

# NOTES

## The Monster Under the Bed: The Imaginary Circuit Split and the Nightmares Created in the Special Needs Doctrine's Application to Child Abuse

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## I. INTRODUCTION

Kessler Wilkerson was only two years old on the morning of October 16, 1976.<sup>1</sup> At approximately 10:30 a.m., neighbors heard loud noises emanating from inside the Wilkerson trailer, alongside the sound of Kessler’s crying and his father’s screams.<sup>2</sup> Two hours later, the now-quiet father delivered his two-year-old son to the emergency medical technicians. Despite their attempts to resuscitate the boy en route to the hospital, Kessler was pronounced dead on arrival.<sup>3</sup>

Discoveries in the hours and days that followed made Kessler’s death even worse. Kessler’s autopsy revealed “multiple bruises all over the child’s body and . . . significant bleeding and a deep laceration of the liver,” which resulted in his death.<sup>4</sup> Testimony after the fact revealed that Kessler’s father Kenneth Wilkerson repeatedly kicked him, whipped him with a belt, and tied up Kessler in order to “bring him up to be a man.”<sup>5</sup> What makes Kessler’s death so tragic was that it came at the hands of his father’s “repeated beatings witnessed by others who did not know abuse when they saw it, and who never bothered to report” the abuse.<sup>6</sup> By the time anyone paid attention, it was too late. Kessler was too young to call out for help, leaving the state unaware of the abuse and unable to intervene.

Unfortunately, tragic results can also ensue from an investigation of a child abuse allegation. Jochebed Good was just

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1. State v. Wilkerson, 247 S.E. 905, 907 (N.C. 1978).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 908.

6. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 531 (2005).

seven years old on the night of April 24, 1987.<sup>7</sup> Armed with an anonymous tip, state social services caseworker W.N. Hooper and a female police officer drove to the Good household to investigate allegations of child abuse.<sup>8</sup> At 10 p.m., Jochebed's mother Sandra answered a "very loud pounding" at the door.<sup>9</sup> Sandra, feeling compelled to do so, reluctantly allowed Hooper and the officer into her home.<sup>10</sup> After talking with Sandra Good, Hooper allegedly chased a frightened Jochebed around the house. Hooper proceeded to order the policewoman to conduct a strip search of Jochebed under his supervision, despite a lack of any evidence suggesting abuse.<sup>11</sup> Finding no evidence of marks, injury, or abuse, Hooper and the officer left Jochebed and her mother "shocked and shaken, deeply upset and worried."<sup>12</sup> Jochebed, a child who showed no signs of abuse, was forced to endure the frightening and humiliating experience of an invasive strip search on the basis of an anonymous call and an agency afraid of another child falling through the cracks.

The investigation of the Goods and the death of Kessler only begin to shed light on the nightmare created by the pervasive problem of child abuse in the United States. Child protective services ("CPS") agencies often face the difficult task of walking the fine line between protecting the child from abuse and preserving familial privacy. Included in this familial privacy consideration is the privacy of the child from intrusive and potentially traumatic searches. What makes this task more difficult is the federal judiciary's lack of guidance in determining the Fourth Amendment protections that bind CPS investigations. The states and the federal circuits must answer the following question: When child welfare officials are investigating allegations of abuse and neglect, are they bound by the probable cause and warrant requirements of the Fourth Amendment, or can a court loosen the Fourth Amendment requirements for the state and its actors? Specifically, do the searches qualify for the "special needs doctrine," an exception to the Fourth Amendment where a court replaces traditional warrant and probable cause requirements with a two-step test considering whether the search and seizure was

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7. *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089 (3d Cir. 1989).

8. *Id.*

9. *Id.* at 1089–90.

10. *Id.* at 1090.

11. *Id.*

12. *Id.*

conducted to meet a state's "special need" and whether the search was reasonable in light of the individual privacy interests and the government's goals?<sup>13</sup> Furthermore, if the special needs doctrine applies, when and how does it apply?

Currently, the federal circuits appear to be divided in a three-way circuit split when answering that question, but this Note will show that circuit split is an illusion.<sup>14</sup> Through a series of cases involving a variety of investigatory techniques, this complicated web of opinions from the federal circuits creates more questions than answers in the realm of Fourth Amendment jurisprudence. Factual differences and a complicated balancing test involving state, parent, and child interests make the courts' job difficult. Although many of the decisions rely on the same logic and recognize the same privacy and state interests, factual differences between the cases produce different outcomes. These factual differences create the illusion that the circuits are divided, despite their ideological similarities.

Moreover, the courts' tentative case-by-case approach to deciding the special needs question has left the states with little guidance in shaping their CPS policies. Over the years, CPS agencies across the nation have created a wide range of policies and procedures that vary in scope and intrusiveness. These procedural differences often influence how a court will determine whether the CPS has violated the Fourth Amendment. Because the circuits are responding reactively to the special needs question, their decisions oftentimes only cover a small subset of agency policies. In essence, CPS is flying blindly, hoping that the courts will find their policies satisfactory under the Fourth Amendment.

The web of competing interests between the state, parents, and child, in conjunction with the appearance of a circuit split, has drawn the attention of the Supreme Court. Just last term, the Supreme Court granted certiorari in *Camretta v. Greene*, a case involving an in-school warrantless interview of a suspected child abuse victim.<sup>15</sup> Despite the Court's desire to address the issue, reuniting the circuits will have to wait for another day. The Court dismissed the case, finding the case-in-controversy moot.<sup>16</sup>

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13. See *O'Connor v. Ortega*, 480 U.S. 709, 726–27 (1987); see also Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 793 (2011).

14. See *infra* Part III.

15. *Camretta v. Greene*, 131 S. Ct. 2020, 2027–28 (2011).

16. *Id.* at 2026.

This Note, however, argues that the appearance of a circuit split is nothing but a figment of judicial imagination. Like shadows resembling monsters, the case-by-case approach adopted by the circuits to address the special needs question has created the illusion of a circuit split. But when light is cast upon the circuit opinions collectively, the illusion of the split, like the shadowy monster, disappears. What is left is not a circuit split but a unified and well-developed special needs doctrine.

This Note will demonstrate that the circuits are not split as follows: Part II focuses on the evolution of the special needs doctrine and the lack of guidance the Supreme Court has provided to the lower courts in defining what constitutes a “special need.” It also discusses the current state of child abuse in the United States and how the states are attempting to combat the problem. Part III examines the illusion of a three-way circuit split on the special needs doctrine’s application to child abuse cases. Part IV explains how the circuits are actually applying a unified interpretation of the law. Finally, Part V argues that the circuits should acknowledge the unified and detailed special needs analysis created by the circuits’ own opinions.

## II. SPECIAL NEEDS AND THE CHILD ABUSE PROBLEM

The Supreme Court’s lack of guidance on the issue of special needs creates confusion in the lower courts on the doctrine’s application to child abuse investigations. Over the past twenty-six years, the Supreme Court has had several opportunities to define what constitutes a special need, yet the Court has merely given the circuits a list of seemingly related cases as examples of when the doctrine can be used. As a result, the lower courts have been left to their own devices to attempt to define a special need.

The Fourth Amendment provides that “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”<sup>17</sup> The special needs doctrine is one of those carefully defined classes of cases. Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.* established the special needs doctrine.<sup>18</sup> There he explained that “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement

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17. *Camara v. Mun. Court*, 387 U.S. 523, 528–29 (1967).

18. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”<sup>19</sup> The creation of the special needs doctrine affirmed a trend that began with the administrative search doctrine nearly twenty years earlier.<sup>20</sup> With the creation of the special needs doctrine arose a new standard of Fourth Amendment jurisprudence. This new standard replaced probable cause with a balancing of the state’s interests in the search against the individual’s right to privacy.<sup>21</sup>

While the modern special needs doctrine is a vital tool to the state in achieving goals that would have been frustrated by a strict Fourth Amendment approach, the test’s flexibility has come with a considerable cost. Specifically, the Supreme Court’s lack of guidance and the expansiveness of the doctrine’s balancing test have led to application problems in the lower courts.<sup>22</sup> The uncertainty among the circuits on which child abuse investigations satisfy the special needs doctrine demonstrates the difficulty of applying the doctrine consistently. In order to understand how the circuits are applying the same standard, this Section first explains the relevant principles that shape the circuit opinions discussed in Part III. This Section then discusses the confusion the special needs doctrine has created among the circuits and concludes with a discussion of the current state of child abuse investigations in the United States.

*A. The Foundation of Special Needs: Finding Functionality in the Fourth Amendment*

To understand the special needs doctrine, one must first examine the cases that led to the famous *T.L.O.* opinion. While the Supreme Court created the special needs doctrine in *T.L.O.*, the modern administrative search cases beginning in *Camara v. Municipal Court* laid the foundation for this opinion.<sup>23</sup> In *Camara*, the Court decided the constitutionality of a statute authorizing a warrantless search of a home for the purposes of a civil health and

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19. *Id.*

20. Relying heavily on the 1967 opinion *Camara v. Municipal Court*, the Supreme Court incorporated the “frustrat[ing] the governmental purpose” language it used to validate civil searches by health inspectors based on generalized suspicion, to support a search of an individual student based on the special circumstances created by the school environment. *Id.* at 340 (quoting *Camara*, 387 U.S. at 533).

21. *See id.* at 337.

22. *See infra* Part II.C.

23. *See supra* note 20 and accompanying text.

safety inspection and without probable cause that the dwelling violated the housing code.<sup>24</sup> The Court recognized that requiring an individualized probable cause standard for housing inspections would inevitably hinder the government's high public health and safety interests.<sup>25</sup> Therefore, it adopted a balancing test to determine whether the inspection was reasonable.<sup>26</sup> The *Camara* balancing test, which would serve as the basis of the administrative search doctrine, weighed the government's objectives in performing the search against the personal privacy interests of the individual to determine if the government's actions were valid under the Fourth Amendment.<sup>27</sup> In *Camara*, however, the Court was not ready to authorize a search of the home without a warrant, even for the purposes of a civil health inspection, given the homeowner's personal privacy and security interests.<sup>28</sup>

In the twelve years following *Camara*, the Court continued to shape the administrative search doctrine gradually, easing the rigors of Fourth Amendment jurisprudence to create a functional mechanism in situations where the warrant and probable cause standards would be impractical. In a companion case to *Camara*, the Court in *See v. Seattle* applied the same balancing-test approach to fire inspections of a warehouse, although it continued to require a warrant to authorize the search.<sup>29</sup> The Court later removed the warrant requirement from cases involving heavily regulated industries such as liquor stores<sup>30</sup>

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24. *Id.* at 527. While the inspector had generalized probable cause that there were violations of the health code in a given area, the Court differentiated this from individualized probable cause, which required that the inspector have probable cause to search the specific house he suspected contained health code violations. *Id.* at 533–39.

25. Here the Court mentioned “fires and epidemics” as potential physical hazards as well as the economic hazards of “unsightly conditions,” which would affect the value of surrounding properties. *Id.* at 535.

26. *Id.* at 534–35.

27. *Id.* at 536–37 (“Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”).

28. *Id.* at 530–31 (“For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.”). The Court continued to recognize that the warrant requirement was not only a safety measure to protect against unreasonable intrusions into a person's home, but also a mechanism to assure the homeowner that the inspector is in fact authorized to perform the search in question. *Id.* at 532.

29. 387 U.S. 541, 545–46 (1967). The Court continued to explain in dicta that it is possible that businesses might reasonably be inspected in many more situations than homes. *Id.*

30. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76–77 (1970).

and pawnshops selling firearms,<sup>31</sup> because violations of liquor and firearms statutes could be easily concealed. As the Court explained, "In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."<sup>32</sup> The administrative search doctrine underwent its final revisions in *Donovan v. Dewey*, where the Court upheld the warrantless inspection of a mine, because Congress's regulations were sufficiently strict in design so as to deny the inspector unbridled discretion, thus serving as a "constitutionally adequate substitute for a warrant."<sup>33</sup> *Dewey* created, for the first time, the opportunity for the government to perform a warrantless search based on less than probable cause.

As demonstrated above, the administrative search doctrine requires a showing of four elements prior to the performance of a warrantless administrative search. First, the government must demonstrate a substantial interest in the search, usually linked to the health and safety needs of the community.<sup>34</sup> Second, the search must be reasonable to the extent that the interests of the government outweigh the privacy interests of the individual, which often turns on the nature of the search.<sup>35</sup> Third, the government must demonstrate that requiring a warrant would frustrate the governmental purpose.<sup>36</sup> Finally, the government can overcome the warrant requirement by creating guidelines that provide a "constitutionally adequate substitute" for the warrant requirement.<sup>37</sup>

Understanding the administrative search doctrine is important when viewed in the context of the rise of the special needs doctrine. However, the connection between the two doctrines is baffling given

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31. *United States v. Biswell*, 406 U.S. 311, 317 (1972).

32. *Id.* at 316.

33. *Donovan v. Dewey*, 452 U.S. 594, 600–603 (1981).

34. *Id.* at 602; *see also Biswell*, 406 U.S. at 315 (recognizing that "close scrutiny of [gun] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (noting that health inspections are "of indispensable importance to the maintenance of community health").

