UNREASONABLE SEIZURE: GOVERNMENT REMOVAL OF CHILDREN FROM HOMES WITH DRUGS BUT NO EVIDENCE OF NEGLECT

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INTRODUCTION

When police found ten grams of marijuana in Penelope Harris's apartment in 2010, a quick phone call to the New York State Administration for Children's Services resulted in the removal of her children from her home.[1] A spokesman for the Administration admitted that "[d]rug use itself is not child abuse or neglect, but it can put children in danger of neglect or abuse."[2] However, in Ms. Harris's case, mere possession justified removal of her children.[3] Although Ms. Harris's biological child returned home about a week later, her foster child was not allowed to come home for more than a year.[4] The Administration returned the children only after Ms. Harris agreed with the agency's many conditions, several of which did not relate to the children's welfare.[5] The children suffered time in foster care even though Ms. Harris did not actually own the marijuana, and the case closed without a finding of neglect.[6]

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[1] Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES, Aug. 18, 2011, at A1.

[2] *Id.* (quoting Michael Fagan).

[3] *See id.*

[4] *Id.* This difference may be due to an interpretation of the Fourteenth Amendment that finds a parent's interest in a continued relationship with a child contingent on a biological relationship. "Several courts have explicitly held that foster parents do not have a constitutionally protected liberty interest in a continued relationship with their foster child." Wildauer v. Frederick Cnty., 993 F.2d 369, 373 (4th Cir. 1993) (per curiam) (citing cases in the Third, Fifth, Sixth, and Ninth Circuits).

[5] Secret, *supra* note 1. Although she did nothing wrong, civilly or criminally, Ms. Harris must now submit to random drug tests, attend therapy, allow caseworkers to make announced and unannounced visits to her home, and prevent her boyfriend, the owner of the marijuana, from coming to her home. *Id*.

[6] *Id.* Had the marijuana actually belonged to Ms. Harris, the case may have come out differently. The seizure of the children, however, would have occurred in the same fashion, with the children be-

This situation is not unique. In New York, where Ms. Harris resides, the law presumes neglect where parents "repeatedly misuse[] a drug" and there is a "substantial impairment of judgment."[7] Several other states have similar laws.[8] This presents a conflict between protecting children, respecting Fourth Amendment privacy interests, and fighting the War on Drugs.[9] As Professor Ken Gormley asserts, Fourth Amendment jurisprudence now rests on the subject-matter, and "the Court seems to be especially heavy-handed in discounting the 'reasonableness' of the citizen's expectation of privacy where the individual's claim to secrecy or solitude collides with the government's war on drugs and alcohol."[10]

Although most federal circuits have determined how the Fourth Amendment applies to removal of children from their homes by child protective services,[11] the Supreme Court has not yet settled this issue.[12] Accordingly, this Comment argues that the Supreme Court should consider the constitutional rights of minors[13] and apply the well-established guidelines of the Fourth Amendment to the seizure of children under state neglect statutes.[14] This Comment further posits that statutes that incorporate parental drug possession or use[15] into the definition of neglect are unconstitutional because they may cause a deprivation of Fourth Amendment rights by leading to unreasonable seizures of children from their homes.[16] As one court has determined, "[t]he fact that a home is 'improper' in the eyes of the state

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coming victims of child protective services procedure, regardless of whether they suffered harm from Ms. Harris's alleged drug use. *See id.*

7 *Id.*

8 *See infra* Part I.B. In California, however, child protective services must find evidence of harm to the child where legal medical marijuana is the basis of alleged neglect. Secret, *supra* note 1.

9 In 1982, the federal government launched an aggressive campaign against drug use and trafficking. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 49 (2010).

10 Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1370; *see also* Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 178 (2002) (arguing that social context shapes Fourth Amendment protections).

11 *See infra* Part II.C.

12 *See* Camreta v. Greene, 131 S. Ct. 2020, 2026-27 (2011) (vacating the Ninth Circuit's holding that questioning a nine-year-old girl at school by child protective services constituted an unreasonable seizure in violation of the Fourth Amendment due to mootness); *see also infra* Part II.C.

13 *See, e.g.*, *In re* Gault, 387 U.S. 1, 55 (1967) (holding that a minor was entitled to the Fifth Amendment right against self-incrimination).

14 *See infra* Part II.

15 For the purposes of this Comment, "drug abuse" and "drug use" include drug possession and alcohol abuse.

16 *See infra* Part III; *see also* Jillian Grossman, Note, *The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations*, 27 FORDHAM URB. L.J. 1303, 1306 (2000) (summarizing Supreme Court cases that upheld the constitutional rights of children). *But see* Santosky v. Kramer, 455 U.S. 745, 748 (1982) (explaining that neglect statutes authorize child protective services caseworkers to remove children from their homes).

officials does not necessarily mean that a child in that home is subject to physical or emotional harm."[17]

Part I of this Comment provides an overview of the *parens patriae* doctrine, child welfare proceedings, drugs and child neglect statutes, and the Fourth Amendment. Part II argues that removing a child from his or her home is a seizure within the meaning of the Fourth Amendment and that caseworkers, as state government officials, should comply with Fourth Amendment search and seizure requirements. Part III argues that state statutes allowing for removal of a child based on parental drug use are unreasonable because they fail to meet the probable cause requirement for a court order and the exigent circumstances requirements for seizure of a child without a court order, and are therefore unconstitutional. Finally, Part IV contends that incorporating drug use and possession in neglect statutes is bad public policy, and suggests removing this language to redirect the focus to protecting children from harm.

I. BACKGROUND

This Part provides an overview of *parens patriae*, drug use, neglect statutes, and the Fourth Amendment. Part I.A describes the state's obligation to ensure the welfare of children, child protective services investigations, and proceedings resulting in the termination of parenthood. Part I.B discusses drugs and neglect statutes, addressing drug use in the United States, neglect statutes among different states, and the role of the War on Drugs on Fourth Amendment jurisprudence. Part I.C then introduces Fourth Amendment seizures, encompassing the reasonable expectation of privacy and the method of analysis for seizures. Finally, Part I.D introduces seizures conducted by child protective services.

A. Parens Patriae *and Child Protective Services Investigations*

Under the common law doctrine of *parens patriae*, the state has an obligation to care for those who cannot care for themselves.[18] Because the "prerogative of *parens patriae* is inherent in the supreme power of every State," each may set its own regulations for the welfare of others.[19] This is limited to "those who can be helped" and requires that the state "be able to

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[17] Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976) ("The Alabama statute defining 'neglected' children sweeps far past the constitutionally permissible range of interference into the sanctity of the family unit.").

[18] *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979); Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56-58 (1890); Hafetz, *supra* note 10, at 205 n.203.

[19] *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 57.

show that its action will, in fact, result in the desired effect."[20] Part I.A.1 discusses child welfare and the state's authority under the *parens patriae* doctrine and the conflicting jurisprudence between the interests of the state, parent, and child. Part I.B.2 then describes the child protective services investigation process.

1. Child Welfare and the State's Authority Under *Parens Patriae*

Parens patriae gives the state the authority to develop and enforce regulations to protect the well-being of minors.[21] In exercising this power, the state respects three major principles: (1) minors do not have the mental competence and maturity of adults; (2) intervention is acceptable only where the child's parents are "unfit, unable, or unwilling to care for the child adequately"; and (3) the state must act in the best interests of the child.[22]

Although initially the state's intervention into family life[23] often centered on removing children from their parents where the parents were found to be immoral,[24] the state's power is now more limited. The state may intrude upon the privacy of a family where there is "a 'reasonable relation' to a legitimate state purpose,"[25] generally operating to serve "the best interest of the child."[26] Examples of the state's use of *parens patriae* in the child

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20 Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561, 577 (2000).

21 Schall v. Martin, 467 U.S. 253, 263 (1984); *Santosky*, 455 U.S. at 766; *see also* Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 59-65 (2009) (describing the evolution of the state's duty to protect children under the *parens patriae* doctrine and how that authority under *parens patriae* trumped parents' custodial rights to their child prior to the landmark Supreme Court cases of Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

22 *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1201-02 (1980) [hereinafter *Developments*].

23 In 1601, the *parens patriae* doctrine gave rise to the Poor Laws in England, authorizing highly intrusive state intervention. Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 150 (2006); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998).

24 Notorious reformers known as "child savers" sought to separate children from their parents, believing this would end their suffering and stop them on their path to becoming "mature criminals." Hafetz, *supra* note 10, at 205 n.204, 207-08.

25 *See generally* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 544-45 (2000) (describing a dissonance between the Supreme Court's discussion of the importance of family privacy and its willingness to allow exceptions for certain state intrusions).

26 *See* Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 737 (2000); Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in*

welfare context include compulsory education,[27] mandatory vaccinations,[28] regulation of child labor,[29] drug-testing of student athletes,[30] curfew laws,[31] and laws setting minimum ages for driving[32] and tobacco[33] and alcohol[34] consumption.

The state's *parens patriae* power in the child welfare context is limited by the federal Constitution.[35] While the state's power to intervene directly conflicts with and reduces parents' custodial rights over their children,[36] the exercise of each state's *parens patriae* power is limited by the Fourteenth Amendment's substantive and procedural due process guarantees, protecting parental custodial rights.[37] Because of this conflict between the state and the parent, a parent's custodial rights may be limited by what the state deems to be in the best interest of the child.[38] While the Supreme Court has yet to opine directly on this issue, most federal circuits have held that a child's privacy interests are protected by the Fourth Amendment guarantee

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Custody and Visitation Cases Involving Domestic Violence?, 47 UCLA L. REV. 813, 820 & n.5 (2000) (listing child custody and visitation statutes which use the "best interests of the child" standard).

27 Hafetz, *supra* note 10, at 204.

28 *See generally* Zach Williams, Note, *When the Physician Says You Have to Get the Shot, but Mommy Says No: The Cases of Taige Mueller and Daniel Houser, and How the State May Force Parents to Accept Unwanted Medical Treatment for Their Children*, 8 IND. HEALTH L. REV. 199, 199-201, 206-09 (2011).

29 5 C.F.R. § 551.601(a)-(c) (2012) (setting minimum age standards for employment under the Fair Labor Standards Act); Hafetz, *supra* note 10, at 204.

30 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (holding that a school's requirement that students be subject to random urinalysis for participation in interscholastic athletics was constitutional).

31 *See, e.g.*, D.C. CODE § 2-1541 (2012); IND. CODE ANN. §§ 31-37-3-2 to -3 (West 2012); VA. CODE ANN. § 15.2-926(A) (2012).

32 *See, e.g.*, 625 ILL. COMP. STAT. 5/6-103 (West 2012); KY. REV. STAT. ANN. § 186.440 (West 2012).

33 *See, e.g.*, DEL. CODE ANN. tit. 30, § 5363 (2012).

34 *See, e.g.*, 23 U.S.C. § 158(a)(1) (2006) (authorizing the federal government to withhold state funds for federal highway construction for noncompliance with the national minimum drinking age); South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding the constitutionality of the minimum drinking age statute).

35 *See Developments*, *supra* note 22, at 1159.

36 Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); *see also* 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, 421-22 (2005) (discussing the tension between the state's desire to protect children and parents' desire to maintain privacy in the home and protect their children from unnecessary investigations).

37 *Developments*, *supra* note 22, at 1161-62.

38 United States v. Green, 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 15,256) ("As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant . . . ."); *Developments*, *supra* note 22, at 1223.

of freedom from unreasonable searches and seizures,[39] further limiting the state's *parens patriae* power.

The United States has struggled to strike the right balance between the state's duty to protect children and parents' rights to have custody over their children. Despite inconsistent jurisprudence,[40] courts recognize the right to family privacy.[41] However, further defining the relationship between the state, family, and child has proven to be a difficult task. Federal statutes oscillate between keeping families together and providing quick means of terminating parental rights.[42]

2. Investigation by Child Protective Services and Termination of Parenthood

Investigation usually begins after a child protective services agency receives a report of suspected abuse or neglect.[43] About two-thirds of the reports received are "screen[ed] in," or deemed worthy of further investigation.[44] Typically, "[t]he investigation includes an assessment of safety and risk, as well as a determination of service needs"[45] and involves a home visit and interviews with the child and his parents,[46] with caseworkers having broad discretion throughout the process.[47] In Federal Fiscal Year 2009, 3.6 million children were subjects of child maltreatment reports receiving responses from child protective services.[48] Of these, only one-fifth were found to be victims of some form of child maltreatment, usually neglect.[49]

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39 *See infra* Part II.C.

40 *See* Meyer, *supra* note 25, at 531-32; *see also id.* at 545 ("[T]he Court's parental-rights cases remain profoundly murky . . . because they rest uncomfortably upon two competing and as-yet-unreconciled metaphors: the family as a 'private refuge' from a brutal or indifferent community and the state as 'protector' of children from a brutal or indifferent family." (footnotes omitted)).

