with constitutional mandates. See *id.* No further explanation or instruction is provided. See *id.*

234. See *supra* note 220.

235. See, e.g., *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1983). The distinction between the roles of a social worker and a police officer during a child abuse investigation justified a policy providing for a less stringent requirement of probable cause in those searches performed by Social Services. See *id.* The *Franz* court also pointed out that a warrant or probable cause requirement imposed on a social worker would hinder his ability to effectively investigate. See *Compitello*, *supra* note 228, at 173.

236. 844 F. Supp. 163 (S.D.N.Y. 1994) (holding that caseworkers who received a report of suspected child abuse acted reasonably in removing children from their parents’ home and taking them to the hospital for medical examination and were entitled to qualified immunity).

237. See *id.*

238. *Id.* at 168 (quoting *Van Emrik v. Chenung County Dep’t of Soc. Servs.*, 911 F.2d 863, 866 (2d Cir. 1990)).

239. *Id.*

In addition to the courts, numerous state legislatures have enacted statutes that confer various forms of immunity upon social workers in child abuse investigations.²⁴⁰ These statutes illustrate the States' concern that "[t]he threat of potential liability will likely deter child protection workers from exercising their best professional judgment in child abuse investigations."²⁴¹ Where a social worker's actions coincide with those actions protected under the specific statute, the social worker may enjoy whatever level of immunity the statute confers. While these state statutes only protect against liability for reporting child abuse, their underlying rationale echoes that of the courts in granting qualified immunity to social workers for conducting a search of a child in violation of the parents' constitutional rights.²⁴²

III. RELAXING THE RULE

A. Children Should Possess the Authority to Consent to Entrance and Strip Searches in Child Abuse Investigations

Children should be afforded the right to consent to the entrance into the home and search by State officials of their body for evidence of child abuse. If courts permit parents to veto the child's consent, a troubling scenario arises. In most situations where child abuse is present in the home, the abuser is a parent.²⁴³ A parent who is guilty of abusing his or her own child will usually not willingly permit a police officer or social worker to enter the home and search the child's body for evidence of abuse.²⁴⁴ To evade discovery of his or her involvement in the abusive situation, the parent will likely refuse consent.

The fact that parents' actions are often inconsistent with their children's best interest²⁴⁵ heightens the State's concern in affirmatively safeguarding children from harm. The State cannot effectively ensure the safety and welfare of its children if the violators of the children are permitted to shield them from the protections of the State and the law. It is unrealistic and problematic to believe that the State's interest in protecting its minor citizens will be best

240. See, e.g., ALA. CODE § 26-14-9 (1999) (providing absolute immunity for persons involved in the reporting of suspected child abuse); CAL. PENAL CODE § 11172 (West 2000) (granting immunity for persons involved in reporting suspected child abuse).

241. Courville, *supra* note 211, at 951.

242. See, e.g., *supra* notes 236-239 and accompanying text.

243. See *supra* note 177.

244. See *supra* note 178.

245. See, e.g., *supra* notes 152, 177.

served by entrusting parents with the authority to consent to these searches.²⁴⁶ In *Danforth* and *Santosky*, the Supreme Court illustrated its willingness to remove authority from the hands of the parents in situations where the parents are not acting in the child's best interest.²⁴⁷ Thus, in child abuse investigations, to ensure that parents are not refusing to allow a strip search of their child for suspect reasons, the child should retain the authority to consent to the search.

Courts' willingness to allow children to consent to medical treatment where their parents' motives might be suspect²⁴⁸ provides further support for the contention that children should have a right to consent to entrance into the home and a strip search of their body for evidence of abuse. In addition, the many state statutes that reflect the need to protect children from their parents' arbitrary decisions²⁴⁹ provide an even stronger basis to argue that children should be allowed to consent in these special situations. The fact that courts and state legislatures afford children the right to consent to medical procedures such as abortion and the treatment of sexually transmitted diseases²⁵⁰ lends weight to the studies that indicate minors of a certain age are capable of making rational, mature decisions with almost the same degree of competency as adults. Furthermore, courts' adoption of the mature minor doctrine illustrates the courts' recognition that, in certain situations, minors can make independent and responsible decisions. A similar rationale lies at the core of allowing children to consent in child abuse investigations.

B. The Evidentiary Standard for the Exigent Circumstances Exception Should Be Lowered to Reasonable Suspicion

The evidentiary requirement for conducting strip searches in child abuse investigations under the exigent circumstances exception should be lowered to reasonable suspicion. The potential con-

246. See, e.g., *supra* notes 152, 177.

247. In *Danforth*, the Supreme Court recognized that the constitutionally protected right of privacy encompasses a woman's decision whether to terminate her pregnancy. See 428 U.S. 52, 60 (1976). In *Santosky*, the parents of three children appealed a family court ruling that their children were permanently neglected. See 455 U.S. 745, 752 (1982). The family court ordered that the children be removed from the home and placed in foster care. See *id.* The Supreme Court ruled that a state may terminate parental rights upon finding by clear and convincing evidence that the child is permanently neglected. See *id.* at 769.