35. *Camara*, 387 U.S. at 536–37.

36. *Dewey*, 452 U.S. at 603; *Biswell*, 406 U.S. at 316; *see also Camara*, 387 U.S. at 533 (rejecting the warrantless search, but noting that "assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement . . . depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search").

37. *Dewey*, 452 U.S. at 599, 603.



the significant differences between when the court applies the two doctrines. Administrative searches were justified because the searches were limited in their intrusiveness, supported by substantial government interests, and would frustrate important governmental purposes if governed by the Fourth Amendment.<sup>38</sup> Yet, as the next Section illustrates, unlike the previous administrative searches, the special needs cases often relied upon searches that were far more intrusive.<sup>39</sup> Furthermore, the special needs cases did little to limit an official's discretion in conducting searches.<sup>40</sup> Finally, while special needs cases often involve individuals with a lower expectation of privacy than those involved with administrative searches, special needs cases are more troubling because they are "more likely to carry the stigmatic burdens associated with the suspicion of wrongdoing."<sup>41</sup>

### B. T.L.O.: *Turning Administrative Searches into Special Needs*

The special needs doctrine began in *T.L.O.* While the Court's majority opinion never used the term "special needs," the majority opinion's rationale combined with the language in Justice Blackmun's concurring opinion would be used to shape the doctrine over the next thirty-five years.<sup>42</sup> *T.L.O.* involved a school official's warrantless search of a student's purse.<sup>43</sup> While the Court, relying heavily on *Camara*, held that the Fourth Amendment protects against unwarranted intrusions by *any* government official, including those in the public school system,<sup>44</sup> the Court balanced that expectation of privacy against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."<sup>45</sup> As one of the primary factors supporting the reasonableness balancing test, school officials were not as familiar

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38. See Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 270–73 (2011).

39. *Id.* at 271.

40. *Id.*

41. *Id.* at 272.

42. *New Jersey v. T.L.O.*, 469 U.S. 325, 323–50. While the phrase "special needs" appears in a footnote in the majority opinion, *id.* at 332 n.2, the term "special needs" is specifically attributed to Justice Blackmun's concurrence. *Id.* at 351 (Blackmun, J., concurring in the judgment).

43. *Id.* at 328.

44. *Id.* at 334–35.

45. *Id.* at 339.

with the probable cause standard as police officers were and therefore should not be bound by the “niceties of probable cause.”<sup>46</sup>

It is important to note that this lower standard did not open the door for all types of searches. Only searches that satisfy the two-prong reasonableness analysis will qualify as constitutional under the special needs doctrine.<sup>47</sup> First, the state’s action must be “justified at its inception,” meaning that the state had “reasonable grounds for suspecting that the search will turn up evidence” prior to conducting the search.<sup>48</sup> Second, the means used to conduct that search must be “reasonably related to the objectives of the search” such that the search is not “excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>49</sup>

While the Court’s majority opinion provided the foundation for the special needs doctrine, the doctrine can only be appreciated through the prism of Justice Blackmun’s concurrence. Justice Blackmun authored his concurrence under the belief that the Court had omitted a key first step.<sup>50</sup> Before employing the majority’s balancing test, a court must first find an “exceptional circumstance[] in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>51</sup> Absent an exceptional need, such as the school’s need for discipline and the prevention of drug and gun possession on campus, the traditional Fourth Amendment warrant and probable cause requirements bind the state.<sup>52</sup>

In *T.L.O.*, the Court established a new test for searches of individuals with a reduced expectation of privacy.<sup>53</sup> Under this new test, the Court lowered the requirements demanded by the Fourth Amendment based on three conditions. First, similar to the

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46. *Id.* at 343.

47. *Id.* at 341–42.

48. *Id.* at 342. In the context of the school search, the evidence the school official expects to find must link the student to a violation of either the “law or the rules of the school.” *Id.*

49. *Id.* at 342. Justice Stevens focused primarily on the “nature of the infraction” language proposed by the majority. Specifically, Justice Stevens would limit the school’s authority to conduct searches that “will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.” *Id.* at 377–78 (Stevens, J., concurring in part and dissenting in part) (emphasis omitted).

50. *Id.* at 352 (Blackmun, J., concurring in the judgment) (“The Court’s implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case.”)

51. *Id.* at 351 (Blackmun, J., concurring in the judgment).

52. *Id.* at 352–53 (Blackmun, J., concurring in the judgment).

53. Primus, *supra* note 38, at 270–71.

administrative search context, the state must demonstrate a substantial interest that would be unduly hindered by the warrant and probable cause standard. The second prong is where the special needs doctrine differs from its predecessor. Whereas the administrative search context limited the intrusiveness of the search, the special needs test weighs the intrusiveness of the search against the state's interest in conducting the search. Finally, the nature of the search must reasonably relate to the government's interests in performing the search.

*C. Special Needs: The Development of an Exception and the Confusion It Caused*

While the Court has tried to define it, the special needs doctrine has become less clear since *T.L.O.* In *O'Connor v. Ortega*, the Court held that the special needs doctrine applied to searches of government employees' offices for "noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct."<sup>54</sup> *Ortega* developed two important elements of the special needs doctrine. First, the *Ortega* test embraced Justice Blackmun's opinion that the special needs doctrine should apply only when the government's "interest [is] substantially different from 'the normal need for law enforcement.'"<sup>55</sup> Second, while the *T.L.O.* case merely implied a lower expectation of privacy, the *Ortega* case explicitly referenced a government employee's reduced expectation of privacy as a primary factor in its analysis.<sup>56</sup>

Subsequent cases in the special needs context repeatedly relied on the concept of a party's reduced expectation of privacy. The Court found that probationers<sup>57</sup> and parolees<sup>58</sup> have a reduced expectation of privacy based on their state supervision; in conjunction with the special needs of the supervision system, this reduced expectation

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54. *O'Connor v. Ortega*, 480 U.S. 709, 725–26 (1987).

55. *Id.* at 724 (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)).

56. *Compare id.* at 717 ("Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."), *with T.L.O.*, 469 U.S. at 340 (majority opinion) ("How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place?").

57. *Griffin v. Wisconsin*, 483 U.S. 868, 874, 878 (1987).

58. *Samson v. California*, 547 U.S. 843, 849–50 (2006).

requires applying the special needs doctrine to home searches.<sup>59</sup> Later, the Court extended the reduced expectation of privacy rationale to student athletes being tested for drugs,<sup>60</sup> students participating in extracurricular activities,<sup>61</sup> persons working in highly regulated industries,<sup>62</sup> and federal customs officials.<sup>63</sup>

While the Court has consistently relied on the reduced expectation of privacy rationale to support the application of the special needs doctrine, the Court's primary focus has been on the language articulated in Justice Blackmun's concurrence from *T.L.O.* that the government must show a substantial need "beyond the normal need for law enforcement."<sup>64</sup> Specifically, in this first prong, the Court is concerned about the involvement of police and law enforcement in the search and the purpose of the search. In *T.L.O.*, for example, the Court did not rule against the school for turning over evidence found in the search to the police.<sup>65</sup> Secondary criminal repercussions that develop around a civil search alone do not make non-law-enforcement searches unreasonable under the Fourth Amendment.<sup>66</sup>

However, where the government has dual purposes in conducting the search, such that the search is inherently linked to the discovery of criminal activity or the search is entangled with law enforcement, the Court will not apply the special needs doctrine.<sup>67</sup> In *Ferguson v. City of Charleston*, the Court rejected a public hospital's policy of testing pregnant women for cocaine use to encourage them to seek drug counseling and treatment, because the hospital relied heavily on the coercion of law enforcement.<sup>68</sup> Despite the hospital's legitimate interest in protecting the health of the mother and child,

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59. *Griffin*, 483 U.S. at 874, 878; *see also Samson*, 547 U.S. at 849–50. While the Court did not use the term special needs in this case, the authority rests on the same principles and came to the same conclusion as the special needs cases. A different interpretation of *Samson* is that the case created a broader range of authority for the government even greater than those powers granted under the special needs doctrine based on the parolee's "severely diminished privacy expectation." *See id.* at 852.

60. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

61. *Bd. of Educ. v. Earls*, 536 U.S. 822, 831–32 (2002).

62. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627 (1989).

63. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 671 (1989).

64. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring in the judgment).

65. *Id.* at 340.

66. *See id.* (finding the maintenance of order and discipline in the school to be the primary aim of the school official's search).

67. *Ferguson v. Charleston*, 532 U.S. 67, 79 (2001).

68. *Id.* at 79–81.

the Court was troubled by the police's day-to-day role in administering the policy, the perception that the policy's immediate goal was to "generate evidence for law enforcement," and the use of police coercion in forcing the mothers into treatment.<sup>69</sup> The Court was suspicious of this entanglement with law enforcement and thus found that where the special need was not "divorced from the state's general interest in law enforcement," the Court will not apply the doctrine.<sup>70</sup>

Recently, the Court attempted to define its intrusiveness standard clearly in *Safford Unified School District v. Redding*. In that case, the school principal ordered thirteen-year-old Savana Redding to strip down to her underwear and then instructed her to "pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree"; this search was based on a report alleging that Redding was distributing medicine to other students and other incriminating evidence found in Redding's day planner.<sup>71</sup> The *Redding* case expounded on the requisite knowledge necessary to perform a search, holding that the state's pre-search information must suggest a "moderate chance of finding evidence of wrongdoing."<sup>72</sup>

However, the Court's primary focus was on the scope of the search, which the Court classified as a "strip search."<sup>73</sup> The Court, in considering the individual's privacy expectations, considered both subjective<sup>74</sup> and reasonable societal expectations<sup>75</sup> of personal privacy implicated in strip searching a teen. Merely having a high privacy interest, however, is not enough to bar the search. The search in *Redding* failed not because Redding had a high privacy interest but rather because "the content of the suspicion failed to match the degree

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69. *Id.* at 82–84 (emphasis omitted). The Court considered the generation of evidence, in the form of drug test results, as the "immediate objective" of the drug testing policy. The purpose of the evidence collected is one of the central tenets of the *Ferguson* test. *Id.* at 68.

70. *Id.* at 79 & n.15, 82.

71. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2638 (2009). The incriminating evidence included: knives, lighters, a cigarette, four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, which were all banned by the school. *Id.*

72. *Id.* at 2639.

73. *Id.* at 2641 ("The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it.").

74. The Court recognized that the search made Savana feel humiliated, afraid, and embarrassed. *Id.*

75. On the societal expectation, the Court took judicial notice of the fact that most schools ban the use of strip searches. *Id.* at 2642.

of intrusion.”<sup>76</sup> *Redding* makes clear that the scope of the search must relate not only to the state’s interest in performing the search but also to the knowledge that justified the search. Therefore, in order to perform a highly intrusive search, the state must have a very strong interest in performing the search, and the information supporting the search must specifically be linked to the intrusive search.<sup>77</sup>

While the evolution of the special needs doctrine has shown some general trends, the doctrine’s balancing test has caused considerable confusion among the lower courts and has come under considerable criticism from scholars as well. As the Tenth Circuit noted, “At this stage in [the] development of the doctrine, the ‘special needs’ category is defined more by a list of examples than by a determinative set of criteria . . . [t]he Supreme Court has not told us what, precisely, this set of cases has in common.”<sup>78</sup> The Fifth Circuit concurred with this observation and explained that the Supreme Court’s “vague test for finding a ‘special need’ caused the federal circuits to diverge over” the “substantive question” of child abuse investigations.<sup>79</sup> Professor Primus compares the entire administrative search regime to the “pre-Miranda voluntariness test both in terms of the lack of guidance . . . and in terms of the confusion in the lower courts.”<sup>80</sup>

Furthermore, the imposition of a balancing test, as employed by the special needs doctrine, is bound to create dissention among the lower courts. Professor Doriane Coleman notes that “[c]onstitutional balancing tests . . . have been strongly criticized for their lack of rigor and for their outcomes.”<sup>81</sup> As Professor Coleman explains, balancing

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76. *Id.* The school lacked the necessary knowledge that would specifically connect the information that prompted the search and the scope of the search itself. Specifically, the school lacked “facts that pointed to Savana[,] . . . any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.” Because the school’s antidrug interest was not significantly high (as compared to other illegal drugs) and the school’s information did not suggest that a strip search would turn over evidence, the search was unreasonable. *Id.* at 2642–43.

77. *Id.* at 2642–43. Specifically, the information must suggest that the specifically intrusive search would likely lead to the discovery of evidence and not that the investigation generally would produce evidence. The distinction lies in the specificity of the evidence. In *Redding*, the school received reports that Savana was bringing drugs to school. This supports a general suspicion that Savana has drugs on her person. However, if the school received reports that Savana smuggled drugs in by hiding the drugs in her bra and underwear, this would be specifically linked to the search performed in *Redding*. *See id.*

78. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1213 (10th Cir. 2003) (citations omitted).

79. *Roe v. Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 409 (5th Cir. 2002).