41 *Id.* at 544 (citing Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

42 Michelle Kommer, Comment, *Protecting Children Endangered by Meth: A Statutory Revision to Expedite the Termination of Parental Rights in Aggravated Circumstances*, 82 N.D. L. REV. 1461, 1478 (2006).

43 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at 6-7 (2010), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf; Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785, 788 (1994); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1755 (1987).

44 Coleman, *supra* note 36, at 429-30.

45 CHILDREN'S BUREAU, *supra* note 43, at 20.

46 Coleman, *supra* note 36, at 434.

47 *Id.* at 437, 441.

48 CHILDREN'S BUREAU, *supra* note 43, at 20. A unique count reveals that three million children received a response from child protective services. *Id.*

49 *Id.* Neglect comprises 78.3 percent of child maltreatment cases. *Id.* at 23.

The caseworker assigned to the family determines whether and how to intervene and may choose between bringing charges against the parents, offering aid, and doing nothing.[50] If the caseworker has reasonable grounds to believe a child is in danger, she may temporarily remove the child from the home for safekeeping during the investigation.[51] Sometimes the child is placed with other relatives, but usually the child stays in a foster home or institution while the caseworker determines whether the parents pose a threat to the child.[52] Parents may contest the removal at a hearing.[53] However, as Ms. Harris experienced,[54] "[o]nce a child is removed the child welfare system tends to show a great deal of reluctance to return [the] child[] until a variety of procedural hoops have been jumped through by parents."[55] Thus, more than half of the children caseworkers remove from homes remain in foster care for over a year.[56]

If, based on the investigation and evaluation of the parents, the caseworker decides that permanent termination of parenthood is necessary, she will bring the case to the juvenile and domestic relations court or family court.[57] A judge will then make the final determination of whether the parents neglected the child and whether the court should permanently terminate parental rights or, instead, require in-home assistance.[58] Such a determination is based on the standard of proof for termination proceedings, which varies by state. Most states use the "clear and convincing" standard, which requires the government to demonstrate that the existence of a fact is "highly probable."[59] Some jurisdictions, however, have opted to use the more stringent "proof beyond a reasonable doubt" standard, which typically applies to criminal cases.[60]

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50 Garrison, *supra* note 43, at 1755.

51 Cressler, *supra* note 43, at 788; *see also* Liebmann, *supra* note 23, at 144.

52 Liebmann, *supra* note 23, at 144-45.

53 *Id.* at 145.

54 Secret, *supra* note 1.

55 Liebmann, *supra* note 23, at 161 n.83.

56 *Id.* at 161. Where neglect is unfounded, however, removal of children from their homes for this time while caseworkers build their case is particularly disturbing.

57 Robert E. Buckholz, Jr., Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 719 (1979).

58 *Id.*

59 *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) (holding that the clear and convincing evidence standard should be a minimum, and leaving up to states whether to adopt the "beyond a reasonable doubt" standard); *In re* J.O.A., 283 S.W.3d 336, 344 (Tex. 2009). Clear and convincing evidence is a more demanding standard than preponderance of the evidence, but imposes a lower burden than "beyond a reasonable doubt." Cressler, *supra* note 43, at 792.

60 The states of Louisiana and New Hampshire, as well as the U.S. Congress in jurisdiction over the Native American population, use this standard, and the states of New Jersey and North Dakota have indicated in dicta that this standard would be appropriate in child removal proceedings. Cressler, *supra* note 43, at 792; *see also In re* Winship, 397 U.S. 358, 361 (1970) (explaining the history of the "beyond a reasonable doubt" standard in criminal cases).

B. *Drugs and Neglect Statutes*

The Child Abuse Prevention and Treatment Act ("CAPTA")[61] authorizes states to develop statutes defining child abuse and neglect[62] and allocates federal dollars to assist states in enacting those statutorily-defined standards.[63] CAPTA defines child abuse and neglect as "at a minimum, any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act, which presents an imminent risk of serious harm."[64] Because each state may create its own laws to govern family law and child neglect, states have differing definitions of what constitutes a neglect finding sufficient to remove a child from his home.[65] Generally, neglect consists of "lack of adequate food, clothing, shelter, medical care, and supervision, or abandonment."[66]

With the increased awareness brought to drug use in the United States since the 1982 initiation of the War on Drugs,[67] it has become evident that drug use occurs in millions of homes in the United States.[68] The reemergence of an antidrug policy and funding to go along with it has, in turn, affected statutory definitions of child neglect sufficient to justify removal[69] and has altered Supreme Court analysis of Fourth Amendment cases where drugs are involved.[70] According to the Substance Abuse & Mental Health Services Administration of the U.S. Department of Health & Human Services, "[m]ost states identify substance abuse as one of the top two fac-

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61 Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5119 (2006).

62 *Id.* § 5106a; *see also* Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1215 n.6 (1991) ("To some significant extent, abuse and neglect are discrete phenomena. Parents who neglect their children are not generally the same parents who abuse their children. Generally, neglect involves 'acts of omission' by parents." (citations omitted)); Stephanie Sciarani, Comment, *Morbid Childhood Obesity: The Pressing Need to Expand Statutory Definitions of Child Neglect*, 32 T. JEFFERSON L. REV. 313, 318 (2010).

63 42 U.S.C. §§ 5106a(b), 5106c(b); *see also* Sciarani, *supra* note 62, at 318.

64 Child Abuse Prevention and Treatment Act, Pub. L. No. 111-320, § 3, 124 Stat. 3459, 3482 (2010) (codified in scattered sections of 42 U.S.C.).

65 *See infra* notes 80-88.

66 Weinstein & Weinstein, *supra* note 20, at 580 (quoting Susan J. Rose & William Meezan, *Defining Child Neglect: Evolution, Influences, and Issues*, 67 SOC. SERV. REV. 279, 281 (1993)).

67 ALEXANDER, *supra* note 9, at 49.

68 CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., PARENTAL SUBSTANCE USE AND THE CHILD WELFARE SYSTEM 2 (2009), *available at* http://www.childwelfare.gov/pubs/factsheets/parentalsubabuse.pdf [hereinafter PARENTAL SUBSTANCE USE].

69 *See, e.g.*, E. Michelle Tupper, Note, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL'Y 325, 334 (2005) ("Child welfare agencies began to see the results of increased incarcerations and increased child neglect charges stemming from untreated drug use . . . .").

70 ALEXANDER, *supra* note 9, at 60.

tors in child abuse and neglect."[71] This is problematic both because of the relative commonality of drug and alcohol abuse in the United States[72] and because "the *assumption* that parents who misuse drugs . . . harm their children allows courts hearing neglect cases to curtail or circumvent the process through which harm to the child is identified and evaluated."[73]

A recent study found that approximately 9 percent of children in the United States, or six million children, live in homes where at least one parent abuses alcohol or drugs.[74] These children are disproportionately represented in child maltreatment cases, with between one-third and two-thirds of child removal cases involving some form of substance use.[75] Problems typically associated with parents who abuse drugs and alcohol include impairment from consumption, domestic violence, unwise expenditures, frequent arrests and incarceration, time spent preoccupied with drugs, and family dysfunction.[76] These issues, however, do not necessarily have a negative impact on a child; an increased risk of harm is not itself a harm.[77] As one court has stated, a finding of neglect requires "evidence of danger to [the child] sufficient to implicate the state's interest in protecting the health, safety, and welfare of minors."[78] Moreover, unlike cases of abuse, child neglect typically presents in the form of parental omissions, and are therefore less likely to warrant immediate action. Thus, caseworkers should have the flexibility to observe the child more closely to determine whether he is under a threat justifying removal. Indeed, the American Bar Association has determined that "'many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child.'"[79]

A survey of eleven states[80] and the District of Columbia revealed greatly different methods of associating controlled substances and alcohol with child neglect. Some states incorporate drug use, possession, manufac-

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71 E.M. BRESHEARS, S. YEH & N.K. YOUNG, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN, U.S. DEP'T OF HEALTH & HUMAN SERVS., UNDERSTANDING SUBSTANCE ABUSE AND FACILITATING RECOVERY: A GUIDE FOR CHILD WELFARE WORKERS 1 (2009), *available at* http://www.ncsacw.samhsa.gov/files/Understanding-Substance-Abuse.pdf; *see also* Dolgin, *supra* note 62, at 1213 ("[L]egislatures and courts frequently assume that parental alcohol or drug misuse inevitably entails harm to the child.").

72 PARENTAL SUBSTANCE USE, *supra* note 68, at 2.

73 Dolgin, *supra* note 62, at 1213.

74 PARENTAL SUBSTANCE USE, *supra* note 68, at 2.

75 *Id.*

76 *Id.*

77 *See infra* Part III.

78 Wooley v. City of Baton Rouge, 211 F.3d 913, 925 (5th Cir. 2000).

79 Lynn M. Paltrow, *Why Caring Communities Must Oppose C.R.A.C.K./Project Prevention: How C.R.A.C.K. Promotes Dangerous Propaganda and Undermines the Health and Well Being of Children and Families*, 5 J.L. SOC'Y 11, 86-87 (2003) (quoting MARK HARDIN, FOSTER CHILDREN IN THE COURTS 206 (1983)).

80 California, Colorado, Florida, Illinois, Maryland, Michigan, New York, Pennsylvania, Texas, Virginia, and West Virginia were the states surveyed.

ture, or sale into their neglect statutes.[81] Others also include alcohol abuse alongside the prohibition of controlled substances.[82] The degree of drug involvement varies by state: some states consider prenatal ingestion of a controlled substance abuse;[83] some find neglect where a child is "regularly exposed to illegal drug-related activity in the home;"[84] others require the manufacture and sale of controlled substances for a neglect finding.[85] More common, however, are states that do not explicitly mention drugs, but may leave some room for it in interpretation[86] by finding neglect where there is "harm or threatened harm to the child's health or welfare"[87] or "a substantial risk of immediate harm to the child."[88]

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81 Colorado, Florida, Illinois, New York, Virginia, and the District of Columbia contain provisions in their neglect statutes finding neglect where a parent either possesses, uses, sells, or manufactures illegal substances, depending on the state. *See* COLO. REV. STAT. ANN. § 19-3-102(1)(g) (West 2012); D.C. CODE § 16-2301(9)(A)(viii)-(ix) (2012); FLA. STAT. ANN. § 39.806(1)(j)-(k) (West 2012); 750 ILL. COMP. STAT. ANN. 50/1(D)(k) (West 2012); N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2010); VA. CODE ANN. § 63.2-100(1) (2011).

82 New York and Florida are two of these states. In New York, neglect encompasses "misusing a drug or drugs; or [] misusing alcoholic beverages to the extent that [a parent] loses self-control of his actions." N.Y. FAM. CT. ACT § 1012(f)(i)(B). In Florida, the state may terminate parental rights where a parent has

> a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders [him or her] incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights.

FLA. STAT. ANN. § 39.806(1)(j).

83 Of the states surveyed, Colorado, Florida, Illinois, and the District of Columbia have statutes concluding that prenatal ingestion of controlled substances constitutes neglect. *See* COLO. REV. STAT. ANN. § 19-3-102(1)(g); D.C. CODE § 16-2301(9)(A)(viii)-(ix); FLA. STAT. ANN. § 39.806(1)(k); 750 ILL. COMP. STAT. ANN. 50/1(D)(k). For example, in Illinois, "[t]here is a rebuttable presumption that a parent is unfit . . . with respect to any child to which that parent gives birth where there is a confirmed test result that at birth the child's blood, urine, or meconium contained any amount of a controlled substance" and where the mother has at least one other child who has been adjudicated a neglected minor. 750 ILL. COMP. STAT. ANN. 50/1(D)(k).

84 D.C. CODE § 16-2301(9)(A)(x).

85 In Virginia, a child is neglected where a parent or other person responsible for the child's care manufactures or sells a controlled substance where such activity would constitute a felony. VA. CODE ANN. § 63.2-100.

86 California, Pennsylvania, Maryland, Michigan, Texas, and West Virginia contain similar language relating to protecting the health or welfare of the child in child neglect statutes. *See* CAL. PENAL CODE § 11165.2 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 3-801(s) (LexisNexis 2012); MICH. COMP. LAWS SERV. § 722.602(1)(d) (LexisNexis 2012); 11 PA. CONS. STAT. ANN. § 2233 (West 2012); TEX. FAM. CODE ANN. § 261.001(4)(B)(i) (West 2012); W. VA. CODE ANN. § 49-1-3(4) (LexisNexis 2012).

