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Joshua Gupta-Kagan

Columbia Law School, jgupta-kagan@law.columbia.edu

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Ending CPS home searches' evasion of the Fourth Amendment

Author : Josh Gupta-Kagan

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Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 Calif. L. Rev. ___ (forthcoming 2023), available at [SSRN](#).

Every year, Child Protective Service (CPS) agencies investigate about [3 million families](#) around the country for alleged neglect or abuse of their children. Under agency policies, all of those millions of investigations include searches of families' homes. CPS investigators knock on the door (usually unannounced), look in every room of the house, open kitchen cabinets, sometimes inspect children's bodies, and generally look for any evidence of child maltreatment. Yet CPS agencies rarely seek a warrant, and typically act as if that is unnecessary. (P. 18 & n.86.)

In [Family Policing and the Fourth Amendment](#), Tarek Ismail aptly explains why, notwithstanding current practice, the Fourth Amendment's normal warrant and probable cause requirements actually do apply to CPS home searches. Nothing in the Fourth Amendment's text is limited to police investigations, but the Supreme Court has established some exceptions to when a warrant is required for searches beyond criminal investigations. For example, the Court has permitted [dragnet searches](#) of every home in any area without individualized suspicion when those searches are limited in nature to meet a public need such as enforcing housing safety codes. (Pp. 23-26.) But the Court has never carved out an exception for CPS searches, which begin with allegations to a state child protection hotline that a specific parent (or guardian) is neglecting or abusing their children. (Pp. 47-49.) And CPS searches are quite invasive, featuring inspections of "a family's most intimate spaces – their bedrooms, bathrooms and kitchen cabinets." (P. 55.)

The Supreme Court has also developed the "special needs" doctrine (named for a phrase in Justice Blackmun's concurrence in [New Jersey v. T.L.O.](#)) for searches of individuals with reduced expectations of privacy, like children at school or parolees. Most relevant to CPS searches, the Court has applied the special needs doctrine to cases where it believed no constitutional rights were at stake, such as in the search of a public benefits applicant's home by a public benefits caseworker in [Wyman v. James](#). (Pp. 29-30) That holding is controversial, and has led to compelling critiques, like Khiara Bridges' [argument](#) that poor families lack privacy rights due to rules like *Wyman*'s. However troublesome *Wyman* may be, Ismail explains how CPS home searches are doctrinally different, so the special needs doctrine does not apply. (Pp. 53-55.) Instead of a situation involving diminished rights, CPS searches implicate parents' and children's fundamental right to family integrity. And individuals' Fourth Amendment protections are at their apex in their homes. (Pp. 53-55.)

The riddle here is not whether the Fourth Amendment applies or whether the warrant and probable cause requirements should generally cover these searches. Of course they should, and most courts have held that a warrant is required. (P. 46.) (Common exceptions like exigent circumstances apply too.¹ The riddle is why the Fourth Amendment's modest protections are not more prominent during CPS investigations. Recent [media](#) attention (which, not incidentally, features Ismail's scholarship) even quotes a former CPS investigator as saying, shockingly, "Rights – no we never did that. I didn't even know that was a thing." The Supreme Court has never squarely addressed CPS home searches, and a circuit split even exists with five circuits appropriately holding that CPS home searches generally require warrants, and [two circuits](#) holding otherwise that the special needs doctrine, aided by qualified immunity, prevents liability for such searches. (Pp. 45-46.) As Ismail asks in his introduction: "[W]hat is it about CPS investigations that has allowed them to escape critical legal scrutiny for so long?" (P. 7.) The answer, he suggests, is that the legal system has for too long viewed CPS investigations as something other than what they are – family policing. This has led CPS investigators and agencies to [assert](#) – incorrectly – that the Fourth Amendment does not apply to them, and to act accordingly. And the absence of an exclusionary rule coupled with deferential standards in civil rights actions like

qualified immunity (Pp. 45-46) have limited courts' capacity to enforce the Fourth Amendment.



A New York City billboard. Source: JMacForFamilies.org

In explaining exactly how CPS investigations operate like police searches, Ismail's article conclusively answers the Fourth Amendment question and demands a re-conception of the legal system that begins with those investigations. CPS investigators train "side-by-side" with police and learn police investigative techniques. (Pp. 16-18.) CPS investigations address allegations that could amount to criminal offenses (assault, or child endangerment). And they address accusations that were referred to law enforcement in the early 1960s, but shifted to CPS agencies as they became more established (and separated more families) in that decade. (Pp. 20-22.) CPS investigations seek to gather evidence to use in court cases against individuals when the state seeks to limit their fundamental constitutional rights. As one advocacy group's [billboard](#) put it, "some cops are called caseworkers." Ismail puts these adversarial investigatory procedures in the context, explaining how the creation of modern CPS agencies in the 1960s was not about helping vulnerable children, but designed to police families receiving public benefits and ensure their "suitability," a term whose application was just as racialized and gendered as one would expect. (Pp. 20-22.) Thus the "family policing" of Ismail's title. Just as the police cannot threaten physical liberty by searching homes for evidence of a crime without triggering Fourth Amendment protections, CPS agencies may not threaten the fundamental constitutional right of family integrity by searching homes for evidence of neglect or abuse without triggering Fourth Amendment protections. Because they engage in policing, not welfare supervision, Ismail shows why Fourth Amendment protections are essential. And, optimistically, he identifies what may be the beginning of a trend towards enforcing such rights. (P. 64, citing *In re Y.W.-B.*) With no suppression rule in family court (P. 45), the development of [organizations](#) that will sue to enforce rights during CPS investigations is a crucial part of this trend. More broadly, this article joins a [growing literature](#) seeking to rename the legal system at issue – not "child welfare" but the "family regulation" or, yes, the "[family policing](#)" system. Ismail has contributed greatly to it by demonstrating just how literally accurate those names are.

1. The exigent circumstances exception requires a reasonable person to believe that entering the home is necessary to prevent some imminent danger. While exigent circumstances surely exist in some CPS searches, the mere existence of a hotline call alleging neglect (the action triggering most CPS investigations) would not generally rise to that level.

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