80. Primus, *supra* note 38, at 300.

81. Coleman, *supra* note 6, at 531.

tests, such as the one employed under the special needs doctrine, “tend to reflect normative judgments rather than objective conclusions about the merits of the evidence,” as the courts “rely instead on [their] values-laden characterization of the relevant competing interests to justify [their] outcomes.”<sup>82</sup> Without clear guidance from the Supreme Court on what constitutes a special need and how they should balance the interest, the circuits are left to their own devices to create a system which in their view best comports with the values set forth in *T.L.O.* and its progeny. Doing so forces the lower courts to rely on their own “normative judgments” and “value-laden characterizations,” causing confusion over what precisely constitutes a special need.

#### *D. Child Abuse in the United States*

As demonstrated above, there is no set definition for what types of cases fall within the realm of the special needs doctrine. Therefore, before a court can determine whether a government search falls within the special needs exception, it must first have a thorough understanding of the problem the state faces. In the context of child abuse, it is important to consider the magnitude of the problem and the costs of investigating abuse allegations.

The current state of child abuse in the United States illustrates the complicated problem that the states confront. During 2009, it is estimated that approximately 763,000 incidents of child abuse or neglect occurred, involving 702,000 children in the United States.<sup>83</sup> Of these victims, over seventy-five percent of them were under the age of eleven.<sup>84</sup> However, that same year, more than 3.3 million child abuse allegations were reported in the United States involving approximately six million children—more than seven times the number of children actually abused.<sup>85</sup> Of the 3.3 million reports, CPS agencies deemed approximately two million (61.9 percent) of them credible enough to warrant an investigation.<sup>86</sup> Of the two million investigations performed, CPS agents substantiated approximately

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82. *Id.* at 531–32.

83. U.S. DEP’T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2009, at 21 (2009) [hereinafter CHILD MALTREATMENT], available at [www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf](http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf).

84. *Id.* at 22.

85. *Id.* at 6.

86. *Id.* at 7.

442,100 reports (22.1 percent) of abuse victims, while finding approximately 1.3 million reports (64.1 percent) unsubstantiated.<sup>87</sup>

The considerable difference between the number of reports and the number of children actually found to have been abused is surprising at first. A closer examination produces several explanations. First, the screening process utilized by CPS serves as an effective screen, funneling out reports that are not credible before an investigation begins.<sup>88</sup> Second, as Doctor Tisha Wiley recognized, absent an investigation of the child, the state is left with little evidence to corroborate an abuse allegation because physical evidence is either inconclusive or nonexistent.<sup>89</sup> This lack of physical evidence can halt an investigation before it even starts. Furthermore, if an investigation develops and becomes more intensive, a trained child services agent can successfully winnow out unsubstantiated claims from those that truly warrant a further investigation.<sup>90</sup> However, it is possible that the number of actually abused children is even higher, given the difficulties posed by child abuse investigations.<sup>91</sup>

While the high number of abuse cases creates a compelling interest for the state, the aftermath of these investigations creates considerable costs. In 2009, over 1.1 million CPS investigations were fruitless, either due to lack of evidence or because the child was never abused.<sup>92</sup> While some of these investigations may have simply consisted of interviews,<sup>93</sup> others involved an intrusive physical examination similar to the strip search of Jochebed Good.<sup>94</sup>

These highly intrusive searches have caused the greatest confusion among the circuits. The special needs doctrine requires the most thorough review in those cases that involve strip searches,

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87. *Id.* at 8.

88. *Id.* at 5–6.

89. Tisha R. Wiley, *Legal and Social Service Responses to Child Sexual Abuse: A Primer and Discussion of Relevant Research*, 18 J. CHILD SEXUAL ABUSE 267, 275 (2009).

90. CHILD MALTREATMENT, *supra* note 83, at 6.

91. The tragic death of Kessler Wilkerson addresses some of these problems. Most notably, the lack of reporting, the child's inability or refusal to call for help, and the parent's involvement or ignorance of the abuse all place considerable hindrances in the face of CPS agents.

92. CHILD MALTREATMENT, *supra* note 83, at 8.

93. See *Investigation of Child Sexual Abuse*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, <http://www.childwelfare.gov/pubs/usermanuals/sexabuse/sexabused.cfm> (last visited Feb. 18, 2012) ("If no confirming evidence emerges and there is no other supporting evidence, the CPS worker will usually deny the case after a single interview.").

94. *Supra* Part I.



interviews of the child without parental consent, or both.<sup>95</sup> While the problem of child abuse is as real as it is large, the solutions and tools available for investigating child abuse place a considerable burden on an even larger population of children.

The size and the nature of the child abuse epidemic pose major challenges for the state. The problems created by child abuse investigations exist primarily because these cases involve three separate parties (the state, the child, and the parents), each with strong and legitimate interests in the way the state conducts the investigation. These interests overlap with one another, which leads to a myriad of questions that a judge must resolve. How can the state gather the requisite information to act when the child is either too young or too scared to talk? How should the court weigh the child's privacy and personal autonomy interests, the constitutional rights of the parents to raise their children, and the state's interest in protecting children who cannot protect themselves? How does the state substantiate the reports of others when the individual, who is allegedly conducting the abuse, controls access to the home and the child? Can courts differentiate between a parent's dual interests in protecting the child's privacy and in keeping information away from the state? Should this potential conflict of interest diminish the parent's rights to challenge the actions of CPS?

While the state has a difficult job investigating allegations of child abuse, those investigations often come with incredible emotional costs that the child and family must bear. While the state's mission to protect children from abuse and to investigate allegations of abuse is certainly commendable, innocent parents, such as Sandra Good, often face significant and unwarranted emotional consequences. The significant stigma that surrounds an allegation of child abuse,<sup>96</sup> coupled with the fact that many of these parents often must watch or actively participate in the highly intrusive, physical examinations of their children,<sup>97</sup> can leave an indelible mark on the memories of the parents.

However, the greatest costs of child abuse investigations are borne by the children themselves. The children in these cases are not

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95. See *infra* Part IV.B (discussing the heightened interests of the child and parents during these types of investigations).

96. Coleman, *supra* note 6, at 497–98.

97. E.g., *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808, 811 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089–90 (3d Cir. 1989).

just parties to a dispute but people with “names, faces, and stories that ought not to be hidden from view.”<sup>98</sup> In wretched irony, the child bears much of the emotional consequences of temporary seizures and physical examinations that are done for his protection. For example, it is the child, and not the alleged wrongdoer, who is forced to endure the humiliating and frightening experience of a strip search at the hands of the state. On the other hand, preserving the dignity of the American family and the personal autonomy of the child in the face of a grave social epidemic could lead to a child’s unnecessary exposure to physical, sexual, and emotional abuse, which can result in the serious injury or death of the child. It is with this understanding of the full complexity of the child abuse problem that the confusion among the circuits can be properly considered.

### III. THE NIGHTMARE SPLIT

Given the legitimate interests of the state, parents, and child, as well as the Supreme Court’s lack of guidance, it would not be surprising if the federal circuits were divided on how the special needs doctrine applies to child abuse investigations. While it is not surprising that confusion exists among the federal circuits on how the special needs doctrine applies to child abuse investigations, the circuits have actually developed a comprehensive and consistent body of case law on when the special needs doctrine applies. Specifically, the circuits have consistently relied on a series of factors including: the location of the search, the involvement of law enforcement officers, the intrusiveness of the search, and the existence of discretion-limiting statutes or regulations. However, to understand the potential for a united body of case law, it is important to examine how the circuits created the perception of a split.

At first glance, the circuits appear to be divided into three basic approaches. The first approach, originally created by the Seventh Circuit and later adopted by the Fourth and Tenth Circuits, applies the special needs doctrine to child abuse investigations.<sup>99</sup> The second approach, adopted by the Second, Third, Fifth, and Ninth Circuits, holds that the special needs doctrine does not apply to child abuse investigations, particularly when the search is in the home or involves

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98. Coleman, *supra* note 6, at 446.

99. See *Doe v. Bagan*, 41 F.3d 571, 574 n.3 (10th Cir. 1994); *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372–73 (4th Cir. 1993); *Darryl H. v. Coler*, 801 F.2d 893, 900–02 (7th Cir. 1986).

law enforcement.<sup>100</sup> The third approach, developed when the Seventh Circuit revised its position, creates a jurisdictional element that determines the appropriateness of applying the special needs doctrine to child abuse investigations based on where the search or seizure occurs. Under this approach, cases often turn on whether the search occurred in a public school, a private school, or the home.<sup>101</sup>

This Part examines how the federal circuits came to perceive a three-way split. Section A considers the rationale supporting the application of the special needs doctrine advanced by the Fourth, Seventh, and Tenth Circuits. Section B then considers the competing rationale found in the Second, Third, Fifth, and Ninth Circuits' rejection of the special needs doctrine. Section C illustrates how the Seventh Circuit has appeared to separate itself from the Fourth and Tenth Circuits by creating an additional jurisdictional approach.

#### *A. The Special Needs Circuits: The Fourth, Seventh, and Tenth Circuit Approach*

The circuits that apply the special needs doctrine to child abuse investigations acknowledge the application of the doctrine in three cases with significant factual differences. While each court discusses the special needs analysis in a similar manner, these factual differences require us to examine each circuit separately.

##### 1. The Seventh Circuit

In *Darryl H. v. Coler*, the Seventh Circuit became the first court to affirmatively recognize the applicability of the special needs doctrine to investigations of child abuse. In doing so, *Darryl H.* also laid the foundation for other circuits to apply the special needs doctrine to child abuse investigations. *Darryl H.* was a consolidated appeal challenging the Illinois Department of Children and Family Services ("DCFS") policies.<sup>102</sup> Under DCFS policies, an investigation into an allegation of child abuse could only begin if the allegation

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100. See *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011); *Roe*, 299 F.3d at 406–07; *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999); *Calabretta*, 189 F.3d at 816–17; *Good*, 891 F.2d at 1093–94.

101. Compare *Michael C. v. Gresbach*, 526 F.3d 1008, 1015 (7th Cir. 2008) (applying traditional Fourth Amendment analysis when search conducted on private school grounds), and *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003) (same), with *Darryl H.*, 801 F.2d at 900–02 (applying special needs inside public schools).

102. *Darryl H.*, 801 F.2d at 894.

satisfied a litany of requirements.<sup>103</sup> If an allegation met the requirements, a DCFS caseworker could interview the child and caretaker, observe the home environment, and potentially perform a physical examination of the child.<sup>104</sup>

While the cases were consolidated, the court examined each plaintiff's case individually, beginning with "B.D." and "A.O." Four months after receiving a report that A.O. was physically abused, a DCFS caseworker interviewed A.O. at his school and asked A.O. to remove his shirt and pants so that the caseworker could examine him for signs of abuse.<sup>105</sup> In the spring of 1981, armed with an anonymous allegation, a DCFS caseworker went to ten-year-old B.D.'s school and asked the child to remove his pants to look for signs of abuse.<sup>106</sup> Finally, in the fall of 1982, DCFS agents asked two children, Lee and Marlena, to disrobe in a "semi-private room" of their school to look for signs of abuse, despite the children denying the abuse and the caseworkers' discovery of evidence undermining the abuse allegation.<sup>107</sup>

After finding that the visual inspection of the children clearly implicated the Fourth Amendment,<sup>108</sup> the Seventh Circuit addressed the essential issue that the two consolidated cases shared: whether a DCFS caseworker, following the agency policy listed by the court, can constitutionally conduct a nude body search of a child "without meeting the strictures of probable cause or the warrant requirement."<sup>109</sup> Applying the *T.L.O.* balancing test, the court began its analysis by recognizing that "nude physical examination is a

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103. *Id.* at 895. Under Illinois law, a child could only be investigated when the allegation involved: (1) a child younger than eighteen years old; (2) who was harmed or in danger of being harmed; (3) by a specified incident of abuse; and (4) either (a) "a parent, caretaker, sibling or babysitter" was the person neglecting the child or (b) "a parent, caretaker, adult family member, adult individual residing in the child's home, parent's paramour, sibling or babysitter" was the individual abusing the child. *Id.*

104. *Id.* at 896. Due to the intrusive nature of a physical examination, DCFS caseworkers must inform the caretaker of their intent to perform such a search and explain that the examination could be performed by a physician, the caseworker, or the school nurse. *Id.*

105. *Id.* at 897.

106. *Id.*

107. *Id.* at 905-06.

108. *Id.* at 899-900. For the purposes of this Note, all of the cases will be assumed to implicate the Fourth Amendment unless otherwise stated. This is primarily because a court would not address the special needs doctrine without first finding that the action taken by the state implicated the Fourth Amendment. Therefore, no extensive examination of the nature of the state action is needed outside its applicability to the special needs doctrine.