87 CAL. PENAL CODE § 11165.2.

88 TEX. FAM. CODE ANN. § 261.001(4)(B)(i).

C. *Seizure Under the Fourth Amendment*

The Fourth Amendment, incorporated to the states by the Fourteenth Amendment, provides for the right of citizens "to be secure in their persons . . . against unreasonable . . . seizures. . . ."[89] This right seeks to preserve an individual's sense of security by protecting the individual's reasonable expectation of privacy,[90] and it provides protection against seizure of a person.[91] It applies to state government officials conducting civil activities,[92] including those employed by child protective services agencies.[93]

To determine the reasonableness of government intervention, courts employ a balancing test, "assessing, on the one hand, the degree to which [a particular government action] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interest."[94] In other words, an individual claiming to have a reasonable expectation of privacy within the meaning of the Fourth Amendment must show a subjective expectation of privacy that society is prepared to recognize as reasonable.[95] Importantly for the child neglect context, an individual has a heightened expectation of privacy in the home.[96]

Fourth Amendment searches and seizures undergo separate analyses,[97] and an unconstitutional search does not automatically invalidate a resulting seizure.[98] For example, in *Gates v. Texas Department of Protective & Regulatory Services*,[99] the Fifth Circuit held that there were no exigent circumstances to justify warrantless entry into a home, but that the same evidence constituted exigent circumstances to justify removal of the children from

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89 U.S. CONST. amend. IV.

90 *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 718 (1987) (stating that an employee's reasonable expectation of privacy must be determined on a case-by-case basis); Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (adopting the view in *Katz v. United States* that the protection of the Fourth Amendment is contingent on whether "there was a reasonable expectation of freedom from governmental intrusion"); *see also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

91 Graham v. Connor, 490 U.S. 386, 394 (1989).

92 *O'Connor*, 480 U.S. at 714-15.

93 *See, e.g.*, Calabretta v. Floyd, 189 F.3d 808, 813 (9th Cir. 1999).

94 Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999).

95 Smith v. Maryland, 442 U.S. 735, 740 (1979); *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

96 *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))). The recognition of this right dates back to 1886, when the Supreme Court held that the Fourth Amendment applies "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life." Boyd v. United States, 116 U.S. 616, 630 (1886).

97 O'Donnell v. Brown, 335 F. Supp. 2d 787, 806 (W.D. Mich. 2004).

98 *See, e.g.*, Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 419-24, 430 (5th Cir. 2008).

99 537 F.3d 404 (5th Cir. 2008).

the home.[100] This Comment therefore focuses exclusively on Fourth Amendment seizures, because the constitutionality of the preceding search will not impact the constitutionality of the seizure.[101]

To determine whether a seizure is unconstitutional under the Fourth Amendment, courts must first look at whether there was a seizure, and then consider whether that seizure was "unreasonable."[102] The test for whether the government conducted a seizure is relatively straightforward: "a person has been 'seized' . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[103] In other words, there must be a "governmental termination of freedom of movement through means intentionally applied."[104] The test for the reasonableness of that seizure, however, is both difficult to define and to apply and "must be judged from the perspective of a reasonable officer on the scene."[105] Courts must consider "not only . . . *when* [the seizure was] made, but also . . . *how* it [was] carried out."[106] In determining whether a seizure conducted in the absence of a warrant meets the requirements of the Fourth Amendment, courts must engage in context-specific analysis, "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[107]

A seizure conducted pursuant to a valid warrant is reasonable if conducted in a reasonable manner.[108] To obtain a warrant, a government official must demonstrate that there is probable cause necessitating government action.[109] Additionally, the Supreme Court has said that "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money,'" there must be clear and convincing evidence of wrongdoing.[110] Thus, because of the importance of the loss of one's child, this standard should apply in child welfare cases. Neglect statutes incorporating drug and alcohol use as forms of neglect, however, do not abide by this standard, since this evidence is not clear and convincing evidence of harm to a child.[111]

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100 *Id.* at 419-24, 430.

101 *See, e.g.*, *id.*

102 *See* Donovan v. City of Milwaukee, 17 F.3d 944, 948 (7th Cir. 1994).

103 United States v. Mendenhall, 446 U.S. 544, 554 (1980).

104 Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (emphasis removed).

105 Graham v. Connor, 490 U.S. 386, 396 (1989).

106 *Id.* at 395 (citing Tennessee v. Garner, 471 U.S. 1, 7-8 (1985)).

107 United States v. Place, 462 U.S. 696, 703 (1983); *see also* New Jersey v. T.L.O, 469 U.S. 325, 337 (1985).

108 *See supra* notes 105-107 and accompanying text.

109 Probable cause is context-specific. Ornelas v. United States, 517 U.S. 690, 696 (1996).

110 Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

111 *See supra* notes 74-78 and *infra* Part III.

Warrantless seizures are per se unreasonable under the Fourth Amendment, but there are a few exceptions to this rule, judged by the "reasonableness" of government action.[112] To determine whether a warrantless seizure is reasonable, a court considers whether the seizure is civil or criminal in nature,[113] whether the individual had a reasonable expectation of privacy,[114] and whether exigent circumstances[115] exist that would lessen the requirements of Fourth Amendment protections.[116] The special needs doctrine, which provides government officials with the opportunity to look for evidence of wrongdoing, abrogates the need to comply with Fourth Amendment requirements,[117] and may also apply in child neglect cases.[118]

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112 *Cf.* Terry v. Ohio, 392 U.S. 1, 9 (1968) ("For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" (quoting Elkins v. United States, 364 U.S. 206, 222 (1960))).

113 While criminal law enforcement activities require "a stricter, more rule-oriented 'probable cause' analysis," in civil cases, a court will apply "a more flexible and less rule-bound 'balancing' methodology" weighing the government's interest in conducting a search or seizure against the individual's privacy interests. Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1127 (1984) (noting, however, that criminal cases are now on the way to adopting a balancing test approach). Part of this is because courts view civil searches and seizures as less intrusive than criminal searches and seizures. *See, e.g.*, Wyman v. James, 400 U.S. 309, 317 (1971) (finding that a home visit was not a Fourth Amendment search because it occurred only after the homeowner consented and its purpose was "rehabilitative" instead of "investigative"); Wildauer v. Frederick Cnty., 993 F.2d 369, 372 (4th Cir. 1993) (per curiam) (holding that a search of a foster mother's home is held to a different standard than searches conducted in the criminal context, and that the state therefore was not required to inform her she could refuse to consent to a search of her home); *see also* Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 368 (2010) (discussing the Court's rationale for its holding in *Wyman* that a home visit was not a Fourth Amendment search); Hafetz, *supra* note 10, at 176-78.

114 *See supra* notes 90-95.

115 *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006) (noting that preventing imminent destruction of evidence is an exigent circumstance); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (explaining that the need to provide emergency aid is an exigent circumstance); United States v. Santana, 427 U.S. 38, 42-43 (1976) (discussing exigent circumstances in hot pursuit of a fleeing criminal); United States v. Rohrig, 98 F.3d 1506, 1515-16 (6th Cir. 1996) (finding that the need to prevent risk of danger to the police or others constitutes an exigent circumstance).

116 Exigent circumstances represent a compelling need for government action because there is an imminent danger of future harm. Michigan v. Tyler, 436 U.S. 499, 509 (1978). However, the home is strongly protected in Fourth Amendment jurisprudence. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001). Thus, courts construe the exigent circumstances exception more narrowly in cases involving a seizure from a home. Lorna Cobb, Note, *Raid of the Masses: How the Seizure of FLDS Children Supports Applying the Traditional Criminal Law Exigent Circumstances Exception in the Child Removal Context*, 20 U. FLA. J.L. & PUB. POL'Y 273, 281 (2009). This is important in child neglect cases, and for this Comment, which focuses on seizures of children from the home.

117 The special needs doctrine provides government officials with the opportunity to look for evidence of wrongdoing. Griffin v. Wisconsin, 483 U.S. 868, 870-71, 874-76 (1987) (upholding the constitutionality under the special needs doctrine of a warrantless search of a probationer's home because there were reasonable grounds to believe that evidence of wrongdoing would be discovered and a warrant requirement would interfere too much with the probation system). The special needs doctrine

D. *Seizures by Child Protective Services*

Caseworkers employed by a child protective services agency must operate in a manner consistent with the Fourth Amendment.[119] In most circuits, a caseworker's seizure of a child is reasonable where there is a court order, consent, or exigent circumstances.[120] A court order "is probably the equivalent of a warrant for Fourth Amendment purposes" and requires probable cause.[121] However, warrantless seizures of children without parental consent are the most common method of removing children from their homes.[122] Accordingly, this Comment addresses seizures from homes conducted pursuant to neglect statutes governing seizures of children with a court order, as well as seizures without court orders justified by exigent circumstances.

Three federal circuit court cases demonstrate the law relating to seizures of children. In *Brokaw v. Mercer County*,[123] the Seventh Circuit held that the seizure of a child in response to relatives' allegations of child neglect constituted an unreasonable seizure under the Fourth Amendment because there was no court order.[124] Similarly, in *Wallis v. Spencer*,[125] the Ninth Circuit reversed summary judgment for defendant police officers after they seized two children based on an unreasonable belief of neglect and abuse that could have constituted a violation of the Fourth Amend-

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applies where the state can show that (1) "it has some 'special need' or governmental interest beyond normal law enforcement activities that make the search or seizure necessary" and (2) "its interest cannot be achieved or would be frustrated if a court imposed normal warrant and probable cause requirements." Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259 (2000); *see also* Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 544-49 (1997) (discussing four qualities that contribute to a finding that the special needs doctrine applies). *But see* Buffaloe, *supra*, at 536, 559 (criticizing the special needs exception for overlooking the individualized suspicion requirement).

118 *See infra* Part II.C.

119 *See, e.g.*, Roska *ex rel.* Roska v. Peterson, 304 F.3d 982, 988-89 (10th Cir. 2002) (finding that defendant-caseworkers can violate the Fourth Amendment when, in the absence of exigent circumstances, they enter a house without knocking to remove a child), *superseded by* 328 F.3d 1230 (10th Cir. 2003) (adopting same reasoning).

120 *See* Doe v. Heck, 327 F.3d 492, 517 (7th Cir. 2003); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 (7th Cir. 2000); Wooley v. City of Baton Rouge, 211 F.3d 913, 925-26 (5th Cir. 2000); Tenenbaum v. Williams, 193 F.3d 581, 605 (2d Cir. 1999). *But see* Landstrom v. Ill. Dep't of Children & Family Servs., 892 F.2d 670, 676 (7th Cir. 1990) (finding that a seizure of a child must be "reasonable" but need not necessarily be based on probable cause or warrant).

121 Nicholson v. Scoppetta, 344 F.3d 154, 176 (2d Cir. 2003).

122 *See* Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 458 (2003).

123 235 F.3d 1000 (7th Cir. 2000).

124 *Id.* at 1011.

125 202 F.3d 1126 (9th Cir. 2000).

ment.[126] Significantly, the Ninth Circuit also found that a jurisdiction's practice of removing children based on the alleged existence of court order without verification may constitute a practice violating the Fourth Amendment.[127] Additionally, in *Roska ex rel. Roska v. Peterson*,[128] the Tenth Circuit found that a child demonstrated a claim based on a violation of the Fourth Amendment when caseworkers seized him from his home in response to a report from his school about his frequent illnesses.[129] The court seemed to believe that the interest in keeping the family together outweighed the state's interest in intervening.[130] Nonetheless, the court exercised restraint and followed the lower court's determination that the state actors had acted reasonably.[131]

These cases establish that children should have Fourth Amendment protection from unreasonable seizures and that the removal of a child from his home constitutes a Fourth Amendment seizure.[132] Thus, even when a caseworker believes she is acting in the best interests of the child, she must first conduct an investigation through a home visit or an interview with the child to grant legitimacy to her actions.[133] An unreasonable belief of imminent harm to a child will render a seizure unreasonable.[134] Reasonable seizures must be conducted pursuant to a court order or in the presence of exigent circumstances posing immediate danger to the child.[135] The Ninth Circuit's definition of immediate danger serves as guidance.[136] Finally, to best comply with the protections of the Fourth Amendment, caseworkers should follow the two-part standard established in the Tenth Circuit, which requires caseworkers to determine that "(1) the child's health or safety was at risk, and (2) this risk was due to the child's presence in the home."[137] Because statutes identifying drug use as grounds for neglect warranting seizure of a child cannot pass muster under this standard, such statutes should be targeted as a practice in violation of the Fourth Amendment.[138] Further-

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126 *Id.* at 1145.

127 *Id.*

128 328 F.3d 1230 (10th Cir. 2003).

129 *Id.* at 1238, 1244.

130 *See id.* at 1245-46 (holding that a child's parents sufficiently alleged a violation of their liberty interest when they alleged that no exigent circumstances existed to justify state intrusion upon their family relationship interest).