248. See *supra* notes 149-168 and accompanying text.

249. See *supra* notes 170, 173.

250. See *supra* notes 149-168, 170, 173.

sequences of failing to intervene in an abusive situation outweigh the ramifications of infringing on the privacy rights of the child and his family.²⁵¹ Requiring social workers and police officers to comply with a probable cause standard would create the possibility that State actors will fail to meet this requirement in situations where risk of death or severe and permanent physical injury exists.²⁵² Moreover, in some instances, strict adherence to a probable cause standard will paralyze State officials' efforts to investigate allegations of child abuse.²⁵³ Permitting social workers and police officers to conduct warrantless searches in child abuse investigations where there exists a reasonable suspicion that child abuse is present will allow them to perform their professional duties free from fear that they have not complied with the high evidentiary standard of probable cause.

In addition, where child abuse is present but does not threaten physical injuries severe enough to require intervention under a probable cause standard, a reasonable suspicion requirement will prevent less severe cases of abuse from being unattended.²⁵⁴ Although employing the stricter standard may avoid interventions based on unsubstantiated reports of child abuse, it also will produce an increased likelihood that actual cases of child abuse remain undetected.²⁵⁵

Furthermore, social workers and police officers should have authority to conduct a strip search where they suspect the child has been harmed even if the harm is not of the magnitude that will endanger the child. Physical abuse, however slight, can potentially cause grave emotional and psychological trauma.²⁵⁶ Where parents are not ensuring the safety of their children, it is the State's responsibility to ensure that children are not subject to such abuse.²⁵⁷ By lowering the threshold of suspicion, courts would provide children in danger with greater protection from harm.

C. Qualified Immunity Defense: Available to Social Workers But Not to Police Officers

In the context of child abuse investigations, courts should recognize a rebuttable presumption that the qualified immunity defense

251. *See supra* note 193.

252. *See supra* note 194.

253. *See supra* note 195.

254. *See supra* notes 195-196.

255. *See supra* note 196.

256. *See supra* note 76 and accompanying text.

257. *See supra* note 178 and accompanying text.

is available to social workers, but not police officers.²⁵⁸ First, the practical differences between a search by a social worker and a search by a police officer indicate that the presence of a police officer will increase the likelihood and magnify the severity of trauma to the child.²⁵⁹ A police officer in uniform and armed with a weapon will likely cause the child to be embarrassed and intimidated, convinced that he has done something wrong.²⁶⁰ In contrast, the presence of a social worker will most likely not produce the same troubling result. Social workers are dressed in plain clothes and their appearance is less likely to create an uncomfortable environment for the child.²⁶¹

Moreover, the differences in training protocol for social workers and police officers regarding child abuse investigations are significant and support the proposition that they be afforded different levels of immunity. Social workers are trained in carefully dealing with the sensitive issues that accompany abusive situations.²⁶² Because becoming familiar with the subtleties of the Fourth Amendment is beyond the scope of social workers' training,²⁶³ it is unreasonable to expect them to satisfy the warrant and probable cause requirements when conducting searches during child abuse investigations. To protect the welfare of children in abusive situations, social workers must be able to use their best professional judgment in determining when and to what extent to intervene. Their efforts to investigate child abuse must not be unduly restricted.²⁶⁴ While the qualified immunity defense will retain the judicial review necessary to prevent social workers' unwarranted intrusions into the family's zone of privacy, it also will ensure that these State actors are able to perform their job unhindered by fears of prosecution.

258. This Note does not propose a bright line rule making the qualified immunity defense only available to social workers. Instead, this Note suggests the formulation of a rebuttable presumption that the qualified immunity defense is available to social workers, but not police officers. In unique situations where a social worker is well-trained in the warrant or probable cause requirements of the Fourth Amendment, or wears a police-like uniform, courts should consider these factors in determining whether to subject these State actors to liability. Similarly, if a police officer is dressed in plain clothes and conducts a non-criminal investigation that focuses primarily on the child's welfare, courts should account for these factors in assessing the availability of the qualified immunity defense.

259. See *supra* notes 223-224 and accompanying text.

260. See *supra* notes 223-224 and accompanying text.

261. See *supra* note 227 and accompanying text.

262. See *supra* notes 221, 225 and accompanying text.

263. See *supra* notes 228, 232-228 and accompanying text.

264. See *supra* note 211.

On the other hand, police officers are well-trained in the legal standards of the Fourth Amendment²⁶⁵ and should be expected and required to comply with them. Furthermore, since their chief interest lies with the capture and prosecution of criminal offenders,²⁶⁶ and not with the well-being of children, officers need not be afforded the same latitude as social workers in determining when it is appropriate to intervene in an abusive situation. Because the urgency of a child abuse investigation centers on the safety of the child, not on the investigation of a crime, only those officials with primary concern for the child should be shielded from liability.

CONCLUSION

Although increasing incidents of child abuse make clear the desperate need for legal reform, courts and state legislatures have yet to develop uniform rules of law that adequately safeguard the health and well-being of children in abusive situations. By relaxing the current standards governing strip searches in child abuse investigations and affording children a voice in these situations, the law will reflect a significant advance toward keeping children from harm.

265. See *supra* notes 229-231 and accompanying text.

266. See *supra* note 218.