109. *Id.* at 901. While the policy was applied to both investigations, only one party was actively seeking to challenge the policy itself. *Id.*

significant intrusion into the child's privacy," due not only to the humiliation of the search itself but also to the search's potential for long-term psychological side effects.<sup>110</sup> The court further acknowledged that although other methods of investigation may be more intrusive to the child, that fact does not diminish the substantial intrusion of a nude body search.<sup>111</sup> The court also recognized the "closely related legitimate expectations of the parents or other caretakers . . . that their familial relationship will not be subject to unwarranted state intrusion."<sup>112</sup> As the court observed, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."<sup>113</sup>

Despite these strong interests, the court recognized that the state's need was substantial and multifaceted.<sup>114</sup> As the court observed, there is no more worthy public calling than the protection of children.<sup>115</sup> The court found that, due to the nature of child abuse investigations and the need to remove a child from a dangerous home as quickly as possible, the time allotted to the state in conducting these investigations is very short.<sup>116</sup> The court rationalized the use of nude strip searches by acknowledging that a physical inspection is the quickest way to assess the credibility of an abuse allegation.<sup>117</sup> Ironically, relying on concerns for familial privacy, the court recognized that a nude body search might actually best protect familial privacy from an otherwise extensive home investigation.<sup>118</sup> While evidence from the search could be used in a criminal investigation, that fact is secondary to protecting the child.<sup>119</sup> As such, the special needs doctrine was appropriate for child abuse investigations.<sup>120</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

114. *Id.* at 902.

115. *Id.* ("There is no more worthy object of the public's concern.") (quoting *Wyman v. James*, 400 U.S. 309, 318 (1971)). The court relied on the fact that in 1982, seventy-two children died in Illinois due to child abuse. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Finding special needs, the court then examined the reasonableness of the searches in question. While the court refused to definitively state whether the strip searches were unreasonable, it noted several reservations regarding the DCFS guidelines.<sup>121</sup> Specifically, the court noted that at least half of the reports made to DCFS in a given year are unfounded.<sup>122</sup> While speed is of the essence and third-party corroboration is often counterproductive, that the policy did not seek further corroboration when time permitted disturbed the court.<sup>123</sup> The court noted that lengthy delays between the allegation and the investigation or the discovery “of information which cast serious doubt on the validity of the charge” were not reasonable under the special needs doctrine.<sup>124</sup>

## 2. The Fourth Circuit

The Seventh Circuit stood alone for seven years in its application of the special needs doctrine to child abuse investigations until the Fourth Circuit adopted its rationale in *Wildauer v. Frederick County*.<sup>125</sup> *Wildauer* is unique because it involved a foster parent who did “not have a constitutionally protected liberty interest in a continued relationship with [her] foster child.”<sup>126</sup> In *Wildauer*, the caseworker, responding to a neglect allegation, entered and searched the Wildauer’s house with nurses to “investigate [the children’s] medical histories, medications, and schooling.”<sup>127</sup>

While relying largely on *Darryl H.*, the Fourth Circuit based its decision on two additional factors. First, the Fourth Circuit interpreted the Supreme Court’s *Wyman v. James* to stand for the proposition that home visits by social workers are subject to less

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121. *Id.* at 903.

122. *Id.*

123. *Id.*

124. *Id.* at 907. The court was also concerned that DCFS policy did not require at least some corroboration where the reports are made by anonymous sources, minors or other “reasonably suspect” sources and that the policies did not “differentiate between the search of the very young child and the search of a child with the maturity and ability to communicate.” *Id.* at 903. This distinction is important given the Supreme Court’s instruction that age should be taken into consideration when considering the reasonableness of a particular search. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

125. *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 373 (4th Cir. 1993).

126. *Id.*

127. *Id.* at 371. Cruger’s initial search of the home was done to recover children whose natural parents demanded returned to them. The initial search was lawful as Wildauer invited her inside to search for two of the children. *Id.*

scrutiny than criminal investigations.<sup>128</sup> This proposition is a particularly broad interpretation of the *Wyman* opinion, which the Court decided on consent grounds and not the reasonableness of the search.<sup>129</sup> That the Court took great efforts to distinguish *Wyman* from its prior administrative search cases emphasizes this further.<sup>130</sup> Second, since *Darryl H.* held that the state interest in a child abuse investigation supersedes the natural parents' interests, it must then supersede a foster parent's attenuated interest.<sup>131</sup>

### 3. The Tenth Circuit

One year later, the Tenth Circuit, in *Doe v. Bagan*, became the third circuit to apply the special needs doctrine to child abuse investigations. Notably, just a year earlier, the Tenth Circuit rejected the special needs doctrine in *Franz v. Lytle*.<sup>132</sup> In *Franz*, Officer Lytle, who was investigating a neglect allegation about baby Ashley, asked the babysitter to remove the child's diaper so that he could take several pictures of the vaginal region before informing the parents.<sup>133</sup> Officer Lytle later returned with a female officer who performed a more probing physical investigation before ordering a complete medical examination.<sup>134</sup>

The Tenth Circuit in *Franz* rejected the applicability of *Darryl H.* on several grounds. First, the court held that a strip search that involved photographing and touching the child's nude body is unreasonable even under special needs.<sup>135</sup> Second, the Tenth Circuit

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128. *Id.* at 372.

129. *Wyman v. James*, 400 U.S. 309, 317–18 (1971). In *Wyman*, the New York statute made it a requirement that welfare recipients must make their homes open to inspection or have their benefits revoked. As such, the Court's opinion determined that since the individual could simply refuse to accept welfare, by accepting the benefits, the individual consented to the search thereby negating any Fourth Amendment claim. *Id.*

130. *Id.* at 324–25.

131. *Wildauer*, 993 F.2d at 373. Interestingly enough, the Court never distinguished between Wildauer's position as a foster parent to nine of the children and her status as the legal guardian of her natural son and adopted son. Given the Fourth Circuit's considerable reliance on *Darryl H.*, however, it seems unlikely that the differentiation between the two statuses would have made any difference. *See id.*

132. *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993).

133. *Id.* at 785.

134. *Id.* at 785–86. The second physical examination involved specific acts of touching the child in order to gauge the child's response. For a more detailed description of this process, see *id.*

135. *Id.* at 790.

was concerned about the involvement of the police.<sup>136</sup> This distinction is important given *T.L.O.*'s rationale that other officials require special needs because they are not fully versed in the niceties of probable cause like police officers.<sup>137</sup> As the Tenth Circuit recognized, when the investigation's "focus was not so much on the child as it was on the potential criminal culpability of her parents," special needs is not appropriate because the search is primarily for law enforcement purposes.<sup>138</sup> Finally, the court was concerned that the state lacked a written policy that would limit the officer's discretion.<sup>139</sup>

The *Bagan* case is interesting because, unlike most other special needs cases, the child examined was not the alleged victim but the alleged perpetrator.<sup>140</sup> In *Bagan*, the caseworker Bagan interviewed John Doe, a nine-year-old boy, who was accused of sexually assaulting a five-year-old girl.<sup>141</sup> Knowing the girl had tested positive for chlamydia, Bagan ordered Doe to submit to a test by a doctor.<sup>142</sup> Because the court held that the parents consented to the chlamydia test,<sup>143</sup> the court only addressed the in-school interview.

After assuming that the interview was a "seizure," the court applied the *T.L.O.* balancing test to the interview and determined that the temporary seizure was reasonable.<sup>144</sup> The Tenth Circuit, however, provided no basis for why it analyzed the "seizure" under *T.L.O.* as opposed to the traditional Fourth Amendment standard. The Tenth Circuit, in *Jones v. Hunt*, would later suggest that this balancing test might also apply when a social worker removes a child from "parents' custody at a public school."<sup>145</sup> Although the Tenth Circuit has yet to endorse the special needs doctrine explicitly, at least one circuit has

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136. *Id.* The court emphasized the fact that the officers were always in full uniform and carried firearms. *Id.* at 785.

137. See *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985) ("[T]he standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause . . .").

138. *Franz*, 997 F.2d at 791. When an officer's focus is on a possible criminal investigation, the focus does not satisfy the requirement that the search be "beyond the normal need for law enforcement." *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

139. *Franz*, 997 F.2d at 789.

140. *Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994).

141. *Id.*

142. *Id.*

143. *Id.* at 576-77 ("Doe's mother, however, did at all times remain free to refuse to have her son tested until later in the investigatory process.")

144. *Id.* at 575 n.3.

145. *Jones v. Hunt*, 410 F.3d 1221, 1228 n.4 (10th Cir. 2005). It is interesting to note the Court again refused to call the case a special needs case. *Id.*



interpreted *Bagan* as the Tenth Circuit's adoption of the special needs doctrine.<sup>146</sup>

*B. The Rejecting Circuits: The Second, Third, Fifth, and Ninth Circuit Approach*

1. The Third Circuit

Three years after *Darryl H.*, the Third Circuit refused to consider the special needs doctrine in *Good v. Dauphin County Social Services for Children & Youth*. As described in Part I, at approximately 10 p.m., caseworker Hooper and a female police officer arrived at the home of Sandra Good based on an anonymous tip that her daughter Jochebed was being abused.<sup>147</sup> After talking with Sandra Good, Hooper allegedly chased a frightened Jochebed and then had the policewoman conduct a strip search of Jochebed, despite no signs of abuse.<sup>148</sup>

The *Good* case is particularly telling of the Third Circuit's view of the special needs doctrine because it does not even address the applicability of the doctrine.<sup>149</sup> Recognizing that the state did not have probable cause, the Third Circuit proceeded to the traditional Fourth Amendment defenses of consent and exigent circumstances.<sup>150</sup> The Third Circuit rejected the special needs doctrine, arguing that the court found "no suggestion . . . that the governing principles [of the Fourth Amendment] should vary depending on the court's assessment of the gravity of the societal risk involved."<sup>151</sup> This statement is odd given the Supreme Court's majority and concurring opinions in *T.L.O.* recognizing that exceptional circumstances may authorize a more lenient Fourth Amendment test.<sup>152</sup> Finally, the lack of "any

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146. See *Greene v. Camreta*, 588 F.3d 1011, 1026 n. 11 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

147. *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089–90 (3d Cir. 1989).

148. *Id.*

149. *Id.* at 1092 ("The decided case law made it clear that the state may not . . . conduct a search of a home or strip search of a person's body in the absence of consent, a valid search warrant, or exigent circumstances.")

150. *Id.* at 1093.

151. *Id.* at 1094.

152. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those *exceptional circumstances* in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.") (emphasis added).

established guidelines” curbing the officer’s discretion, the officer’s forced entry into the home in the middle of the night, and the intrusive strip search were of particular concern to the Third Circuit.<sup>153</sup>

## 2. The Ninth Circuit

The first case to address the application of the special needs doctrine to child abuse investigations was *Calabretta v. Floyd*. Four days after receiving an allegation of abuse, social worker Floyd attempted to visit the Calabrettas’ home.<sup>154</sup> Although Mrs. Calabretta denied Floyd entrance into the home, Floyd was able to observe that the children did not appear abused.<sup>155</sup> Two weeks later, Floyd returned with a police officer, entered the home without consent, interviewed the children, and ordered Mrs. Calabretta to remove the youngest child’s clothing for a strip search.<sup>156</sup>

Much like the Third Circuit, the presence of a police officer during the search and the location of the search in the child’s home immediately troubled the Ninth Circuit.<sup>157</sup> Specifically, the court recognized that when there is a “criminal aspect to the investigation,” the search moves beyond the realm of special needs and into the realm of traditional law enforcement purposes.<sup>158</sup> The Ninth Circuit also rejected the Second Circuit’s broad interpretation of *Wyman*, holding that the *Wyman* opinion turned on the issue of consent, not on a lower expectation of privacy.<sup>159</sup> Finally, the Ninth Circuit held that *T.L.O.*’s special needs test applies only to the special environment in schools and not to children in general.<sup>160</sup>

Nevertheless, the court considered whether the special needs doctrine would apply to strip searches in child abuse cases. While the court acknowledged the existence of the state’s important interest in protecting children, that interest “include[s] not only protection against child abuse, but also ‘the child’s psychological well-being,

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153. *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1096 (3d Cir. 1989).

154. *Calabretta v. Floyd*, 189 F.3d 808, 810 (9th Cir. 1999). The report stated that there was shouting on other occasions, but did not provide specifics. *Id.*

155. *Id.*

156. *Id.* at 811–12. Based on the record provided, the Court treated the entry in this case as without consent. *Id.*

157. *Id.* at 813, 815.

158. *Id.* at 815.

159. *Id.* at 816.

160. *Id.*

autonomy, and relationship to the family or caretaker setting’ ” and their “interest in the privacy and dignity of their homes.”<sup>161</sup> The Ninth Circuit considered the interests of the child and the parents to be substantially greater than the state’s interests.<sup>162</sup> While the court acknowledged that a three-year-old child’s cognitive abilities do not raise a great concern for the child’s “privacy and dignity,” it noted that “there is a very substantial interest, which forcing the mother to pull the child’s pants down invaded, in the mother’s dignity and authority in relation to her own children in her own home.”<sup>163</sup> The forced entry into the home, coupled with the parent’s active participation in the strip search, not only humiliated the parent in front of the child but also undermined the parent’s authority over her child in her own home.<sup>164</sup> Finally, the court recognized that the child and the parent have an essential interest “in the privacy of their relationship with each other.”<sup>165</sup>

If the state had hoped that *Calabretta* would be limited to nonconsensual, in-home strip searches, *Camreta v. Greene* dashed that hope.<sup>166</sup> In *Camreta*, investigators informed the Oregon Department of Human Services that Nimrod Greene was having unsupervised contact with his daughters K.G. and S.G., despite having recently been released on child molestation charges.<sup>167</sup> Three days later, caseworker Camreta interviewed S.G. at her school without notifying her mother or obtaining a warrant.<sup>168</sup> Camreta, with Deputy Sheriff Alford in tow, interviewed S.G. in a private office at the elementary school for over two hours.<sup>169</sup>

The Ninth Circuit began by rejecting the argument that *Calabretta* was limited to in-home investigations.<sup>170</sup> The court held that *T.L.O.* should be limited only to searches and seizures conducted by teachers and administrators in the school environment, in order to “spare teachers and administrators the necessity of schooling

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161. *Id.* at 820 (quoting *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993)).