131 *Id.* at 1250.

132 *See id.* at 1240-42; Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 (7th Cir. 2000).

133 *See Brokaw*, 235 F.3d at 1011 (stating that only in rare circumstances can allegations of neglect be so severe or credible that an investigation into the allegations is not required for removal); Wallis v. Spencer, 202 F.3d 1126, 1140 (9th Cir. 2000).

134 *Wallis*, 202 F.3d at 1140.

135 *See Roska*, 328 F.3d at 1240; *Brokaw*, 235 F.3d at 1010; *Wallis*, 202 F.3d at 1138.

136 *See Wallis*, 202 F.3d at 1138 (holding that the state must have specific, articulable evidence that a child is in imminent harm to remove a child without a court order); *see also infra* Part III.B.

137 *Roska*, 328 F.3d at 1249-50 (footnote omitted).

138 *See Wallis*, 202 F.3d at1145.

more, courts should consider the Fourth Amendment regardless of whether the removal is temporary or permanent because seizure is not determined by duration.[139]

Some circuits, however, have been more willing to create rules around Fourth Amendment requirements. In *K.D. v. County of Crow Wing*,[140] the Eighth Circuit found that the state's temporary removal of a child from his home did not constitute a violation of the Fourth Amendment prohibition against unreasonable seizures.[141] The court reasoned that a seizure was reasonable where police investigated a mother for drug trafficking, found drugs in her car, and believed she was on drugs when she appeared at the police station to retrieve her car.[142] If the Tenth Circuit's two-part test had been used in this case, the seizure of the child may have been unlawful because no drugs were found in the home,[143] meaning his presence in the home did not expose him to risk.[144] Instead, the Eighth Circuit reasoned that "[t]he fact that no drugs were found during one search of [a mother's] home [did] not detract from the reasonableness of [the police's] concerns for [a child's] safety."[145] Under this standard, the mother's drug use in combination with an ongoing narcotics trafficking investigation were sufficient to support the temporary removal.[146] The court did not engage in Fourth Amendment analysis because it determined that the caseworkers acted reasonably, entitling the caseworkers to qualified immunity.[147] It also relied on its finding that the removal was only temporary and therefore not a seizure.[148]

II. CHILD REMOVAL BY STATE GOVERNMENT OFFICIALS CONSTITUTES A SEIZURE UNDER THE FOURTH AMENDMENT

The Fourth Amendment "confer[s], as against the Government, the right to be let alone—the most comprehensive of rights and the right most

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139 *Cf.* Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999) (holding that a caseworker could not temporarily remove a child from her home without a court order unless there was probable cause to believe that the child was in imminent danger and there was not enough time to obtain a court order).

140 434 F.3d 1051 (8th Cir. 2006).

141 *Id.* at 1058.

142 *Id.* at 1053-54.

143 *Id.*

144 *See Roska*, 328 F.3d at 1249-50 & n.24 (recognizing that an immediate risk was not present in this case).

145 *K.D.*, 434 F.3d at 1057.

146 *Id.*

147 *Id.* at 1056.

148 *Id.* at 1057; *cf.* Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999) (holding that a caseworker could not temporarily remove a child from her home without a court order unless there was probable cause to believe that the child was in imminent danger and there was not enough time to obtain a court order).

valued by civilized men."[149] The Supreme Court has held that this right applies "to all invasions on the part of the government and its employ[ees] of the sanctity of a man's home and the privacies of his life."[150] Additionally, as the Seventh Circuit has noted, this right "extends beyond criminal 'arrests' to civil 'seizures,' including a child's removal by social workers."[151] In child neglect cases, the child usually must make the claim that he was unreasonably seized,[152] though a parent may in some instances make this claim on behalf of a child.[153]

Part II.A argues that a Fourth Amendment seizure occurs when child protective services removes a child from his or her home. Therefore, Part II.B examines balancing the government's interest in coercive intervention with the child's interest in privacy and remaining with his or her family. Part II.C dismisses the use of the special needs doctrine to remove children from their homes pursuant to neglect statutes incorporating drug and alcohol use as grounds for neglect. Finally, Part II.D uses the *parens patriae* doctrine to discuss how the state's authority to protect the best interests of the child does not abrogate the need to comply with the Fourth Amendment.

A. *Removing Children from Their Homes Constitutes a Fourth Amendment Seizure*

The Supreme Court has declared that the interests in preserving the family unit "are sufficiently vital to merit constitutional protection in appropriate cases."[154] Moreover, in *In re Gault*,[155] the Supreme Court determined that minors have constitutional rights.[156] In cases involving government seizure of a child, courts have held that parents may make claims

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149 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

150 Boyd v. United States, 116 U.S. 616, 630 (1886); *see also* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

151 Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 n.4 (7th Cir. 2000) (citation omitted) (citing Wooley v. City of Baton Rouge, 211 F.3d 913, 925 (5th Cir. 2000)).

152 *See* Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.").

153 J.B. v. Washington Cnty., 127 F.3d 919, 928 (10th Cir. 1997) ("[T]here may be circumstances in which a parent has Fourth Amendment standing to challenge a seizure involving a minor child.").

154 Lehr v. Robertson, 463 U.S. 248, 256 (1983).

155 387 U.S. 1 (1967).

156 *Id.* at 55 (holding that a minor was entitled to the Fifth Amendment right against self-incrimination); *see also* Grossman, *supra* note 16, at 1306.

based on the Fourteenth Amendment,[157] even though the Fourth Amendment protects the child against unreasonable seizures.[158] The Supreme Court has held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[159]

Therefore, where the state removes a child from his home without a warrant, the appropriate mode of analysis is Fourth Amendment seizure analysis. Eight federal circuits have concluded that the Fourth Amendment applies to seizures of children,[160] with some specifically holding that removing a child from his home constitutes a Fourth Amendment seizure.[161] To receive Fourth Amendment protection against unreasonable searches and seizures, a child must have a reasonable expectation of privacy that deserves legal protection.[162] This requires identifying (1) a child's subjective expectation of privacy that (2) society is prepared to recognize as reasonable.[163]

As a general rule, to be consistent with Fourth Amendment requirements, a child protective services caseworker should obtain judicial authorization before removing a child from his home.[164] However, the caseworker's action may fall under one of the exceptions to the court order requirement. For instance, courts do not require that caseworkers have judicial authorization for seizure of a child where emergency circumstances justify removal[165] because the state has a strong interest in protecting the child from neglect. A caseworker may thus remove a child from his home where she has "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."[166]

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157 *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment protects a parent's due process and liberty interest in raising and caring for her child. *See* Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999).

158 *See* U.S. CONST. amend. IV.

159 Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)); *see also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998).

160 Coleman, *supra* note 36, at 470 n.170.

161 *See, e.g.*, Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 (7th Cir. 2000); *see also* Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1240-42 (10th Cir. 2003).

162 *See* Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

163 *See id.* at 361.

164 *See, e.g.*, *Roska*, 328 F.3d at 1240-42.

165 Mabe v. San Bernardino Cnty. Dep't Pub. Soc. Servs., 237 F.3d 1101, 1106 (9th Cir. 2001); *Brokaw*, 235 F.3d at 1020; Tenenbaum v. Williams, 193 F.3d 581, 593-94 (2d Cir. 1999); Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997); Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994).

166 Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000).

Although whether the caseworker actually had reasonable cause for intervention is a question of fact to be determined by a jury,[167] courts have created some specific guidelines for what constitutes reasonable cause. In the Second, Third, and Ninth Circuits, there must be "specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse."[168] The Ninth Circuit, in addition to the Fourth and Seventh Circuits, also explicitly requires that "reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been—or will be—committed."[169]

Therefore, an emergency situation may negate the need to pursue a reasonable avenue of investigation, as long as that emergency situation is reasonable.[170] This means that a caseworker must have conducted an investigation and confirmed the alleged threat to the child.[171] For example, in *Wallis v. Spencer*, the Ninth Circuit held that caseworkers acted unreasonably when, instead of investigating an institutionalized relative's allegation that the father was going to kill his son in a satanic ritual, they simply removed the child from the home.[172] Even if such action was reasonable, the court said, the interference may not have been justified by the alleged exigency because the threat was only for a specific day—a ritual on the Equinox.[173] The caseworkers were unjustified in removing the child because of the questionable reliability of the source and because beyond that date, there was likely no threat to the child.[174]

Caseworkers should take precaution and seek to comply with Fourth Amendment requirements when investigating reports of neglect and determining whether removal is appropriate. Because children are entitled to constitutional protections,[175] they, like adults, have a reasonable expectation of privacy that should be recognized by Fourth Amendment jurisprudence.[176] The Constitution did not envision extending personal rights only

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167 *Id.*

168 *Id.* (citing Ram v. Rubin, 118 F.3d 1306, 1311 (9th Cir. 1997); Croft v. Westmoreland Cnty. Children & Youth Servs., 103 F.3d 1123, 1125 (9th Cir. 1997); Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1093-94 (3d Cir. 1989)).

169 *Id.* (citing Sevigny v. Dicksey, 846 F.2d 953, 957 (4th Cir. 1988); BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986)).

170 *See id.*

171 *See id.* at 1138-40.

172 202 F.3d at 1140.

173 *Id.*

174 *Id.*

175 *See In re* Gault, 387 U.S. 1, 55 (1967).

176 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337-38 (1985) (analyzing a child's Fourth Amendment rights at school); Doe v. Heck, 327 F.3d 492, 511-12 (7th Cir. 2003) (holding that young children could substitute their parents' reasonable expectations of privacy for their own and sue under the Fourth Amendment); Darryl H. v. Coler, 801 F.2d 893, 899-900 (7th Cir. 1986) (holding that a thirteen-year old child's reasonable expectation of privacy was violated by a strip search); *see also*

to people ages eighteen and over; they are meant for all people.[177] The Constitution also did not envision extending the expectation of privacy in the home only to homeowners or leaseholders—the dependents of those people are still entitled to those protections in the places they inhabit. At least some courts have held that children do not have a reasonable expectation of privacy in schools because the interest in maintaining order in schools outweighs the individual child's interest in privacy.[178] However, because of the special protections afforded to the home, children have a reasonable expectation of privacy there.[179] Contrary to the Eight Circuit's finding in *K.D. v. County of Crow Wing*, this protection should apply regardless of the length of intended separation from family.[180]

This expectation of privacy in the home should not operate to hide child neglect, since children have a legal right to be free from harm,[181] but it should work to protect children against seizures precipitated by unfounded beliefs of neglect. An unreasonable belief of harm to a child renders the subsequent seizure unreasonable.[182] Parental drug use is an unreasonable basis for believing that a child is neglected because it may not directly harm the child.[183] Drug use may raise the risk of harm, but it alone does not constitute neglect. To determine whether the child has been neglected, caseworkers should conduct a home visit and interview with the child to confirm suspicions, rather than relying on alleged exigent circumstances to justify immediate removal.[184] Additionally, a child's reasonable expectation of privacy in his home indicates that caseworkers should be required to demonstrate probable cause when seeking a court order to remove a child from his home after the investigation has been made.

B. *Balancing the Interests: Fourth Amendment Analysis of Removing Children from Their Homes*

Fourth Amendment analysis for civil seizures involves a balancing of the interests test, weighing the government's interest against the individu-

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Liebmann, *supra* note 23, at 156 n.59 ("[C]ourts have generally granted standing to a child under the Fourth Amendment to contest the constitutionality of a removal.").

177 *See In re Gault*, 387 U.S. at 55.

178 *See, e.g.*, *T.L.O.*, 469 U.S. at 341.

179 *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Budd, *supra* note 113, at 359.

180 K.D. v. County of Crow Wing, 434 F.3d 1051, 1056-57 (8th Cir. 2006).

181 *See* Cressler, *supra* note 43, at 802.

182 *Cf.* Wallis v. Spencer, 202 F.3d 1126, 1144-45 (9th Cir. 2000) (reversing a trial court's grant of summary judgment for a county on the issue of sovereign immunity because the trial court erred in finding that officers had reasonable cause to seize a child).

183 *See infra* Part III.

184 *See* Brokaw v. Mercer Cnty., 235 F.3d 1000, 1011 (7th Cir. 2000); *Wallis*, 202 F.3d at 1140.

al's reasonable expectation of privacy.[185] There is no Fourth Amendment violation if the caseworker's action was reasonable[186] and the government's interest outweighs the individual's interest in privacy.[187] If the government's interest in intervention is sufficient, government officials may act despite lack of probable cause, warrant, or court order.[188] Importantly, in assessing the reasonableness of government intervention, courts must consider the government's interest in each specific situation, not the general interest in protecting children from neglect.[189] As the Ninth Circuit has noted, "[t]he government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents,"[190] reflecting the child's interest in being free from harm. Moreover, "[t]he state also has an interest in preserving the natural family unit" and in "using its limited resources wisely."[191] Despite these restrictions, however, as Professor Janet Dolgin has argued, "in the majority of cases involving neglect as defined by most statutes, the disadvantages of coercive intervention far outweigh the benefits."[192] With this in mind, seizures of children should be conducted sparingly.