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. While the opinion provides valuable insight into the opinion of the Ninth Circuit, the opinion itself was vacated as moot by the Supreme Court last term. *Camreta*, 131 S. Ct. at 2027–28.

167. *Greene v. Camreta*, 588 F.3d, 1011, 1016 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

168. *Id.* at 1016–17.

169. *Id.* at 1017.

170. *Id.* at 1023.

themselves in the niceties of probable cause.”<sup>171</sup> Second, the court found that the involvement of Deputy Sheriff Alford in the search violated the special needs principle that the search be conducted absent the “presence of law enforcement objectives.”<sup>172</sup> Specifically, the ongoing investigation of S.G.’s father, coupled with Oregon regulations that require cooperation between social workers and law enforcement, created significant entanglement between the objective of protecting the general welfare of the child and the goal of obtaining evidence in a criminal investigation.<sup>173</sup> As the court concluded, “At least where there is . . . direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim, we simply cannot say, as a matter of law, that she was seized for some ‘special need[], beyond the normal need for law enforcement.’ ”<sup>174</sup>

### 3. The Second Circuit

In *Tenenbaum v. Williams*, New York City caseworkers, responding to a kindergarten teacher’s report that her student Sarah was abused, interviewed Sarah’s parents and performed a partial physical inspection of their children, which yielded no information supporting the abuse allegation.<sup>175</sup> After an unsuccessful attempt to interview Sarah at her school, caseworkers removed Sarah from her classroom without a warrant and without parental consent and took her to the hospital to test for sexual abuse.<sup>176</sup>

The Second Circuit began its analysis by addressing the competing interests of the parents, the child, and the state. The Second Circuit conceded that the state had “a profound interest in the welfare of the child.”<sup>177</sup> Nevertheless, the court recognized the fundamental right of parents to raise their children free from the intrusion of the state.<sup>178</sup> Despite these profound interests, however, the court stated that “[w]hen child abuse is asserted, the child’s welfare predominates over other interests of her parents and the State.”<sup>179</sup> The court adopted the Tenth Circuit’s rationale in *Franz*,

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171. *Id.* at 1024 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985)).

172. *Id.* at 1027.

173. *Id.* at 1027–28.

174. *Id.* at 1030 (quoting *Ferguson*, 532 U.S. at 74 n.7).

175. *Tenenbaum v. Williams*, 193 F.3d 581, 588–89 (2d Cir. 1999).

176. *Id.* at 591.

177. *Id.* at 593–94.

178. *Id.* at 593 (citations omitted).

179. *Id.* at 595.

that the multifaceted interests of the child include the interest to be free from not only physical abuse but also unwarranted assaults from the state against the child's "psychological well-being, autonomy, and relationship to the family."<sup>180</sup>

Despite balancing the competing interests in this case, the Second Circuit refused to apply the special needs doctrine. The court found specific utility in requiring the state to seek judicial authorization, which "makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State."<sup>181</sup> However, because the court never definitively stated whether the state is bound by special needs or traditional Fourth Amendment standards, the amount of information required for a grant of judicial authorization is not entirely clear.<sup>182</sup> Furthermore, the court found that the state had both probable cause to believe that Sarah was in danger and had satisfied the special needs reasonableness test, thus making a definitive statement on the matter irrelevant.<sup>183</sup>

#### 4. The Fifth Circuit

In *Roe v. Texas Department of Protective and Regulatory Services*, the Fifth Circuit became the last circuit to address the special needs question, although it did not explicitly endorse a position. In the summer of 1999, the Texas CPS agency received a tip that Jackie Roe was acting inappropriately at a day camp, which was viewed as a sign of physical abuse.<sup>184</sup> CPS agent Woods visited Jackie's home and, after discussing the matter with Jackie's mother, asked Mrs. Roe to remove Jackie's clothes so that she could look for bruises and photograph Jackie.<sup>185</sup>

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180. *Id.* (quoting *Franz v. Lytle*, 997 F.2d 784, 792–93 (10th Cir. 1993)).

181. *Id.* at 604.

182. *See id.* at 601–05 (declining to categorically decide whether the traditional or special needs standard applies).

183. *Id.* at 604. The court also argued that because the case involved the safety of the child, the exigent circumstances doctrine, which authorizes police to step in without probable cause or a warrant if a person of reasonable caution would believe the individual is in imminent harm, would justify the state's actions. *Id.* at 604–05.

184. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 398 (5th Cir. 2002) (where the report stated that Jackie was touching herself and other children, among other acts, while naked).

185. *Id.* at 398–99. The photographs taken by Woods and Wood's requirement that Mrs. Roe participate in the process are more probing than the above description provides. For a more detailed description of the nude body inspection, see *id.*

The Fifth Circuit, limiting its inquiry to the nude body search, held that the special needs doctrine did not apply to strip searches.<sup>186</sup> To reach this conclusion, the court noted that while none of the Supreme Court's special needs cases "involved strip searches or nudity, the [C]ourt has long held that citizens have an especially strong expectation of privacy in their homes."<sup>187</sup> Interestingly, despite refusing to endorse a position on the issue of special needs, the Fifth Circuit's opinion included the most detailed discussion of Supreme Court special needs precedent.

The Fifth Circuit's opinion focused on three Supreme Court cases, *Wyman*, *Griffin*, and *Ferguson*. Unlike the Ninth Circuit, which explicitly rejected *Wyman*'s applicability, the Fifth Circuit recognized that the Court in *Wyman* applied a "general reasonableness test rather than requiring a warrant and probable cause" in the home searches of welfare recipients but held that this "general reasonableness test" was dictum.<sup>188</sup> The Fifth Circuit found *Griffin* to be equally unsupportive of the state, as the special need in that case was supported primarily because probationers "waive many of their privacy rights and have a much lower subjective expectation of privacy in the home."<sup>189</sup> The Fifth Circuit recognized that "[t]he court has never upheld a 'special needs' search where the person's expectation of privacy was as strong as Jackie's interest in bodily privacy."<sup>190</sup> Finally, even if the search itself did not involve heightened privacy interests, the entanglement of the Texas CPS agency regulations with law enforcement undercuts the holding in *Ferguson* that special needs can only be applied where the need is "divorced from the state's general interest in law enforcement."<sup>191</sup>

The wavering of the Second and Fifth Circuits has created a considerable amount of confusion in the lower courts as to what standard binds child abuse investigations, specifically those involving forced home entries.<sup>192</sup> What will happen when the lower courts

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186. *Id.* at 407–08. The court found that the initial entry into the home and interview were consented to and thus were not subject to review. *Id.* at 401.

187. *Id.* at 404–05.

188. *Id.* at 405.

189. *Id.*

190. *Id.* at 406.

191. *Id.* (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001)).

192. See *Martin v. Tex. Dep't of Protective & Regulatory Servs.*, 405 F. Supp. 2d 775, 791 (S.D. Tex. 2005) ("Because the Fifth Circuit has not chosen which standard to apply, this court will analyze the record under both standards."); *Pezzenti v. Capaldo*, No. 3:03CV419(MRK), 2004 WL 2377241, at \*4 (D. Conn. Sept. 23, 2004) ("The Second Circuit has declined to delineate the precise analytical framework for determining when removal of a minor child 'of whom abuse is

inevitably must decide a case where a search would be reasonable under the special needs doctrine but would not be supported by probable cause? While the circuits are concerned about the intrusiveness of the search and the entanglement of law enforcement, it is possible the circuits will rule in favor of special needs for less intrusive home or school inspections by caseworkers who have no involvement with the police. The confusion in the Second and Fifth Circuits shows potential overlap between the seemingly split circuits.

### *C. The Seventh Circuit's Jurisdictional Analysis*

Sixteen years after *Darryl H.*, the Seventh Circuit backtracked on the expansiveness of its decision by adding a jurisdictional element in *Doe v. Heck*. For purposes of this Section, the term “jurisdiction” and the phrase “jurisdictional element” refer to the geographic location in which CPS performed a search. This Section does not use them, as the courts commonly use them, to determine or limit the realm of cases within a court’s authority. Thus, the “jurisdictional inquiry” added by the Seventh Circuit refers to the *state’s* authority to perform a search in a given arena.

In the fall of 1998, the Bureau of Milwaukee Child Welfare (“MCW”) received reports that Troy Bond, the principal of Greendale Academy, a private school, had spanked two students, including John Doe Jr.<sup>193</sup> MCW caseworkers traveled to Greendale Academy to interview John Doe Jr. but did not contact the parents or the school prior to the interview.<sup>194</sup> When Greendale Academy officials refused to allow MCW to interview John Doe Jr. without a court order, the caseworkers brought the police to force the school to allow the interview.<sup>195</sup>

The Seventh Circuit began by noting the distinct difference between searches conducted on private property and searches conducted on public property.<sup>196</sup> “A warrantless search or seizure conducted on private property is presumptively unreasonable” regardless of whether the search was administrative or criminal.<sup>197</sup> The Seventh Circuit equated the rights of students in a private school

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suspected’ is justified.”); *Taylor v. Evans*, 72 F. Supp. 2d 298, 310 (S.D.N.Y. 1999) (“[I]t is unclear under what circumstances a removal would violate the Fourth Amendment.”).

193. *Doe v. Heck*, 327 F.3d 492, 499–500, 502 (7th Cir. 2003).

194. *Id.* at 502.

195. *Id.* at 503.

196. *Id.* at 511 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971)).

197. *Id.* (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312–13 (1978)).

to the rights they have at home, because when parents enroll their children in private schools, “the teachers and administrators . . . stand *in loco parentis* over the children entrusted to them.”<sup>198</sup> While the state did not ask for the special needs doctrine to apply, the Seventh Circuit noted that the private/public distinction would have made the argument baseless, because requiring some form of a warrant before a private school search occurs preserves the constitutional rights of the child, parents, and the private school.<sup>199</sup>

In *Michael C. v. Gresbach*, caseworker Gresbach, armed with an allegation that two students were abused by their parents, went to the Good Hope Christian Academy (“Good Hope”) to interview Ian and his nine-year-old stepsister Alexis.<sup>200</sup> Good Hope Principal Reetz let Gresbach interview the two children in private, believing the law required her to do so.<sup>201</sup> Gresbach interviewed the children in Principal Reetz’s office before conducting a partial strip search of the children.<sup>202</sup>

In *Gresbach*, the Seventh Circuit expounded on the *in loco parentis* argument it raised in *Heck*. Specifically, the court addressed the argument the caseworker advanced, that she had the consent of the private school principal.<sup>203</sup> The court disagreed, finding that although the principal consented to the interviews, she at no time authorized a physical body search.<sup>204</sup> Interestingly, the opinion seems more grounded in the school’s role *in loco parentis* than in the subjective interests of privacy exhibited in the parents’ choice to enroll their children in private school. The *Gresbach* opinion implies that had Principal Reetz consented to the physical examination as well, the court would have likely found in favor of Gresbach, regardless of the parents’ heightened privacy interests.<sup>205</sup>

#### IV. FINDING COMMON GROUND AND RECONCILABLE DIFFERENCES

Between the complexity of the three competing interests of the child, parents, and state in child abuse investigations and the “lack of guidance from the Supreme Court,” it is easy to understand why the

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198. *Id.* at 512 (quoting *Vernonia Sch. Dist 47J v. Acton*, 515 U.S. 646, 654–55 (1995)).

199. *Id.* at 514.

200. *Michael C. v. Gresbach*, 526 F.3d 1008, 1011–12 (7th Cir. 2008).

201. *Id.*

202. *Id.*

203. *Id.* at 1015.

204. *Id.* at 1015–16.

205. *See id.*



special needs doctrine has created “confusion in the lower courts.”<sup>206</sup> However, a close examination of the perceived circuit split produces a different interpretation: that the circuits are not as divided as they appear. In fact, by examining the similarities in the circuits’ logic and the factual differences presented in each case, this Part argues that the circuits are united in their application of the special needs doctrine.

This Part looks at how the courts handled each element of the special needs doctrine. Section A examines the factual difference that causes the primary divisions between the federal circuits: the role of law enforcement in a search. Section B shows how the federal circuits largely agree on the interests involved in the cases and that the variations exist largely due to the intrusiveness of the search. Section C examines how the location of the search creates variations between cases with similarly intrusive searches. As this Part reveals, the primary concern among all of the circuits is not whether special needs applies to child abuse investigations but rather under what circumstances an investigation will satisfy the doctrine. Understanding the circuits’ primary focus, therefore, illustrates how these opinions can be reconciled into a united approach, drawing from shared legal principles.

#### *A. Who Is Investigating and How?*

When CPS agents conduct the investigations alone, the circuits have consistently applied the special needs doctrine. The first principle of applying the special needs doctrine is to consider whether the situation involves “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>207</sup> The circuits applying the special needs doctrine focus on the difficulty of a child abuse investigation and spend less time on the “normal need for law enforcement.” The circuits rejecting special needs focus almost exclusively on the “normal need for law enforcement” and spend less time on the difficulty of a child abuse investigation. The Seventh Circuit lists the challenges of child abuse investigations, including: a short time frame to remove a child from a dangerous home, a child’s inability to admit to the abuse, and that the only way to investigate an

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206. Primus, *supra* note 38, at 300.

207. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment).

abuse case is through the victim and alleged perpetrator themselves.<sup>208</sup> Statistics validate the court's concern that child abuse victims will not be able to speak for themselves. In 2009, over three-quarters of all child abuse victims were under the age of eleven, and more than a third of all victims were under the age of four.<sup>209</sup> While the Seventh Circuit realized that a successful child abuse investigation would likely lead to criminal charges, that fact is secondary to protecting the child.<sup>210</sup>

Child abuse investigations are certainly difficult, supporting the special needs circuits' position. However, CPS often conducts these investigations with a strong reliance on local law enforcement or with the purpose of reporting child abusers to the police. This supports the rejecting circuits' position. As the Fifth Circuit noted, all of the special needs circuits decided their cases prior to the Supreme Court's guidance in *Ferguson*, which rejected the special needs doctrine when the police are intimately involved.<sup>211</sup> When an officer arrives at the scene, courts become less sympathetic to arguments that civil investigators and teachers are not privy to the "niceties of probable cause," because they are working with individuals who are.<sup>212</sup>

The line becomes more difficult to see when, as was the case in *Texas Department of Protective and Regulatory Services*, law enforcement is not involved in the investigation but is a part of the child abuse investigation regulations.<sup>213</sup> For example, the Fifth Circuit referenced Texas laws that required social services caseworkers to report all of their child investigation reports to police and to conduct the investigations jointly.<sup>214</sup> If the law merely required the caseworker to inform the police of the investigation, would that be too much entanglement with law enforcement? What if the caseworker merely asked the police for evidence, records, and other information to corroborate or dismiss an allegation but did not seek any further assistance? While the dual purposes principle is an important element of the special needs doctrine, the line between the two goals of a child abuse investigation is still not clear.

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208. *Darryl H v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986).

209. *CHILD MALTREATMENT*, *supra* note 83, at 22.

210. *Darryl H.*, 801 F.2d at 902.

211. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406 (5th Cir. 2002).

212. *See T.L.O.*, 469 U.S. at 343.

213. *Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d at 406–07.

214. *Id.* at 407.

Although this theoretical debate is fascinating, and the uncertainty of where the *Ferguson* entanglement line is poses real consequences, the circuits are in essence facing an entirely different problem. While the Fifth Circuit correctly noted that the Fourth, Seventh, and Tenth Circuits' special needs cases were decided prior to *Ferguson*,<sup>215</sup> none of these cases would have implicated *Ferguson* in the first place. Specifically, none of these cases involved law enforcement or had policies that required cooperation with law enforcement. *Darryl H.* involved interviews and searches conducted only by caseworkers in schools.<sup>216</sup> The same was true in *Bagan*.<sup>217</sup> In *Wildauer*, CPS conducted the searches at a foster home and involved only caseworkers and nurses.<sup>218</sup> As further proof that these circuits actually are aware of the rationale that the Supreme Court applied later in *Ferguson*, the Tenth Circuit had previously rejected the application of the special needs doctrine to searches relying on law enforcement in *Franz*.<sup>219</sup> That the Tenth Circuit did not overrule *Franz* in *Bagan* bolsters the *Franz* example.<sup>220</sup>

Contrast those cases with the circuits rejecting the special needs doctrine. In both *Good* and *Calabretta*, the caseworkers were only allowed access to the homes as a result of the coercive presence of an armed officer.<sup>221</sup> *Camreta* involved an interview conducted in the presence of a deputy sheriff.<sup>222</sup> The Ninth Circuit was "convinced that law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the 'special needs' doctrine."<sup>223</sup> Finally, in *Texas Department of Protective and Regulatory Services*, while law enforcement was not directly involved, the fact that Texas laws require social services caseworkers to conduct the investigations jointly with law enforcement created a significant entanglement problem consistent with the entanglement found in *Ferguson*.<sup>224</sup>

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215. *Id.* at 406.

216. *Darryl H v. Coler.*, 801 F.2d 893, 895, 905 (7th Cir. 1986).

217. *Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994).

218. *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 370–71 (4th Cir. 1993).

219. *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993).

220. *See Bagan*, 41 F.3d 571 (where the court did not overrule *Franz*).

221. *Calabretta v. Floyd*, 189 F.3d 808, 810 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089–90 (3d Cir. 1989).

222. *Greene v. Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011).

223. *Id.* at 1027.

224. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406–07 (5th Cir. 2002).

*B. Circuit Agreement over Individual Interest*

More than the mere involvement of law enforcement distinguishes these cases from one another. How the courts weigh the interests involved furthers the perception of a circuit split. As a result, the federal circuit division could be based less on how the courts weigh the factors in the abstract and more on how the intrusiveness of the search and/or seizure in a given case alters each interest's weight. This Section, therefore, argues that the circuit divisions are likely the product of the varying intrusiveness of the searches involved. This Section demonstrates this by examining the interests of the child and the parent separately.

*1. The Child*

Beginning at the broadest level, the Seventh Circuit in *Darryl H.* recognized significant privacy and personal autonomy interests for both the child and the parents on the one side and a compelling state interest in protecting the welfare of the child on the other side.<sup>225</sup> Likewise, the Second Circuit in *Tenenbaum* recognized these same competing interests and accorded them the same weight as the interests in *Darryl H.*<sup>226</sup> Although both circuits found in favor of the state, the Seventh Circuit believed that the state's interest was greater than the child's and parents' interests, while the Second Circuit held that "the child's welfare predominates over other interests of her parents and the State."<sup>227</sup> For the Second Circuit, this meant that the child's interest included both a protection from abuse and from the psychological and personal assaults that result from the state's search.

One of the most troubling elements of the Second Circuit's statement that the welfare of the child should triumph over the interests of the state and the parent is that the state can seemingly only apply the test *ex post*, but it must act *ex ante*. It is easy to criticize the state for each investigation that turns out to be fruitless and thus needlessly intrudes in the life of an innocent child, especially given that more than three-quarters of child abuse investigations are fruitless.<sup>228</sup> However, there are still 702,000 victims of child abuse

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225. *Darryl H. v. Coler*, 801 F.2d 893, 901–902 (7th Cir. 1986).

226. *Tenenbaum v. Williams*, 193 F.3d 581, 593–94 (2d Cir. 1999).

227. *Id.* at 595.

228. CHILD MALTREATMENT, *supra* note 83, at 8.

each year.<sup>229</sup> From the state's perspective, every child not investigated is another child, like Kessler Wilkinson,<sup>230</sup> who falls through the cracks. One thing to consider, however, is whether the standard Fourth Amendment justification should apply to child abuse investigations. Courts commonly apply the exclusionary rule under the belief that it is better that one criminal gets away with his crime if it discourages the state from curbing societal liberty through unlawful searches. However, should this same rationale apply when the cost of upholding liberty is a child's injury or death?

Regardless of the ex post/ex ante conundrum raised above, the rejecting circuits have all considered to some extent the physical well-being of the child as a factor both for the state and for the child in balancing the interests. For example, all of the rejecting circuits acknowledge the exigent circumstances exception when they weigh the child's interest in the special needs analysis.<sup>231</sup> While it is an entirely separate exception to the Fourth Amendment, the circuits' reference to exigent circumstances demonstrates the difficulty of considering the child's interest as either solely for or against the state's interest.<sup>232</sup>

The degree of the state's intrusion upon the child's privacy rights may in fact be driving these circuits in their weighing of the child's interest. Considering the degree of intrusion requires a factual inquiry into the precise search measures the state took in a given case. In both *Bagan* and *Tenenbaum*, cases that found no state violation of the Fourth Amendment, a trained medical expert conducted the challenged search in the privacy of a hospital room.<sup>233</sup> Likewise, in *Wildauer*, the record shows that trained nurses limited their examination of the children to investigating the children's "medical

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229. *Id.* at 22.

230. *See supra* notes 1–6 and accompanying text.

231. *See* *Greene v. Camreta*, 588 F.3d 1011, 1027, 1030 n.17 (9th Cir. 2009), *vacated in part*, 131 S. Ct. 2020 (2011); *Michael C. v. Gresbach*, 526 F.3d 1008, 1018 (7th Cir. 2008); *Doe v. Heck*, 327 F.3d 492, 511 (7th Cir. 2003) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474–75 (1971)); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 405 n.12 (5th Cir. 2002) (quoting *Coolidge*, 403 U.S. at 474–75); *Tenenbaum*, 193 F.3d at 604; *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092–93 (3d Cir. 1989); *Darryl H. v. Coler*, 801 F.2d 893, 903 n.8 (7th Cir. 1986).

232. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 377–78 (Stevens, J., concurring in part and dissenting in part) (raising significant questions about how the seriousness of the infraction should be evaluated in light of the special needs doctrine). This Note does not dismiss Justice Stevens's concern. Rather, this Note suggests that the agreement between the circuits on how serious child abuse is, specifically the state's interests in combating the problem, would likely satisfy Justice Stevens's concern that special needs be reserved for major infractions.

233. *Tenenbaum*, 193 F.3d at 591; *Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994).

histories, medications, and schooling.”<sup>234</sup> Thus, a primary motivating factor for the courts’ decisions is the increased dignitary value that comes from who conducts the search and where and how it is conducted.<sup>235</sup> While a strip search is intrusive, a judge is likely less concerned when a doctor, trained to protect the victim’s dignity, conducts the search in a hospital. The dignitary value of a doctor’s examination is best seen when contrasted with *Franz* and *Texas Department of Protective and Regulatory Services*. In both cases, an armed police officer, who lacked specific training in how to properly conduct a strip search, not only conducted the strip search but also photographed the nude child.<sup>236</sup> Given the varying degrees of intrusiveness a search of a child can have, it is easy to understand the varying decisions among the circuits.

## 2. The Parents

Parental interests are more difficult to measure because they may be both the guardian and possible suspect. While all of the circuits seem to agree that the parents have a substantial interest in a child abuse investigation, it is unclear how courts should view those rights in light of the Supreme Court’s special needs doctrine. There are two ways of interpreting *T.L.O.*’s individual interest versus state interest balancing test.<sup>237</sup> One interpretation construes “individual” broadly, requiring consideration of the interests of everyone implicated in the investigation. The second interpretation construes “individual” as limited solely to those searched.

Defining “individual” is crucial in examining the rights of the parents in a search. Either view implicates the parents’ interests in a home search that penetrates the home environment, questions their ability to raise their children, and undermines the parents’ authority in front of their children. The analysis changes when the court considers school searches conducted outside the parents’ presence, where the parents’ rights are more attenuated. As the Supreme Court explained in *Vernonia School District*, “Today, of course, the fact that a child’s parents refuse to authorize a public school search of the child

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234. *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 371 (4th Cir. 1993).

235. For a discussion of how the location of the search played a part in creating an apparently divided court, see *infra* Part IV.C. (discussing the level of attention that the location of a search should garner).

236. *Tex. Dep’t of Protective & Regulatory Servs.*, 299 F.3d at 398; *Franz v. Lytle*, 997 F.2d 784, 785 (10th Cir. 1993).

237. *T.L.O.*, 469 U.S. at 337.

. . . is of little constitutional moment.”<sup>238</sup> Does that logic change in child abuse investigations because the investigation implicates the parents and begins to wander into the territory of family management, which traditionally falls outside the boundaries of state control? Or should the court consider parents’ rights at all, given that the parents’ interests may directly conflict with the well-being of the child? Or should the court apportion weight to the parents’ interests based on where the search occurs? The criticism of the Court’s reliance on balancing tests becomes clear in asking these questions, as the weight of the parents’ interests turns on “normative judgments rather than objective conclusions about the merits of the evidence” based almost entirely on “values-laden characterization[s]” of the parents’ interests.<sup>239</sup>

Setting aside the jurisdictional approach of the Seventh Circuit and its discussion of the parents’ interest in a private school, the nature of the search involved once again explains the circuit split. In a narrow reading of *T.L.O.*, one context in which the court could consider the rights of the parents is when officials coerce the parents into participating in the search of their child. It is true that parents who hear that their child has been strip searched will certainly be upset, if not furious.<sup>240</sup> However, parents will likely have an even stronger reaction when they directly observe the strip search or, even worse, when officials require the parents to help perform the strip search.<sup>241</sup> In *Calabretta*, the Ninth Circuit specifically noted that the mother’s rights were substantially violated when the police “forc[ed] the mother to pull the child’s pants down,” invading “the mother’s dignity and authority in relation to her own children in her own home.”<sup>242</sup>

### *C. How the Location of the Search Explains the “Split”*

The Supreme Court has been clear that a person’s home is entitled to greater protection than other locations. As the Court explained in *Boyd v. United States*, the rigors of traditional Fourth Amendment protection “appl[y] to all invasions on the part of the

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238. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 n.1 (1995).