The federal circuit courts require a variety of showings to demonstrate a legitimate government interest. The Seventh, Ninth, and Tenth Circuits have the strictest standards and provide the most protection for the privacy of family life and Fourth Amendment rights of a child threatened with removal. In the Seventh and Ninth Circuits, government officials must have "some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse."[193] The Tenth Circuit embraces a still tougher requirement, determining that, "[m]easured against th[e] parental interest, the state's interest in protecting children does not excuse social workers from the warrant requirement of the Fourth Amendment."[194]

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185 *See* Wright, *supra* note 113, at 1127.

186 *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) (noting that the right "to be free from unreasonable governmental intrusion . . . must be shaped by the context in which it is asserted").

187 *See* Johnson v. United States, 333 U.S. 10, 14 (1948) ("Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing.").

188 *See, e.g.*, Wooley v. City of Baton Rouge, 211 F.3d 913, 925 (5th Cir. 2000).

189 Doe v. Heck, 327 F.3d 492, 515 (7th Cir. 2003).

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

191 Cressler, *supra* note 43, at 802-03.

192 Dolgin, *supra* note 62, at 1214 (footnote omitted).

193 Brokaw v. Mercer Cnty., 235 F.3d 1000, 1019 (7th Cir. 2000)); *see also* Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000).

194 Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003).

To be consistent with these standards, the government's interest in protecting children from neglect should focus only on harm to the child,[195] requiring "evidence of danger to [the child] sufficient to implicate the state's interest in protecting the health, safety, and welfare of minors."[196] Cases in which parents misuse drugs or alcohol but do not neglect their child fail to justify such drastic state intervention. The lack of causation between parental drug use and harm to a child, the child's interest in staying with his natural family, and the bleak outlook for a child in the foster care system demonstrate that the government's interest does not outweigh the individual privacy interests of a child in cases involving drug use.[197] As Professor Dolgin has argued, "[e]ven when parents are not good parents, even when they use drugs or alcohol and that use harms their children, that harm is usually not the sort that justifies removal or the termination of parental rights."[198]

Although the Supreme Court has not yet decided the issue, it should hold that the Fourth Amendment protection against unreasonable seizures applies to cases involving removal of children from their homes by child protective services. This would be consistent with precedent established by several federal circuit courts. The Fourth Amendment protects children against unreasonable seizures, working to bolster their privacy interests in remaining at home with their families,[199] unless there is reasonable cause to suggest that a child needs protection from one or both of his parents. Parental drug possession or use on its own fails to indicate harm to a child warranting swift removal. Since a child is not at immediate risk of harm when a parent uses illicit substances, the state should work to uphold the protections afforded the child by the Fourth Amendment by obtaining more information before taking action.

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195 *See, e.g.*, People v. Tennyson, 790 N.W.2d 354, 367 (Mich. 2010) (requiring a causal connection between the parent's criminal activity and the child's neglect); *see also* LYNN M. PALTROW, DAVID S. COHEN & CORRINE A. CAREY, WOMEN'S LAW PROJECT & NAT'L ADVOCATES FOR PREGNANT WOMEN, YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS 6 (2000), *available at* http://advocatesforpregnantwomen.org/articles/gov_response_review.pdf (urging that parental drug and alcohol use be considered on a case-by-case basis); Murphy, *supra* note 23, at 711.

196 Wooley v. City of Baton Rouge, 211 F.3d 913, 925-26 (5th Cir. 2000) ("[T]he desire to avoid a domestic dispute cannot form a reasonable basis for depriving [a child] of his fourth and fourteenth amendment rights.").

197 *See* Dolgin, *supra* note 62, at 1255-56.

198 *Id.* at 1255.

199 *See* Santosky v. Kramer, 455 U.S. 745, 765 (1982) ("[T]he parents and the child share an interest in avoiding erroneous termination.").

C. *Seizure of Children Does Not Fall Under the Special Needs Doctrine*

Removal of children from their homes in emergency circumstances does not warrant inclusion in the special needs doctrine.[200] The special needs doctrine provides government officials with the opportunity to look for evidence of wrongdoing.[201] It applies where the state can show that: (1) "it has some 'special need' or governmental interest beyond normal law enforcement activities that make the search or seizure necessary" and (2) "its interest cannot be achieved or would be frustrated if a court imposed normal warrant and probable cause requirements."[202] Courts should view attempted use of the special needs doctrine with scrutiny because the broadness of this doctrine allows government workers to "bypass the rigorous requirements of a warrant and probable cause in a large and growing number of contexts,"[203] which severely detracts from constitutional protections.

While the special needs doctrine uses the traditional balancing test found in Fourth Amendment jurisprudence, in some cases the government's interest in eradicating drug use may override Fourth Amendment protections.[204] In the child welfare context, this could mean that parental drug use results in judicial approval of removing children from their homes. As one court has indicated, "[a]bsent a reduced privacy interest of some kind, it would be nearly impossible for even the most compelling government interest to override an individual's privacy interest unless the burden on the government interest was particularly onerous."[205] The government's interest in the War on Drugs and the government's interest in protecting children from harm both fail to meet this standard to circumscribe Fourth Amendment requirements.

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200 *See* Liebmann, *supra* note 23, at 156 n.59 (2006) ("Case law in most circuits indicates that emergency removal of a child by caseworkers is not a 'special needs' situation.").

201 Griffin v. Wisconsin, 483 U.S. 868, 870-71, 874-76 (1987) (upholding, under the special needs doctrine, the constitutionality of a warrantless search of a probationer's home because there were reasonable grounds to believe that evidence of wrongdoing would be discovered, and holding that a warrant requirement would interfere too much with the probation system); Buffaloe, *supra* note 117, at 559 (criticizing the special needs exception for overlooking the individualized suspicion requirement).

202 Dodson, *supra* note 117, at 259 (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989)).

203 Buffaloe, *supra* note 117, at 531-32 (arguing against the use of a balancing test in civil searches).

204 *See* California v. Acevedo, 500 U.S. 565, 600 & nn.12-15 (1991) (Stevens, J., dissenting) (listing twenty-seven narcotics searches upheld with either no warrant or a defective warrant).

205 State v. Moreno, 203 P.3d 1000, 1011-12 (Utah 2009) (finding that there was no special need for a parent of a delinquent child to undergo random drug testing, and that to do so would be a violation of the Fourth Amendment because such parents do not have reduced expectations of privacy).

Eight circuit courts[206] have addressed the applicability of the Fourth Amendment to child welfare proceedings, concluding that these investigations constitute searches and seizures within the meaning of the Fourth Amendment, but "[t]he circuits disagree about whether child maltreatment investigations trigger the Fourth Amendment's particularized warrant and probable cause requirements, or whether they come within the special needs exception."[207] The majority of circuits conclude that the Fourth Amendment applies and that the special needs exception should not be used in child welfare investigations.[208]

Two federal circuits may apply the special needs exception to child welfare investigations because they have not yet ruled it out, but evidence for its success in a case of alleged child neglect based on parental drug use is weak. The Second Circuit considered the special needs doctrine in *Kia P. v. McIntyre*,[209] but did no analysis on this issue because it determined that the seizure in that instance was reasonable.[210] One year earlier, however, that court determined that "if [child protective services] caseworkers have 'special needs,' we do not think that freedom from ever having to obtain a predeprivation court order is among them."[211] Quoting the Supreme Court, the Second Circuit explained, "[c]aseworkers can effectively protect children without being excused from '*whenever practicable*, obtain[ing] advance judicial approval of searches and seizures.'"[212] The Fourth Circuit's application of the special needs doctrine is similarly tenuous, as it has been applied once in a very specific case involving the search of a foster mother's home.[213] This may have also been justified by the fact that the Constitution does not afford foster parents any protection of a continued relationship with their foster children.[214]

At least six federal circuits have rejected the special needs exception to the Fourth Amendment in child removal proceedings: the First, Third, Fifth, Seventh, Ninth, and Tenth Circuits have determined that the Fourth Amendment applies to child removal proceedings and have rejected the special needs exception.[215] While the Fifth and Seventh Circuits have explicitly rejected the use of the special needs exception to Fourth Amend-

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206 The First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits. Coleman, *supra* note 36, at 470 n.170.

207 *Id.* at 469-75.

208 *Id.* at 474 (noting that the First, Second, Third, Seventh, Ninth, and Tenth Circuits apply the protections of the Fourth Amendment to child welfare investigations, while the Fourth Circuit applies the special needs exception).

209 235 F.3d 749 (2d Cir. 2000).

210 *Id.* at 762-63.

211 Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

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

213 Wildauer v. Frederick Cnty., 993 F.2d 369, 372 (4th Cir. 1993) (per curiam).

214 *Id.* at 373.

215 *See infra* notes 216-224 and accompanying text.

ment analysis where the seizure of a child is under consideration, [216] the other four circuits have rejected the special needs doctrine by indicating that it is not an option in these circumstances, rather than directly stating that it never applies. In *Wojcik v. Town of North Smithfield*,[217] the First Circuit found that a reasonableness standard was required to assess the constitutionality of an investigation initiated by the child's school and led by a child protective service agency about whether a child has been abused.[218] Similarly, the Third Circuit has determined that analysis of searches and seizures involving children requires a warrant, consent, or exigent circumstances.[219] Finally, the Ninth and Tenth Circuits have found in numerous cases that the special needs exception does not apply to child seizure cases brought under the Fourth Amendment,[220] with the Ninth Circuit explicitly expressing the need for caseworkers to be held to the requirements of the Fourth Amendment.[221] Notably, in *Roska ex rel. Roska v. Peterson*, the Tenth Circuit adopted a broad rule for the special needs doctrine, saying "[w]e find no special need that renders the warrant requirement impracticable when social workers *enter a home* to remove a child, absent exigent circumstances."[222] The court reasoned that "individualized suspicion is at the heart of a removal of a child from a home," and where there are no exigent circumstances, "there is no need for surprise or sudden action that renders obtaining a warrant counterproductive."[223]

Although the remaining federal circuits have not yet determined whether the Fourth Amendment applies to state intervention resulting in removing a child from his home, it is likely that these circuits would side with the majority, finding that the Fourth Amendment applies and cannot be

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216 Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395, 407-08 (5th Cir. 2002) (explicitly rejecting the special needs doctrine); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 (7th Cir. 2000) (holding that seizure of a child requires a warrant, probable cause, or exigent circumstances); Wooley v. City of Baton Rouge, 211 F.3d 913, 925-26 (5th Cir. 2000) (discussing child removal consistent with the Fourth Amendment as requiring a warrant, probable cause, or exigent circumstance of a child's imminent harm).

217 76 F.3d 1 (1st Cir. 1996).

218 *See id.* at 3 (using reasonableness analysis to determine the constitutionality of a school's reports of suspicions of abuse and the child protective service agency's subsequent investigation).

219 Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092-93 (3d Cir. 1989) (determining that a strip search of a child can only be valid if one of these requirements is met).

220 Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) (holding that the special needs exception does not apply); Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000) (stating that there must be a reasonable belief of a child's imminent danger to justify removal of a child from his or her home without a court order); J.B. v. Washington Cnty., 127 F.3d 919, 929 (10th Cir. 1997) (analyzing the removal of child under the Fourth Amendment's probable cause standard); White v. Pierce Cnty., 797 F.2d 812, 815 (9th Cir. 1986) (holding that only exigent circumstances could justify warrantless entry into a home to investigate child maltreatment).

221 Calabretta v. Floyd, 189 F.3d 808, 814 (9th Cir. 1999).

222 Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003).

223 *Id.*

abrogated by the special needs doctrine. Indeed, at least one court within the Sixth Circuit used a probable cause standard for assessing the removal of children from a home without a warrant, borrowing the standard from the Second Circuit.[224]

The Supreme Court should adopt the view of the majority of the federal circuits that the seizure of a child from his home does not fall within the special needs exception to Fourth Amendment protections and that the probable cause requirement applies to these cases. The Supreme Court held in *New Jersey v. T.L.O.*[225] that the special needs doctrine applies to searches of children at schools.[226] Nevertheless, a distinction can and should be drawn between searches conducted with the purpose of enforcing discipline at school and seizures conducted with the purpose of removing a child from his home.[227] The Fourth Amendment treats searches and seizures differently.[228] Importantly, "the only situation in which the Supreme Court has extended the 'special needs' doctrine to an individual's home occurred in *Griffin*, where the defendant was a probationer."[229]

Fourth Amendment analysis not abrogated by the special needs doctrine balances the potentially conflicting interests of parent, child, and state in child removal proceedings.[230] First, the state's general interest in protecting children from neglect is not sufficient to constitute a "special need . . . beyond normal law enforcement activities."[231] While child neglect cases are different from usual law enforcement activities involving criminal law, investigation does not require something "beyond normal law enforcement activities."[232] Second, even if child neglect cases fall within a governmentally-recognized "special need" making the seizure of the child "necessary," the state will be unable to show that "its interest cannot be achieved or would be frustrated if a court imposed normal warrant and probable cause requirements."[233] This conclusion is supported by the requirement that caseworkers successfully comply with the Fourth Amendment when seizing

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224 O'Donnell v. Brown, 335 F. Supp. 2d 787, 807-08 (W.D. Mich. 2004).