239. *Coleman*, *supra* note 6, at 531–32.

240. *See Darryl H. v. Coler*, 801 F.2d 893, 897, 906 (7th Cir. 1986).

241. *See Calabretta v. Floyd*, 189 F.3d 808, 811–12, 820 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1090 (3rd Cir. 1989).

242. *Calabretta*, 189 F.3d at 820.

government and its employees of the sanctity of a man's home and the privacies of life."<sup>243</sup> The Court reemphasized this point in *Lawrence v. Texas* when it wrote, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."<sup>244</sup> While *Lawrence* stood for the existence of liberty not confined to "spatial bounds," the Court recognized strong and reasonable expectations of privacy within the home.<sup>245</sup> It is, therefore, not surprising to see location play a prominent role in the application of the special needs doctrine.

Given the prominence of location in each circuit's analysis, the circuits are not divided but rather each circuit is merely giving the appropriate attention to where the search occurred. Viewed less as an ideological difference and more as a factor each circuit applies equally, the picture of the current state of the special needs doctrine is one of unity and not division. In those cases where the Seventh and Tenth Circuits applied the special needs doctrine, officials performed the search initially at a public school, with one instance followed up by a hospital examination.<sup>246</sup> Even though the Second Circuit did not apply the special needs doctrine, the court found in favor of the state when the seizure happened at a public school and the examination occurred at a hospital.<sup>247</sup> These cases thus stand in contrast with the Second Circuit's rejection of the special needs doctrine where the searches occurred primarily in the home.<sup>248</sup>

When the court is asked to balance the interests of the state and the individual, the analysis turns on the weight the court gives each interest. Location plays a major role in determining how much weight the court will give to a person's expectations of privacy. One way of understanding this analysis is to consider the individual's interests on a spectrum, in which the weight of the privacy interest is based on the location where the act occurs. In order to weigh an individual's privacy interests properly, the court must first identify where on the privacy spectrum the individual's interest falls. On one

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243. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

244. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

245. *Id.*

246. *Darryl H. v. Coler*, 801 F.2d 893, 897, 906 (7th Cir. 1986); *see Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994).

247. *Tenenbaum v. Williams*, 193 F.3d 581, 591 (2d Cir. 1999).

248. *Calabretta v. Floyd*, 189 F.3d 808, 811–12 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1090 (3d Cir. 1989); *see also Franz v. Lytle*, 997 F.2d 784, 789 (10th Cir. 1993). The situation in *Franz* could be compared to a parent placing a child into a private school.



side of the spectrum is complete privacy, while the other side of the spectrum is complete exposure. The court could place every location on the spectrum based on the level of privacy the location provides. The closer a location approaches the privacy end of the spectrum, the greater the weight the court should give the individual's interest. As the location becomes more public, the weight accorded to the privacy expectations dissipates (although, at least with regard to personal searches and seizures, it never fully disappears).<sup>249</sup> So when the court faces searches conducted in the home, a location close to the privacy end of the spectrum, the court will heavily weigh an individual's "strong expectation of privacy."<sup>250</sup> When the individual is in a public school, the individual has "a lesser expectation of privacy," placing the individual closer to the open exposure end of the spectrum.<sup>251</sup> That the rejecting circuits held searches inside the home unconstitutional while the applying circuits found public school searches reasonable is, therefore, not an ideological difference but a difference in overall weight of the interests as decided in part by location.

The Seventh Circuit's jurisdictional analysis provides an interesting look into the geographic considerations utilized in Fourth Amendment jurisprudence. In *Heck*, the Seventh Circuit treated the student's right the same at home and at private school because "when parents place minor children in private schools for their education, '[school officials] stand *in loco parentis* over the children entrusted to them.'" <sup>252</sup> Parents expect, by enrolling in a private school, that their

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249. See, e.g., *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (recognizing that privacy rights are diminished but not eliminated in public places like public schools and airports); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (recognizing that, although diminished, drivers of automobiles still have some privacy interest in their cars); *Katz v. United States* 389 U.S. 347, 353 (1967) (recognizing privacy interests in a public phone booth).

250. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 404–05 (5th Cir. 2002); see also *Lawrence*, 539 U.S. at 562 (noting that due process protects a party's liberty interest, which includes protection from "unwanted intrusions" into the home).

251. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). While few Justices and scholars have gone as far to suggest it, we could place public schools on the extreme public end of the privacy spectrum. For example, Justice Thomas suggests a return to the *in loco parentis* rationale in support of authorizing most public school searches. Under Justice Thomas's approach, a school is authorized to conduct the same types of searches that a parent can because, through the process of school enrollment, the parent has voluntarily consented for a third party (the school) to conduct the search. The parents, through school board elections, are free to limit the school's authority. See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2655–57 (2009). (Thomas, J., concurring in part and dissenting in part) (arguing that placing public schools so far down the "public" side of the spectrum helps meet matters of "great concern to teachers, parents, and students").

252. *Doe v. Heck*, 327 F.3d 492, 522 (7th Cir. 2003) (quoting *Vernonia Sch. Dist.*, 515 U.S. at 654–55).

choice to remove their children from the supervision of the government will be respected and that their children will be protected from unwarranted government intrusions.<sup>253</sup>

Although the Seventh Circuit's argument is logical, this *in loco parentis* rationale creates three significant problems. First, it allows abusive parents to hinder a state investigation by placing their children in private schools.<sup>254</sup> This result directly contradicts the Second Circuit's statement that "[w]hen child abuse is asserted, the child's welfare predominates over other interests of her parents and the State."<sup>255</sup> Second, the distinction between public and private schools fails under a limited reading of *T.L.O.*, as the parents' subjective interest in an in-school search may be "of little constitutional moment."<sup>256</sup> Finally, the Seventh Circuit's public-private distinction creates an odd paradox: the government can more freely infringe upon the parents' rights when they place their children in the control of individuals bound by the Fourth Amendment. In *T.L.O.*, the Supreme Court specifically recognized that, although school searches are subject to the more lenient special needs doctrine, public school students nevertheless have a Fourth Amendment right against unreasonable searches and seizures.<sup>257</sup> The Seventh Circuit approach in *Heck* thus affords less protection to the rights of parents and children in public schools, where officials are bound by the Fourth Amendment, than it affords those attending private schools, where the teachers are free from constitutional confines.

While the Seventh Circuit's distinction between public and private schools may create some problems, the focus on these geographic considerations shows that the Seventh Circuit might not be an entirely separate circuit split at all. While the Ninth Circuit in *Camreta* classified the Seventh Circuit's jurisdictional analysis as a third fissure in the "circuit split,"<sup>258</sup> the Seventh Circuit was not creating a new doctrine but rather applying the location analysis upon

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253. *Id.* at 523.

254. This threat is somewhat mitigated if the Seventh Circuit's *in loco parentis* rationale in *Gresbach* authorizes a private school to consent to a full investigation of its students inside the school. 526 F.3d 1008, 1015–16 (7th Cir. 2008).

255. *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999). *See also* *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986) (noting that the state's interest in preventing child abuse is "extraordinarily weighty").

256. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 n.1 (1995) (O'Connor, J., dissenting).

257. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

258. *Greene v. Camreta*, 588 F.3d 1011, 1026 n.11 (9th Cir. 2009) (citing *Gresbach*, 526 F.3d at 1015).

which the other circuits have always relied.<sup>259</sup> The Seventh Circuit's jurisdictional analysis only looks different because it was the only court asked to consider where on the spectrum a private school falls. Therefore, because the privacy interest in a private school was not as clear-cut as the interest in a home or public school, the Seventh Circuit had to examine the privacy expectations a child holds inside a private school, determine where on the spectrum private schools fall, and then weigh accordingly.

## V. CREATING A UNIFIED APPROACH

The opinions of the circuits can be reconciled under a four-prong balancing test. These four elements include: where the child is searched or seized, the nature of the search or seizure, the degree of law enforcement involvement, and the stringency of the regulations curbing the discretion of the individual performing the search or seizure. Clearly defining the elements of the test allows the state to fulfill its duty to protect its children from child abuse without fear that the agency is exceeding the limits of its authority.

### *A. Location*

Clearly defining the special needs doctrine provides state CPS agencies with a necessary tool to use in searches in public. Consider the location element. It is easy to see how the state is left with little policy guidance on the limits of its authority. When a federal circuit rules narrowly on the applicability of the special needs doctrine in one home-search case, the circuit appears to rule against the doctrine's applicability in all child abuse investigations. This shuts off an entire avenue through which the state can help combat child abuse. Likewise, when the Fourth Circuit states that the special needs doctrine applies to a foster care search, an area where the rights of the guardian are considerably lower, it fails to provide a ceiling for just how far the special needs doctrine extends. As a result, the state is still left searching for the constitutional guidelines by which it can make appropriate policy choices.

To correct this, the circuits should clearly define the spatial boundaries within which the special needs doctrine applies. The courts should treat searches made inside the home differently than searches made elsewhere. The courts should and likely will continue only to

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259. *Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994); *Darryl H.*, 801 F.2d at 897, 906.

allow in-home searches and seizures based on exigent circumstances, a doctrine entirely separate from the special needs doctrine. Absent exigent circumstances, the court should generally require a warrant and probable cause for nonconsensual in-home investigations.

The location element is necessary to consider not only because of the element's ties to personal privacy and the subjective expectations that exist within the home but also because of the heightened interests of the parents in the search.<sup>260</sup> Unlike the school setting, where the parents are often not present, in-home searches and seizures often require parental participation.<sup>261</sup> For example, in *Calabretta*, the court recognized that the officer ordering Mrs. Calabretta to participate in the strip search humiliated her in front of her children.<sup>262</sup> But even if the parents are not forced to participate in the search, the very presence of the state in their home has considerable consequences. Because parents are often powerless to prevent the search once the state invades the home, the state inevitably undermines the parents' authority over their home, especially in front of their children. While parents may feel their authority is similarly undermined when the search is conducted on school grounds, by placing their children in school, the parents temporarily cede some of their authority over their children while the children engage in school activities.

While the rejecting circuits' special needs analysis appears to reject the doctrine's applicability in general, all these courts have really found is that the state, in conducting an in-home search, has failed to meet the demands of the special needs doctrine. Otherwise, the circuits would not have spent the time fleshing out the interests of the parents and the child in the investigation itself. Viewing the cases in this light, it is easier to understand the rejecting circuits' logic. Although these circuits acknowledge that the state has a considerable interest, once the state enters the home, the child's and parents' interests increase in weight considerably and outweigh the state's interest. While in a public school, the child's right to personal autonomy is certainly high; in the home, that interest exists alongside the child's right to feel safe and secure in her home. Given the heightened rights of the parents and child inside the home, it is hard

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260. See *supra* notes 187–90, 196–99 and accompanying text.

261. See *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808, 811–12 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089–90 (3d Cir. 1989).

262. *Calabretta*, 189 F.3d at 820.

to imagine a circumstance, outside of exigent circumstances, where the state's interest will ever rise above the heightened parent-child interests under a proper special needs analysis.

The same should be true in private schools. A private school's *in loco parentis* authority over its students is a compelling factor in this scenario because, as the Seventh Circuit recognized, by placing their children in a private school, parents expect that the state will respect their choice to remove their children from the supervision of the government and their children will be protected from unwarranted government intrusions.<sup>263</sup> By interfering with the private school, the state is interfering with the parents' choice, thereby implicating a higher level of individual rights that the state must overcome. The role private schools play in the special needs doctrine could potentially raise a true circuit split in the future, primarily because it is not clear whether the other federal circuits will weigh the individual privacy interests that exist in private schools as heavily as the Seventh Circuit.

### *B. Intrusiveness of the Investigation*

The second prong of the analysis should focus on the intrusiveness of the search or seizure. When balancing the rights of the individual against the interest of the state, courts should view the weight accorded to the rights of the individuals in light of the intrusiveness of the government's investigation and the information on which the government bases its suspicion. This prong will inevitably require the most consideration from the courts. Understanding how the courts can apply this prong requires a return to the spectrum discussion in Part IV.C.

Imagine once again a spectrum, only this time the spectrum goes from the least intrusive act to the most intrusive act. All along the spectrum, one can place different investigatory procedures. The spectrum ranges from interviewing the child, as in *Bagan*,<sup>264</sup> to strip-searching, touching, and photographing the naked child, as in *Texas Department of Protective and Regulatory Services*.<sup>265</sup> As the investigatory technique moves further to the intrusive end of the

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263. *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003).

264. *Doe v. Bagan*, 41 F.3d 571, 574 (10th Cir. 1994).

265. *Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d at 398 (where the report stated that authorities were alerted of potential abuse when notified that the child was touching herself and other children, among other acts, while naked).

spectrum, the interests of the child and the parents become heightened and therefore deserve greater weight. As a result, the state's interest must be significantly higher to perform a strip search than it would be to ask a child a few questions. The state could demonstrate this heightened state interest through a short time window or highly credible evidence supporting the allegation. Since the test turns on the reasonableness of the search, a highly intrusive action requires considerable support in order for a court to find it reasonable.

Standard strip searches are the most difficult to place on the spectrum and have been where the greatest variations among the circuits exist. However, once again, it appears the circuits have begun the process of identifying the appropriate weight to give the individuals' privacy interest in the context of a strip search. Returning to the discussion in Part IV.B.1, when weighing the interests of the child, a judge is likely less concerned about a strip search when it is performed in a hospital by a doctor who is trained to protect the victim's dignity than when it is performed by a police officer, who may not have the requisite training or experience to minimize the trauma of the search.<sup>266</sup> The question then becomes: what about CPS agents and social workers? The courts should consider the training of the agent in conducting a strip search and the method employed by the agent. The more training and experience a caseworker has in conducting a strip search, the better prepared the caseworker is to conduct a strip search that will protect the child's dignity as best as the caseworker can.

The courts should also consider the information that prompted the CPS investigation. Given the requirement in *Redding* that highly intrusive searches require high state interests and a link between the suspicion and the specific intrusive search,<sup>267</sup> the courts should only allow strip searches when the search is specifically supported by credible information. This can also help limit the discretion of the CPS agent. For example, if an agent has several reports from family and neighbors that a child has been hit in the chest, the agent would have credible information to perform a partial strip search of the chest region, where the evidence specifically points, but would not be able to search any further. In *Bagan*, the CPS agent had specific evidence that the victim tested positive for chlamydia.<sup>268</sup> That information was

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266. *Id.* at 398; *Franz v. Lytle*, 997 F.2d 784, 785–86 (10th Cir. 1993).

267. *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642–43 (2009).

268. *Bagan*, 41 F.3d at 574.

both highly credible and specifically linked to the search requested by the CPS agent, a medical test for chlamydia. While *Bagan* was not a pure strip search case and while medical testing is viewed as less intrusive than CPS strip searches, the example shows that the lower courts can easily apply the *Redding* test to several different search and seizure techniques employed by the state.

One area that none of the circuits have fully taken into consideration is how the age of the child searched should factor into a special needs analysis. The Court in *T.L.O.* argued that when measuring the intrusiveness of the search, it must be viewed “in light of the age and sex” of the child.<sup>269</sup> Only the Ninth Circuit took age into partial consideration, recognizing that a three-year-old child would not appreciate the full affront of a nude search to an individual’s personal dignity and autonomy.<sup>270</sup> The Supreme Court and the lower courts, however, have not specified what role age plays in the consideration.<sup>271</sup> As Professor Steven Shatz observed, “It should be obvious that, in determining under what circumstances a strip search is permissible, whether the child is two or seven or seventeen is relevant.”<sup>272</sup> Professor Shatz continued to note:

The general characteristics of cognitive and moral growth associated with these stages, and relevant to the Fourth Amendment inquiry, are as follows . . . In terms of morality, young children are unable to operate by general rules, and their judgment is dominated by “moral realism,” an unquestioning response to demands of authority figures. School age children . . . [do not] derive their morality from adult demands, but rather, their morality finds its basis in social reciprocity. Adolescents . . . have progressed from a morality based on strict adherence to societal rules of equality to a mature morality based on internalized principles of justice.<sup>273</sup>

What Professor Shatz illustrates, and what the Ninth Circuit acknowledged, is that in determining the standard of reasonableness of a strip search, the courts must consider the psychological differences between a three-year-old, a seven-year-old, and a teenager. This is based not only on their ability to speak for themselves but also on the long-term psychological and personal dignity repercussions that come with strip searches.

Despite the areas that still need to be further developed by the Court, the federal circuits are, much as with the first prong, already

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269. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

270. *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

271. Steven Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 14 (1991).

272. *Id.*

273. *Id.* at 15–16.

impliedly applying this test. With the exception of *Camreta*, the prior cases demonstrate that the least intrusive searches (interviews, for example) will largely survive under special needs, while the most intrusive searches (photographed strip searches) will rarely, if ever, pass constitutional muster. The fact that many of the circuits agree with one another about the rights implicated in certain types of searches (specifically strip searches) and about the problems facing CPS agencies mitigates the confusion caused by the term “circuit split.” Thus, if the circuits were to adopt a unified approach based on the previous opinions across the circuits, the state would have a complete picture as to how the courts will view certain types of searches and seizures. As a result, the state would be adequately on notice about the individual interests implicated and thus adequately informed so as to make the appropriate policy choice on how to best conduct child abuse investigations in the future.

### *C. The Role of Law Enforcement*

The third prong should focus on the involvement of law enforcement. On this point, I agree with the Ninth Circuit that police officers should not be involved in conducting the search or seizure. Likewise, any requirement, like those implemented in Texas, that mandates an investigation of child abuse to be performed jointly with a criminal investigation should not be accorded special needs protections, based on the dual-purposes concern laid out in *Ferguson*. However, merely forwarding a case file to the police or working with the police on background information in support of the investigation should not implicate the dual-purposes trigger in *Ferguson*—as long as the police are not involved in the search itself.

The Ninth Circuit’s recognition of the involvement of law enforcement illustrated an important reason why clarifying the current state of the law is necessary. In recognizing that Oregon laws require joint coordination between CPS and law enforcement, the Ninth Circuit was quick to point out:

We do not mean to express any negative judgment concerning the wisdom of Oregon’s policy. It may well be that fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers—each, of course, governmental activity of the highest importance. But we do hold that state officials using such a policy cannot thereby forge



an exception to traditional Fourth Amendment protections for the criminal investigation of child sexual abuse, as they seek to do here.<sup>274</sup>

What the Ninth Circuit recognizes is that the choice for how to proceed in conducting child abuse investigations must be left to the state.<sup>275</sup>

However, a clear statement from the courts, that the involvement of law enforcement would be a dispositive factor in the special needs analysis, would give the state the opportunity to weigh the cost of involving the police appropriately. The state, like the Ninth Circuit recognized, can determine for itself if the benefits of working with law enforcement outweigh the costs of having to follow the traditional Fourth Amendment requirements. Allowing an imaginary circuit split to continue to exist only inhibits the state's ability to make that policy decision. Consider the variation already existing within the courts. The Seventh Circuit argues that a tightly constructed policy limiting the discretion of the caseworker is sufficient, while the Fifth Circuit states that the involvement of a concurrent criminal investigation bars special needs, while the Second Circuit refuses to define what case would or would not fit into the special needs doctrine. The only circuit that has attempted to define its special needs doctrinal position clearly is the Tenth Circuit, by establishing a clear line between *Franz* and *Bagan*. But even the Tenth Circuit could experience the uncertainty that is created in cases, like *Texas Department of Protective and Regulatory Services*, where the entanglement is not as clearly defined as the involvement in *Ferguson* or *Franz*.<sup>276</sup>

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274. *Greene v. Camreta*, 588 F.3d 1011, 1029 (9th Cir. 2009).

275. That is not to say that the state can define the constitutional limitations. To hold that position would run counter to the Supreme Court's position that constitutional rights do not turn on the reasonable beliefs of third parties. See *Morse v. Frederick*, 551 U.S. 393, 441 (2007) ("To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated. . . .").

276. Compare *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002) (where the search was conducted without a police officer but where "Texas law compels social workers to investigate allegations of sexual abuse" as well as requiring CPS to "deeply involve[] law enforcement in the investigation. CPS has a duty to notify law enforcement of any child abuse reports it receives."), with *Ferguson v. City of Charleston*, 532 U.S. 67, 72 (2001) (where hospitals were authorized to use "the threat of law enforcement intervention" to coerce patients into drug treatment, which the state admitted was "necessary"), and *Franz v. Lytle*, 997 F.2d 784, 785 (10th Cir. 1993) (where a police officer, not a social worker, conducted the search in question).

*D. CPS Regulations*

The final prong considers whether a state has specific guidelines limiting the discretion of the caseworker. These guidelines should recommend corroboration of allegations, where feasible, before any investigation of the child's person begins. The policy should also spell out specifically what constitutes an actionable allegation to prevent anonymous sources from triggering intrusive searches.

This prong is consistent with *Dewey*. There the Court held a warrantless search constitutional on the basis that the regulations were sufficiently strict so as to deny unbridled discretion to the inspector, thus serving as a "constitutionally adequate substitute for a warrant."<sup>277</sup> Similar to the intrusiveness prong discussed above, this prong will also ease the courts' concern that the government's action needlessly intrudes on the privacy and dignity of the child and the parents. Finally, having a clearly delineated policy makes it easier for the courts to evaluate the state's interest. If the regulations require corroboration of the allegation or a prior investigation before the agent can act, the agent would be able to provide more facts to bolster the state's interest in conducting the search.

While stringent regulations that prevent needlessly intrusive searches are certainly ideal, it is hard for the state to meet this goal when the circuits claim to be in disagreement with one another. This is essentially the reason why the term "circuit split" is so dangerous to CPS agencies. Child abuse is a large and pressing concern in the United States. It also poses several logistical nightmares that inhibit the states' ability to protect their children.<sup>278</sup> The circuits, by claiming to be divided on the basis of one or two circuit opinions, are leaving the states with an uncertain legal doctrine, inhibiting their ability to develop a clear system to combat child abuse. How can the courts expect a state to create a system that limits its agents' discretion but allows them the ability to conduct a quick and accurate investigation when the circuits fail to provide a clear definition of the state's boundaries?

By recognizing that the circuits are not divided, but rather that their opinions represent a consistent body of case law, the states are provided with a full range of cases on which they can base their policies. By viewing the circuits' decisions as one comprehensive body, the states can see both the upper and lower limits of their authority.

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277. *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

278. *See supra* Parts III and IV.

For example, if we looked at the cases collectively, the states would be aware that photographed strip searches, in-home searches, and searches involving police officers would likely require a warrant. Likewise, the states would also know that their agents could search foster care homes, conduct public school interviews, and authorize hospital examinations without warrants. By viewing these cases collectively, the states can weigh for themselves whether the decreased Fourth Amendment requirements are worth the cost of not involving law enforcement.

Whether the states decide to involve the police or conduct an in-home search is not important; rather, what is important is that the decision on how best to conduct an investigation be left to the states. That is not to say that the states should be entitled to complete discretion in this area. As previously stated, the interest should always be, primarily, in what is in the best interest of the child. However, it is often state CPS agencies, with their years of experience handling child abuse investigations, that are in the best position to know how best to conduct an investigation. A CPS agency might, in weighing the costs and benefits, determine that the assistance of the police is more valuable than the added cost of seeking a warrant. Likewise, the agency might find that a warrant would unduly hinder the speed of the investigation and thus limit its investigations to school interviews and medical examinations. In order for the states to make coherent policy decisions and weigh the costs discussed above, the states must have detailed information about what the Fourth Amendment requires from the states. With this complete test, examining search locations, intrusiveness, government discretion, and law enforcement involvement, the states would finally have the necessary information to establish comprehensive policies that will effectively reduce the necessary evils that come with child abuse investigations.

## VI. CONCLUSION

The stories of Kessler and Jochebed, as detailed in Part I, should serve as reminders of problems plaguing current child abuse investigations and of the traumatic consequences often borne by our nation's youngest citizens. While all of the involved actors—the state, the parents, and the child—have substantial competing interests, the difficulty of the issue should not prevent us from creating a comprehensive system through which our social services caseworkers can operate. The Second Circuit is correct that “[w]hen child abuse is asserted, the child’s welfare predominates over other interests of her

parents and the State.”<sup>279</sup> However, upholding the Second Circuit’s ideal is far from easy, as demonstrated by the confusion amongst the circuits.

Upon closer examination, however, the circuit courts’ approaches are not as divergent as they initially appear. By taking into account the concerns of each circuit, this Note advocates that the circuits recognize a unified, four-pronged balancing test developed from the diverging circuit opinions. This modified approach considers the location and nature of the search, the personnel conducting the search, and the regulations restricting government discretion. It is only by seeing both sides of the issue that we can appreciate how complicated the child abuse dilemma is and how close together the circuits are to one another. By curbing government discretion in all cases but providing states with a mechanism to conduct efficient child abuse investigations, events like those surrounding Kessler and Jochebed will occur less frequently. But this world can only exist when we realize the circuit split does not exist. By exposing the nightmare circuit split as an illusion and by eliminating the uncertainty our CPS agencies currently face, we are able to wake up to a safer reality.

*Adam Pie\**

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279. *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999).

\* Candidate for Doctor of Jurisprudence, May 2012, Vanderbilt University Law School. I am thankful for the advice and insight of Professor Terry Maroney and Professor Christopher Slobogin during the drafting of this Note. I would also like to thank all of my colleagues on the VANDERBILT LAW REVIEW whose help was invaluable. Finally, I would like to thank my family and fiancée for their continuous love and support for all of my academic endeavours.