225 469 U.S. 325 (1985).

226 *See id.* at 333.

227 Indeed, the Tenth Circuit in *Jones v. Hunt* declined to apply the standard in *T.L.O.*, reasoning that because a case involving police and social worker seizure of a child "does not involve efforts by school administrators to preserve order on school property, it does not implicate the policy concerns addressed in *T.L.O.* and therefore does not merit application of the *T.L.O.* standard." Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005).

228 *See supra* Part I.C.

229 Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1248 (10th Cir. 2003) (citing Griffin v. Wisconsin, 483 U.S. 868 (1987)).

230 *Id.* at 1242.

231 Dodson, *supra* note 117, at 259; *see id.* at 271-77 (detailing problems with the "special needs" doctrine); *see also* Buffaloe, *supra* note 117, at 544-49 (discussing four qualities that contribute to a finding that the special needs doctrine applies).

232 *See* Dodson, *supra* note 117, at 259; *see also* Buffaloe, *supra* note 117, at 548-49.

233 Dodson, *supra* note 117, at 259; *see also* Buffaloe, *supra* note 117, at 544-46.

children from their homes,[234] combined with the Court's long protection of preserving the family unit and the sanctity of the home.[235]

D. *The* Parens Patriae *Doctrine Does Not Abrogate the Need to Comply with Fourth Amendment Protections*

Because the Constitution trumps both common law and state law, the Fourth Amendment applies to cases involving the removal of children from their homes. The state's *parens patriae* power in child welfare investigations involves a long recognition of constitutional limitations, which naturally includes the Fourth Amendment protection against unreasonable seizures.[236] It does not justify states drafting neglect statutes to seize children from their homes based on parental drug and alcohol use. The state's goal should not be to remove a child from his home, but to preserve familial bonds where possible.[237] If neglect statutes conflict with the Fourth Amendment, they must be deemed invalid.[238] In Reno v. Flores,[239] the Supreme Court noted that when the state is exercising its *parens patriae* power, "the child's fundamental rights must not be impaired."[240] Unnecessarily removing a child from his home would constitute an impairment of that child's fundamental Fourth Amendment rights in remaining with his family and being secure in his own home.

Moreover, respecting the Fourth Amendment would help states to better comply with the requirements of *parens patriae*, for both doctrines have an interest in keeping families together. As the Supreme Court has said, "the *parens patriae* interest favors preservation, not severance, of natural familial bonds."[241] Recognizing that Fourth Amendment protections apply to children would aid states in achieving this goal of preserving the family unit where possible, and only removing children from their homes where neglect is sufficient to warrant such intervention exists. States could devel-

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234 *See, e.g.*, *Roska*, 328 F.3d at 1240-41.

235 Silverman v. United States, 365 U.S. 505, 511 (1961); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that there is a "private realm of family life which the state cannot enter").

236 *See Developments*, *supra* note 22, at 1159 ("[T]he states' power to legislate and administer family law has never been exempt from constitutional limitations."); *cf.* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (holding that the Due Process Clause of the Fourteenth Amendment required a tougher evidentiary standard for permanent removal of a child than that required by New York's neglect statute).

237 Stanley v. Illinois, 405 U.S. 645, 652 (1972) ("[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.").

238 U.S. CONST. art. VI, cl. 2.

239 507 U.S. 292 (1993).

240 *Id.* at 304; *see also* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("'[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.'" (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925))).

241 *Santosky*, 455 U.S. at 766-67.

op stricter evidentiary standards in their neglect statutes to aid in this endeavor, keeping in mind that "the State registers no gain toward its declared goals when it separates children from the custody of fit parents."[242] Moreover, this would reduce error and would be fiscally responsible as well as easily employable by states.[243]

III. NEGLECT STATUTES THAT ALLOW FOR SEIZURE OF CHILDREN SOLELY BECAUSE OF PARENTAL DRUG POSSESSION OR USE ARE UNREASONABLE

While parental drug possession or use may lead to a higher likelihood of child neglect, this, without any other evidence, is insufficient to constitute neglect. As the Supreme Court has said, "the consequences of an erroneous termination [of parental rights] is the unnecessary destruction of [the] natural family,"[244]and "[e]ven when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."[245] Evidence of an increased likelihood of harm to a child does not constitute actual or imminent threat of harm to a child. "Imminent danger . . . must be near or impending, not merely possible."[246] As at least one court has found, the requirement of "proof of actual (or imminent danger of) physical, emotional or mental impairment to the child" ensures that courts "focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior."[247]

Because caseworkers acting pursuant to child neglect statutes are acting within their bounds, and because appellate courts must be deferential to lower court determinations about probable cause,[248] upholding Fourth Amendment protections for children requires striking down as unconstitutional neglect statutes targeting parental involvement with drugs. To lawfully seize a child from his home, a government caseworker must either have a valid court order or evidence to substantiate probable cause or exigent circumstances.[249] Mere drug possession amounts to neither probable cause nor exigent circumstances. Therefore, neglect statutes that explicitly designate drug abuse as child neglect lead to unlawful seizures within the meaning of the Fourth Amendment and should be struck down as unconstitutional.

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242 *Stanley*, 405 U.S. at 652.

243 *Santosky*, 455 U.S. at 767.

244 *Id.* at 766.

245 *Id.* at 765 n.15.

246 Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004).

247 *Id.*

248 J.B. v. Washington Cnty., 127 F.3d 919, 930 (10th Cir. 1997). This includes whether probable cause existed to grant a court order for removal. *Id.*

249 *E.g.*, Brokaw v. Mercer Cnty., 235 F.3d 1000, 1010 (7th Cir. 2000).

A. *Parental Drug Use Is Insufficient to Constitute Probable Cause of Child Neglect Warranting Seizure*

Probable cause is required to obtain a court order to remove a child from his home, but may also warrant removal in the absence of a court order. This requirement holds in each instance where there are no exigent circumstances to justify immediate intervention. As the Tenth Circuit has said, "unless the child is in imminent danger, there is no reason that it is impracticable to obtain a warrant before social workers remove a child from the home."[250] Obtaining a court order is a "minimal inconvenience"[251] to caseworkers and should be the first priority unless there is reason to believe that waiting for the court order could put a child at severe risk. Unlike abuse, which involves some form of negative parental action, child neglect typically presents in the form of parental omissions, and therefore, cases of neglect are substantially less likely to warrant immediate action.[252] Therefore, caseworkers should have the time to conduct more investigation and obtain a court order. Additionally, drug use on its own should be insufficient to constitute probable cause or to grant a court order because of the lack of causation between parental drug use and harm to a child.

Caseworkers complying with the Fourth Amendment typically may not use a third party's report as justification for removing a child from his home without conducting an independent investigation first.[253] "[A]ppellate courts reviewing probable cause determinations owe substantial deference to the judicial officer making the initial probable cause determination."[254] Because of this, however, there are few federal circuit decisions undermining the probable cause findings of government officials and district courts. Thus, even if an appellate court determines that the lower court's finding of probable cause establishing neglect is faulty, it will be inclined to follow this ruling. This may be particularly true where drug use is involved in making that determination, for overturning such a finding would have the added stigma of condoning drug use or being "weak on crime." Since parental drug use does not necessarily lead to child neglect, however, statutes including parental drug use as a form of neglect fail to constitute a basis for a finding of probable cause or issuance of a court order for removal and should be overturned.

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250 Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003).

251 *Id.* (citing New York v. Burger, 482 U.S. 691, 727 (1987) (Brennan, J., dissenting)).

252 *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT IS CHILD ABUSE AND NEGLECT? 2-3 (2008) (defining child abuse and neglect); *see also* Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000) (noting that removal without prior authorization is only permitted if "the child is in imminent danger of serious bodily injury").

253 *See* Brokaw, 235 F.3d at 1011; *J.B.*, 127 F.3d at 929-30 (explaining that anonymous tips are insufficient to establish probable cause).

254 *J.B.*, 127 F.3d at 930.

Although courts have supported intervention based on probable cause in cases of sexual abuse, such reasoning is not appropriate in cases involving parental drug use. In *J.B. v. Washington County*,[255] the Tenth Circuit found that removing a child from her home for questioning was justified after caseworkers received an eyewitness report that her father sexually abused her.[256] The court analyzed the case under the totality of the circumstances and determined that the action was justified by probable cause.[257] This is distinct from a situation involving drug use because a parent's inebriation does not pose the same immediate threat to the child as the risk of sexual abuse.[258] Sexual abuse directly injures a child, leaving physical damage and potentially permanent emotional damage.[259] Though it may have indirect ramifications for the child, drug use by the parent does not directly affect the child in the same way.[260]

While one study has determined that substance abuse is "almost guaranteed" to lead to child neglect,[261] at least some courts have been willing to recognize that an unsubstantiated causal connection is insufficient to warrant removing a child from his home.[262] Moreover, although drugs are illegal, a parent's criminal activity does not authorize the government to separate a family through child neglect statutes.[263] While incarceration is an enforcement method in criminal law, taking someone's child away is not. Drug use may cross the line into neglect in some, but certainly not all circumstances, meaning that drug use on its own cannot support a finding of

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255 127 F.3d 919 (10th Cir. 1997).

256 *Id.* at 930.

257 *Id.* at 929-30.

258 *See infra* notes 272-279.

259 *See* Leah Irish et al, *Long-Term Physical Health Consequences of Childhood Sexual Abuse: A Meta-Analytic Review*, 35 J. PEDIATRIC PSYCHOL. 450, 450-52 (2010); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY: ADDRESSING THE MENTAL HEALTH OF SEXUALLY ABUSED CHILDREN 2-3 (2007).

260 *See, e.g.*, People v. Tennyson, 790 N.W.2d 354, 367-68 (Mich. 2010) (requiring a causal connection between the parent's criminal activity and the child's neglect); *see also* PALTROW, COHEN & CAREY, *supra* note 195, at 6 (urging that parental drug and alcohol use be considered on a case-by-case basis).

261 NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 3 (1998), *available at* http://www.casacolumbia.org/articlefiles/379-No%20Safe%20Haven.pdf (finding that substance abuse is nearly guaranteed to lead to child neglect).

262 *See, e.g.*, Kozey v. Quarles, No. 3:04 CV 1724 MRK, 2005 WL 2387708, at *2 (D. Conn. Sept. 28, 2005) (recognizing that removal of children would be inappropriate in light of unsubstantiated allegations of substance abuse).

263 *See, e.g.*, Hudson v. City of Salem, No. CV-07-226-ST, 2009 WL 1227770, at *16-17 (D. Or. May 21, 2009) (recognizing that use of marijuana by parent was not sufficient to provide probable cause for arrest for criminal mistreatment and removal of children).

child neglect.[264] While there have been instances where a parent's drug use was so severe as to render the parent incapable of caring for the child,[265] this is better identified by other statutorily-defined symptoms of neglect[266] rather than drug use per se. This helps to ensure that the lines between condemning immoral parental behavior and intervening to protect a child from harm are not blurred.

The Michigan Supreme Court, for example, found that a man's arrest for possessing narcotics and firearms was insufficient to support a finding of child neglect because there was no evidence that the child was aware of the drugs or guns.[267] The court held that there must be a causal connection between a parent's criminal conduct and a child's neglect.[268] Explaining its decision, the court said: "[W]e cannot imagine that it was within the Legislature's contemplation that violations of [the state's child neglect statute] be predicated on what might be momentary lapses in parental conduct rather than on an overall assessment of the child and his or her circumstances."[269]

Indeed, at least one court has even found that a positive toxicology report of drugs in a newborn was insufficient on its own to constitute a neglect finding, reasoning that it "fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child."[270] This is significant because a positive toxicology report indicates that the newborn was physically impacted by the mother's drug use. Even though his health was impacted, prenatal consumption of a drug was not enough by itself to support a finding of neglect.[271] This indicates that circumstances involving parental drug use after the child has already been born, particularly in instances where the child is not even aware of this activity, should be substantially less likely to result in a neglect finding. If an adverse impact on a newborn's health cannot substantiate probable cause of neglect, then the mere presence of drugs in a home should also be unable to substantiate

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264 Mere possession may be insufficient to constitute child neglect. *See Tennyson*, 790 N.W.2d at 367-68. In contrast, manufacture of drugs may constitute probable cause of child neglect warranting removal of a child from his home. *See* United States v. Venters, 539 F.3d 801, 808-09 (7th Cir. 2008).

265 *See, e.g.*, *In re* R.R., 114 Cal. Rptr. 3d 765, 781 (Ct. App. 2010) (finding that a father's hospitalization for methamphetamine use and admission to hospital staff that he also abused marijuana, cocaine, and alcohol rendered him incapable of caring for his child).

266 Examples include "'lack of adequate food, clothing, shelter, medical care, and supervision, or abandonment.'" Weinstein & Weinstein, *supra* note 20, at 580 (quoting Rose & Meezan, *supra* note 66, at 281).

267 *Tennyson*, 790 N.W.2d at 367-68.

268 *Id.* at 367.

269 *Id.* at 360.

270 Nassau Cnty. Dep't of Soc. Servs. *ex rel.* Dante M. v. Denise J., 661 N.E.2d 138, 141 (N.Y. 1995).

271 *Id.* The court did find neglect based on the positive toxicology report along with other factors like infant impairment. *Id.*

probable cause of neglect. Where neglect really is present, caseworkers should be able to find evidence other than drug use to demonstrate probable cause for removal.

This is bolstered by studies of the impact of parental drug use on the welfare of children. While children of parents who abuse drugs are more likely to be neglected than abused, "there is significant disagreement among researchers about the extent to which drug use correlates with neglect."[272] One study involving 200 alcoholics and opiate addicts concluded that "many such addicts neither abuse nor seriously neglect their children."[273] The study found a number of risk factors associated with children of addicts including "the sex of the addicted parent, the extent of violence between spouses, poverty and the absence of financial and social assistance" and found that "neglect is the product of a number of factors, drug use and poverty among them."[274] Based on this study and other conflicting conclusions by researchers,[275] parental drug use cannot constitute probable cause justifying state intervention into family life in a manner consistent with the protections provided by the Fourth Amendment. Parental drug use is merely an indicator of potential neglect, and a causally shaky one at that.

Some cases have confirmed that drug use does not always lead to neglect and should not be a factor demonstrating harm to the welfare of a child. For example, the First District Court of Florida found that a child's mere exposure to small quantities of marijuana and cocaine was insufficient to support a finding of dependency, reversing the decision of the lower court.[276] The court reasoned that a child is only harmed by parental drug use in two circumstances: "(1) when a mother's use of a controlled substance during her pregnancy demonstrably adversely affects the child; or (2) when a parent's 'continued chronic and severe use of a controlled substance' demonstrably adversely affects the child." [277] The court found there was "no evidence that [the father's] drug use was continued, chronic, or severe, or that [the child] was demonstrably adversely affected by [the father's] drug use."[278] Going one step further, the court also determined that there was no evidence that the parents' drug use in this case posed a risk of imminent harm of abuse or neglect.[279]

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272 Dolgin, *supra* note 62, at 1225.

273 *Id.* (citing Rebecca Black & Joseph Mayer, *Parents with Special Problems: Alcoholism and Opiate Addiction*, 4 CHILD ABUSE & NEGLECT 45 (1980)).

274 *Id.*

275 *Id.* at 1225 nn. 52-58.

276 J.B. v. Dep't of Children & Families, 928 So. 2d 392, 395 (Fla. Dist. Ct. App. 2006).

277 *Id.*

278 *Id.*

279 *Id.* at 395-96.

B. *Parental Drug Use Is Insufficient to Constitute an Exigent Circumstance to Justify Seizure of a Child Based on Neglect*

When acting in the absence of a court order, exigent circumstances may justify social worker intervention in family life to prevent a risk of danger to children.[280] Importantly, the child must be "immediately threatened with harm . . . [T]he mere possibility of danger is not enough."[281] This underlies the reasoning behind why a report of neglect on its own is not sufficient to constitute an exigent circumstance.[282] Determining whether an investigation reveals exigent circumstances to justify warrantless removal of a child from his home is within the caseworker's discretion, but this decision is scrutinized by courts.[283] Typically, the standard is that a caseworker basing intervention on exigent circumstances must "have reason to believe that life or limb is in immediate jeopardy."[284] Drug use or possession does not fit within the bounds of exigent circumstances because it does not pose the required immediate threat of harm to the child. [285] Indeed, even if drug use poses an increased likelihood that a child will be neglected, this is insufficient to constitute an exigency warranting immediate intervention.[286]

Although the federal circuit courts have developed different standards to identify exigent circumstances justifying seizure of a child from his home in the absence of a court order,[287] parental drug use fails to constitute exigent circumstance under any of these standards. Because exigent circumstances require the immediate threat of harm to the child, rather than a mere possibility of harm occurring to the child,[288] neglect statutes that identify drug use or possession as forms of neglect justifying removal of a child from a home fail to constitute exigent circumstances. Drugs use or possession does not cause direct harm to a child and is not a guarantee of direct harm to a child, but merely poses a possibility of harm to a child. This possibility of harm is not an exigency.[289] Thus, neglect statutes referring to the

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280 *Cf.* Mincey v. Arizona, 437 U.S. 385, 392-93 (1978) (acknowledging the legal power of police to make warrantless entries in cases of emergency).

281 Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999) (quoting Hurlman v. Rice, 927 F.2d 74, 80-81 (2d Cir. 1991)).

282 *See* Walsh v. Erie Cnty. Dep't Job & Family Servs., 240 F. Supp. 2d 731, 740, 749-50 (N.D. Ohio 2003) (finding no exigent circumstances among evidence of cluttered home, the developmental delays of the children, and the lack of educational and medical care for the children because there was no showing of "imminent or likely harm" to the children).

283 Coleman, *supra* note 36, at 465.

284 Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1094 (3d Cir. 1989).

285 *See id.*

286 *See Tenenbaum*, 193 F.3d at 594.

287 Gates v. Texas Dep't Protective & Regulatory Servs., 537 F.3d 404, 428-29 (5th Cir. 2008) (summarizing the standards adopted by the First, Second, Ninth, Tenth, and Eleventh Circuits).

288 *Tenenbaum*, 193 F.3d at 594.

289 *Id.*

increased possibility of risk of harm to a child caused by parental drug use cannot suffice as exigent circumstances because the harm is not imminent and likely not severe enough in magnitude to require immediate caseworker action.[290]

Three federal circuits have particularly strict standards for seizure of children. The Third Circuit has held that exigent circumstances justify warrantless seizure of children where "the state actors making the search . . . have reason to believe that life or limb is in immediate jeopardy and that intrusion is reasonably necessary to alleviate the threat."[291] The Ninth Circuit requires "reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant."[292] The Tenth Circuit has a similarly strict standard, requiring

> (1) . . . reasonable grounds to believe that there is immediate need to protect . . . li[fe] or . . . property . . ., (2) the search [is not] motivated by an intent to arrest and seize evidence, and (3) there [is] *some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched*.[293]

Thus, where caseworker intervention involves entering a home and removing a child from that home, the Tenth Circuit will scrutinize this action.

Because of the long history of the protection of the home and government recognition of individual privacy, the Tenth Circuit's standard best upholds the provisions of the Fourth Amendment and would result in the determination that parental drug use is not an exigency allowing caseworkers to enter a home without a court order to seize a child. Under any of these standards, however, parental drug use fails to constitute an exigent circumstance, for it does not put a child in "immediate jeopardy,"[294] nor does it pose the threat that the child is "likely to experience serious bodily harm."[295] If, in the Tenth Circuit, a child's frequent illnesses and the suspicions of doctors that the mother harmed him "to gain the sympathy and attention of medical personnel" failed to constitute exigent circumstances,[296]

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290 *See* David B. Ezra, *Sticks and Stones Can Break My Bones, but Tobacco Smoke Can Kill Me: Can We Protect Children from Parents that Smoke?*, 13 ST. LOUIS U. PUB. L. REV. 547, 579 n.192 (1994) (arguing that the magnitude of harm posed by a parent and the difficulty in preventing that harm are important considerations in child maltreatment cases).

291 Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1094 (3d Cir. 1989).

292 Rogers v. Cnty. of San Joaquin, 487 F.3d 1288, 1294 (9th Cir. 2007).

293 United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992) (alterations in original) (quoting United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1986)); *see also* Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003) ("Simply put, unless the child is in imminent danger, there is no reason that it is impracticable to obtain a warrant before social workers remove a child from the home.").

294 *Good*, 891 F.2d at 1094.

295 *Rogers*, 487 F.3d at 1294.

296 *Roska*, 328 F.3d at 1238, 1240.

then mere parental drug use could also not constitute exigent circumstances. In that case, even though doctors suspected that the mother harmed her child, the court found that "no evidence indicates that [the child] was in immediate threat of death or severe physical harm."[297] Parental behavior that does not have such a physical impact on a child, therefore, also cannot meet this standard.

The Second Circuit has the least stringent standards for a government showing of exigent circumstances.[298] The Second Circuit considers sufficient evidence of an exigent circumstance to be present where "information possessed by a state officer would warrant a person of reasonable caution in the belief that a child is subject to the danger of abuse if not removed from [home] before court authorization can reasonably be obtained."[299] Even under this loose standard finding exigent circumstances where the time it takes to obtain a court order could result in harm to the child, parental drug use cannot pass muster. Waiting a few more days to obtain a court order would be unlikely to result in a substantial likelihood of great harm to the child in cases where parents use drugs unless there is other evidence of alleged neglect calling for swifter action.

Because it does not pose an immediate risk of harm to the child, the presence of drugs in a home does not reach the exigent circumstances requirement to justify seizure of a child without a court order.[300] While the manufacture of drugs in the home may constitute such an exigency,[301] the mere presence of drugs, or prior use, does not pose the same threat to a child. As the Second Circuit has warned, "[i]f the mere 'possibility' of danger constituted an emergency, officers would 'always' be justified in making a forced entry and seizure of a child whenever the child was in the presence of a person who had . . . a history [that heightens the possibility of danger to the child]."[302]

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297 *Id.* at 1241.

298 *See* Tenenbaum v. Williams, 193 F.3d 581, 605 (2d Cir. 1999).

299 *Id.*

300 *Compare* R.S. v. Dep't of Children & Family Servs., 16 So.3d 948, 952 (Fla. Dist. Ct. App. 2009) (finding that the alleged neglect necessary for the child's removal did not occur within the meaning of the statute because the child did not live with the father), *with* United States v. Bercier, 326 F. Supp. 2d 992, 998 (D.N.D. 2004) (finding exigent circumstances where the children were found "naked, filthy and suffering from colds and head lice" and based on a caseworker's past dealings with the family, a newborn's positive test for illegal drugs, the presence of drug paraphernalia, and the presence of an explosive device in the home).

301 *See, e.g.*, United States v. Venters, 539 F.3d 801, 808-09 (7th Cir. 2008) (finding that a father's addiction to and manufacture of methamphetamines created an exigent circumstance warranting removal of the child from his home).

302 Hurlman v. Rice, 927 F.2d 74, 81 (2d Cir. 1991).

C. *Neglect Statutes that Identify Parental Drug Use as Neglect Should Be Overturned Because They Are Unreasonable Under the Fourth Amendment*

Courts should not accept the standard set by neglect statutes that mere possession, or even use, of narcotics constitutes neglect because it does not necessarily cause "real physical or emotional harm"[303] to the child, nor does it mean that the child is in imminent danger. Furthermore, neglect statutes that incorporate drug use into their definitions of neglect do not fulfill their purpose of protecting children because the immorality of a particular behavior does not necessarily lead to harm. In 1975, Professor Michael Wald criticized neglect statutes for focusing too much on parental behavior rather than the welfare of the child.[304] Neglect statutes have since changed, but the problem remains the same, with the introduction of parental alcohol and drug abuse reemphasizing the concern with parental misconduct. While many neglect statutes require "a showing of harm to the child . . . [as] a prerequisite for coercive state intervention," statutes incorporating drug use focus on parental behavior and thus "subvert themselves."[305] "[B]y preserving references to parental misconduct . . . as factors to consider in neglect determinations, statutory law . . . undermin[es] the express requirement that harm to the child be a sine qua non of intervention."[306] The result of this is that "such cases often begin to resemble criminal proceedings against errant parents."[307] Indeed, the American Bar Association's Standards Relating to Abuse and Neglect "preclude coercive intervention unless a child has been and will be endangered in a specified manner, and no mention is made of parental misconduct."[308] By focusing on parental behavior, courts are inappropriately encouraged to ignore what is in the best interests of the child.[309] Because the state's intervention is only justified by its *parens patriae* concern with the welfare of the child, the state's removal of a child from a home must necessarily represent a nexus between parental activity and the child's welfare. Caseworkers are to judge the quality of parenting, not the

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303 Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976).

304 Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1007-08 (1975).

305 Dolgin, *supra* note 62, at 1227.

306 *Id.* at 1227-28.

307 *Id.* at 1228.

308 *Id.* at 1230 (citing JUVENILE JUSTICE STANDARDS PROJECT, AM. BAR ASS'N, STANDARDS RELATING TO ABUSE AND NEGLECT §§ 2.1-2.2, at 16-17 (rev. ed. 1990) (prepared under the auspices of, but not adopted by, the A.B.A.)).

309 *Id.* at 1235-36 ("All too often, statutory authorizations to consider drug or alcohol misuse as a factor in neglect proceedings provide a pretext for courts to limit or eradicate parental rights without careful consideration of whether that action serves the child's best interests.").

quality of the person who is the parent.[310] Indeed, courts have held that moral condemnation on its own is insufficient to constitute neglect.[311]

The assumption that drug use constitutes neglect inappropriately shifts the focus from the welfare of the child to the behavior of the parent.[312] The parenting, not the supposed quality of the individual who is the parent, should be at issue.[313] Neglect statutes of the 1960s and 1970s defined neglect in "broad, imprecise terms" and focused on parental behavior.[314] During this time period, "[t]he system was largely preoccupied with punishing parents, rather than aiding children."[315] Modern standards now call for identification of a specific harm that has been or may be inflicted upon the child.[316] However, if child neglect statutes continue to deem evidence of drug use per se neglect, then the changes in these statutes will be rendered moot[317] because they do not identify a specific harm to a child. They instead target a parental behavior. Calling drug use "neglect" is a misuse of the legal standard that should emphasize the relationship between the parent and child, not simply the activities of the parent.[318] This practice makes neglect cases more like criminal proceedings against the parents,[319] rather than the civil proceedings for child protection for which they were intended. Indeed, studies show that the parenting itself is defined differently when there is knowledge that the parent drinks.[320] Evidence that this stigma shifts the focus away from the well-being of the child is found in other studies that "fail[] to explain what criteria were employed to identify alcohol de-

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310 *See supra* Part II.B.

311 *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976) ("The Alabama statute defining 'neglected' children sweeps far past the constitutionally permissible range of interference into the sanctity of the family unit. The fact that a home is 'improper' in the eyes of the state officials does not necessarily mean that a child in that home is subject to physical or emotional harm.").

312 *See* Dolgin, *supra* note 62, at 1213, 1235-36; Wald, *supra* note 304, at 1034; Weinstein & Weinstein, *supra* note 20, at 603.

313 *See* Wald, *supra* note 304, at 1033-34.

314 Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 758 (1990).

315 *Id.* at 758-59; *see also* Wald, *supra* note 304, at 1003 n.107.

316 Dolgin, *supra* note 62, at 1227 ("[C]oercive intervention in many states cannot be predicated upon parental misconduct, however egregious or bizarre, unless actual or imminent harm to the child has been shown.").

317 *Id.* at 1227-28.

318 Robin-Vergeer, *supra* note 314, at 760 ("Such knee-jerk intervention signals a return to the discredited practice of focusing on the repugnance of parental conduct. . . . Whether prior parental conduct is blameworthy or repulsive should *not* be of concern to the child welfare system.").

319 Dolgin, *supra* note 62, at 1228.

320 *Id.* at 1219-20.

pendence and to explain whether and how intoxication was determined to have existed at the time harm to the child occurred."[321]

Federal courts will avoid making a constitutional determination on a state statute wherever possible, particularly where the statute involves an issue of family law, an area left up to state regulation.[322] Even the Supreme Court "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts."[323] Particularly as it relates to question of a state statute governing family law, the Court should defer to state primacy.[324]

However, state statutes that are inconsistent with the Constitution can and should be struck down, "even when the state acts to protect the welfare of children."[325] A municipality violates the Constitution when it has "an express policy that, when enforced, causes a constitutional deprivation."[326] For example, in *Wallis v. Spencer*, the Ninth Circuit found that a "longstanding agreement" of seizing children based on court order without seeing the court order first may constitute such a custom or practice in violation of the Constitution.[327] The court, there, however, did not decide definitively whether the custom or practice was unconstitutional. In *Roe v. Conn*,[328] a federal district court made this leap, striking down a child neglect statute authorizing termination of parental rights if the child "has no proper parental care."[329] The court held that termination of parental rights was permissible "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."[330] Thus, the court reasoned, a lack of "proper" parental care either failed to constitute "real physical or emotional harm" or that the state could take measures other than removing a child to achieve its goal of ensuring the welfare of the child.[331] Striking down the statute, the court noted: "The fact that a home is 'improper' in the eyes of the state officials does not necessarily mean that a

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321 *Id.* at 1220-21 (discussing how studies fail to determinatively state whether effects on a child are caused by a parent's alcohol consumption or by family dysfunction and how there is not a clear pattern of the emotional neglect that may arise from alcoholism).

322 Nicholson v. Scoppetta, 344 F.3d 154, 167 (2d Cir. 2003).

323 Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997) (quoting Poe v. Ullman, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)).

324 Moore v. Sims, 442 U.S. 415, 434-35 (1979).

325 O'Donnell v. Brown, 335 F. Supp. 2d 787, 801-02 (W.D. Mich. 2004) (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001)).

326 Brokaw v. Mercer Cnty., 235 F.3d 1000, 1013 (7th Cir. 2000).

327 Wallis v. Spencer, 202 F.3d 1126, 1142-43 (9th Cir. 2000).

328 417 F. Supp. 769 (M.D. Ala. 1976).

329 *Id.* at 778-80.

330 *Id.* at 779; *see also* Alsager v. Dist. Court, 406 F. Supp. 10, 24 (S.D. Iowa 1975) (holding that the termination of parenthood was permissible only if the child is more likely to be harmed by staying with his parents than by being moved into foster care), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

331 *Roe*, 417 F. Supp. at 779.

child in that home is subject to physical or emotional harm."[332] While this court's decision was based on the parents' Fourteenth Amendment liberty interests in maintaining custody of and caring for their child,[333] it is likely even easier for courts to strike down neglect statutes based on the substantive protections provided by the Fourth Amendment. For example, a district court in New York found that removing children from their homes to prevent them from witnessing domestic violence was bad public policy because it was often unnecessary, involved "overlook[ing] the opportunity to remedy any alleged neglect by working with or removing the batterer," and also meant that caseworkers failed to provide other services to remedy the situation in a less intrusive manner.[334] Accordingly, the court determined that such removals were unreasonable under the Fourth Amendment.[335]

Therefore, requiring that caseworkers find some sort of neglect other than suspected or even confirmed drug use would limit their discretion and help prevent destructive outcomes in the future. Where there is neglect because of parental use of drugs, the parent will manifest this in a form other than the drug use alone. For example, "[t]he basic needs of children, including nutrition, supervision, and nurturing, often go unmet due to parental substance abuse, resulting in neglect."[336] While the presence of drugs may be evidence that child neglect is more likely to occur, correlation is not tantamount to causation. "[A]lthough neglect and abuse do occur among the children of . . . addicts, many such addicts neither abuse nor seriously neglect their children. . . . [N]either drug use nor addiction, per se, produces neglect."[337] As Professor Dolgin has found, the "social and economic class of the family involved" tends to trump other considerations, such as "the distinction between legal and illegal drugs," "the kind of drug used," "the amount of drug used," and "the effect of a drug on parenting ability."[338]

Seizure of a child should be used sparingly in child neglect cases[339] as an effort of last resort, not as an initial way of dealing with a perceived problem.[340] Statutes that include drug use and possession in the definition of neglect bias caseworkers to look for drugs and to remove children from homes where drugs are found.[341] These definitions frame the agenda. Stat-

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332 *Id.*

333 *Id.* at 777.

334 Nicholson v. Scoppetta, 344 F.3d 154, 163 (2d Cir. 2003).

335 *Id.* at 164.

336 NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., SUBSTANCE ABUSE & CHILD MALTREATMENT 1 (2003).

337 Dolgin, *supra* note 62, at 1225 (citing Black & Mayer, *supra* note 273, at 45).

338 *Id.* at 1216.

339 *See* Wald, *supra* note 304, at 1039-40 (developing a statutory definition of "neglect").

340 Dolgin, *supra* note 62, at 1214 ("[I]n-home intervention should replace removal as the first response.")

341 *See id.* at 1227-28 (stating that many state statutes undermine the express requirement of harm to the child by including references to parental misconduct).

utes focused generally on the health and welfare of the child still permit intervention if the drug use actually leads to child neglect without the same bias. Caseworkers have broad discretion in determining outcomes of child neglect investigations.[342] Unclear neglect statutes and inconsistent court rulings have likely contributed to this autonomy.[343] Moreover, caseworkers may be encouraged to remove children first and ask questions later. Often, "child protection agencies do not have appropriate investigative tools to deal with noncooperation. If agency workers cannot gather enough information to support a child protection petition in juvenile court, they may feel forced to choose between dropping the investigation and summarily removing children from their homes."[344] Additionally, caseworkers may "believe that a parent's failure to cooperate with the investigation [is] sufficient to justify taking temporary custody of the child."[345]

The "best interests" of the child language in many neglect statutes indicates a need for more analysis of whether the child would be better off with his parents or better off removed and placed in a foster home.[346] Notably, New York, the same state where Ms. Harris's children were removed based on a small amount of marijuana, "is so far the only state that has taken up the argument that there must be a balancing of the two risks—the potential harm of removal, and the potential harm of non-removal—in assessing the strength of the state interest in removing children from their parents."[347]

Because the extent to which substance use affects others is too difficult to measure, caseworkers should focus more on the manifestations of substance abuse rather than the mere fact that the parent uses drugs. Additionally, caseworkers should provide parents with opportunities to improve before removing a child from his or her home, granted that the child is not in an emergency situation. Assessing evidence of child neglect on a case-by-case basis is a more appropriate standard than determining that drug use always leads to neglect and would lead to fewer unnecessary seizures.[348] Indeed, the American Bar Association has determined that "'many people

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342 *See* Garrison, *supra* note 43, at 1754-55 (citing the modern need for individual diagnosis and treatment as granting broad power upon child protective services agencies).

343 *See id.* at 1755 (criticizing courts for lax review of child protective services agency actions).

344 Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 497 (1988) (footnote omitted).

345 *Id.* at 498 n.9.

346 Liebmann, *supra* note 23, 174-75 (arguing for the use of a "comprehensive risk assessment" to determine what is best for the child, looking at factors such as "the risk of emotional or physical harm to a child" caused by being removed from her parents).

347 *Id.* at 175 n.126 (citing a number of New York cases).

348 *See* PALTROW, COHEN & CAREY, *supra* note 195, at 6 ("Of course, as with parents who do not use drugs, there are instances of drug-using mothers and fathers who are neglectful parents. That is something, however, that needs to be determined on a case-by-case basis rather than based on unsupported assumptions that treat any and all drug use as synonymous with neglectful parenting.").

in our society suffer from drug or alcohol dependence yet remain fit to care for a child.'"[349] Therefore, seizure should only result where that drug use "results in mistreatment of the child, or in a failure to provide the ordinary care required for all children."[350] This would be best accomplished by definitions of child neglect that do not include drug use as a cause of neglect. Training caseworkers on Fourth Amendment protections would further bolster the protections that children deserve, but rewriting neglect statutes is the necessary first step.

CONCLUSION

Although possession or use of a controlled substance fails to indicate the adequacy of parenting, in some states it is enough to seize children based on alleged neglect. Parental drug use on its own fails to constitute probable cause or an exigent circumstance warranting removal of children from their homes in a manner consistent with the well-established privacy protections of the Fourth Amendment. Therefore, when the state removes children from their homes based on neglect statues targeting parental drug use, the state subjects the children to unreasonable seizures under the Fourth Amendment. Striking down these neglect statutes would be consistent with the Fourth Amendment and fulfill positive policy goals. States would still be able to achieve their ends of protecting children if they conducted seizures based on other well-established indicators of neglect. To respect the provisions of the Fourth Amendment, state statutes that indicate that drug use or possession constitutes child neglect should be struck down.

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349 *Id.* (quoting NAT'L LEGAL RES. CTR. FOR CHILD ADVOCACY & PROT., AM. BAR ASS'N, FOSTER CHILDREN IN THE COURTS 206 (Mark Hardin ed., 1983)).

350 *See id.* (quoting FOSTER CHILDREN IN THE COURTS, *supra* note 349, at 206).