

Note to readers: Thank you so much for reviewing this piece, which I look forward to discussing on March 5, 2021. I would appreciate any comments whatsoever, but am especially keen on two questions: first, given the uniqueness of the state regimes here, to what extent is an analysis of state statutory schema and state caselaw necessary in II.B? second, I would appreciate any and all thoughts on the "thesis" section of the piece, II.C.

CHILD PROTECTIVE CASEWORKERS AS LAW ENFORCEMENT OFFICERS

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INTRODUCTION

Imagine you are a single mother living in East Harlem, New York¹ and a caseworker of the New York City Administration for Children's Services knocks on your door. You answer, and she comes in. She tells you that she got a call from your daughter's school — it's really not that serious, but she will have to ask you some questions, and will have to ask your daughter some too.² She also needs to talk to your two other children, what are their names again? And she'll need to take a look around the house, just to make sure you have everything you need. That's fine with you, right?

You watch her take notes as she opens the kitchen cabinets and refrigerator door, counting the number of beer bottles left in the refrigerator from a get-together you had with friends last week. You hesitate — should you explain that to her? She has moved on, though. She tests the carbon monoxide detector, it beeps twice — is that good or bad? — and dramatically steps over the toys that the kids have thrown around the living room. She scribbles in her pad as she walks by the sink, which you have not had time to empty since you came home from work. She walks into your bedroom, then your kids' room, and the bathroom, taking notes the whole time. The caseworker calls your daughter into the bedroom, and sweetly asks you to instruct her that it's OK to speak with her alone, and that she should follow the caseworker's instructions and answer any questions she might have. She

* Author's note.

¹ In 2019, the Community District of East Harlem had the most Child Maltreatment investigations in the borough of Manhattan, 1556, and the 9th most investigations in the City of New York. <https://www1.nyc.gov/assets/acs/pdf/data-analysis/abuse-neglect-report15to19.pdf>

² ACS must conduct "an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment ..." N.Y. Soc. Serv. L. §424(6)(a).

may not feel comfortable speaking with strangers, of course. You do, warily, and walk back to the kitchen table.

What choice do you have, really? This caseworker has power that you know all too well — just last year, you watched an ACS caseworker basically take over your cousin's life. They first came and searched her house, just like this. Eventually, they made her do all sorts of classes that she did not want to, and you knew she did not need. They made her kids get examined by a psychologist, and they asked her get a mental health evaluation too. She tried to reason with them - she did not need to take a class where they taught her how to change baby's diapers, her kids were teenagers! - but it did not work. Eventually, they took her babies away and put them in foster care, and she had to visit them while someone watched and took notes. It was only after she did everything they asked that she was able to get the kids back, and for the ACS worker to stop calling her house everyday; to stop coming.

The caseworker finishes with your daughter, and now calls in your eight-year old son. You want to ask about what is going on, if you are free to go, or better still if she would just leave your family alone, but you are scared that what happened to your cousin will happen to you too. When she is finished speaking to you and your kids, the agent leaves, and tells you that you will hear from her soon.

Agents like these - Child Protective Services or CPS agents - have immense power to disturb fundamental rights to family enshrined in nearly a century's worth of Supreme Court precedent.³ And yet, there are shockingly few protections afforded to families as the state amasses evidence and builds its case to violently disrupt or, eventually, extinguish the relationship between a parent and their child. CPS agents are able to accomplish this task by addressing a sensitive state interest - the protection of children - which is central to the federal and state statutes which mandate their work. CPS agents act as the chief law enforcement officers — and the routine home visit described above is their investigation. It would be reasonable to assume that courts would regard them as such.⁴ Despite CPS agent's awesome power, courts do not.⁵

³ Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Santosky v. Kramer, 455 U.S. 745 (1982); Troxel v. Granville, 530 U.S. 57 (2000)

⁴ See, e.g. Creating Law Enforcement Accountability and Responsibility Project at CUNY School of Law, Know Your Rights! What To Do In Interactions With Law Enforcement, available at <https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c526b0cb8a045df091a58f4/1548905230279/ENGLISH+WHAT+TO+DO+IN+INTERACTION+WITH+LAW+ENFORCEMENT.pdf>; Center for Constitutional Rights, If An Agent Knocks (2009), available at https://ccrjustice.org/files/CCR_If_An_Agent_Knocks.pdf; American Civil Liberties Union, Know Your Rights: The police are at my door, <https://www.aclu.org/know-your-rights/stopped-by-police/#the-police-are-at-my-door>

⁵ Nine circuits have ruled on how the Fourth Amendment applies to child welfare

This paper is the first in a series that lays out the following claim: because of their immense power, the fundamental rights that they routinely infringe, and those which they routinely threaten, CPS agents must be held to the same standards as other law enforcement officers.

This paper sets the stage for the first part of that argument, focusing on CPS agents' rolling investigative function, starting with the initial searches of homes, initiated by mandated or anonymous reporters and interviews of both parents and children which continue for weeks, months and sometimes years. I therefore begin the analysis of CPS' agents law enforcement function through the prism of their search powers, broadly – and theoretically – governed by the Fourth Amendment to the United States Constitution. Future papers in the series delve into the state statutory regimes and case law which buttress CPS agents' investigative powers and responsibilities, and then turn to the other critical policing functions performed by CPS agents.

In Part I, the reader is oriented to the tasks, powers, and responsibilities of a CPS agent investigating allegations of child maltreatment, through the lens of evolving federal statutory requirements, best practice guides promulgated and distributed at the federal and state levels, CPS agents' training regimes, and the on-the-ground experience of CPS agents as experienced by families subjected to CPS investigations. Part I then sketches out the theoretical restrictions on CPS investigations at the constitutional level, and its interplay with parental consent to be searched.

Part II then analyzes courts' interpretation of CPS investigations from a Fourth Amendment perspective, considering particularly federal courts' constitutional analysis of §1983 challenges to CPS investigations, with a particular eye to how the courts regard consent in each of those cases. Here the article arrives at its central thesis: parents under CPS investigation do not have a meaningful right to refuse consent to a search of their home, in large part because courts do not regard CPS agents as law enforcement officers. They should, for reasons which close out this part.

Part III pull together these threads with a straightforward proposition: we would do better to protect parents and families from violent incursions into their families by regarding CPS agents as agents engaged in law enforcement investigations. This part begins to imagine how we might implement that change, and why such a change in legal and theoretical perspective is necessary.

Part IV concludes.

investigations. Five have held that the Constitution requires CP agents to have a warrant to enter a home. Southerland v. City of New York, 680 F.3d 127 (2d Cir. 2012); Gates v. Texas Dep't of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008); Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999); Roska ex rel. Roska v. Peterson, 328 F.3d 1230 (10th Cir. 2003); Good v. Dauphin Cty. Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989).

I. CPS AGENTS

[Part I describes CPS investigations into allegations of child maltreatment, and the theoretical constitutional and statutory limitations placed on those investigations. In subsection A, the part first examines CAPTA, the federal law requiring CPS investigations and moves on to a first-of-its-kind empirical analysis of state statutory regimes implementing CAPTA requirements. Subsection B then examines the traditional jurisprudential restrictions placed on government agents who conduct home searches, including a basic history of the 4th Amendment's warrant requirement, the consent exception to the warrant requirement, and the theoretical underpinnings to the consent exception, including the requirement that consent must be freely given. Finally, with those limitations in mind, Subsection C rounds out the empirical analysis by examining the juridical restrictions state legislatures have placed on CPS agents conducting home investigations.]

A. *CPS Investigations*

1. **CPS investigations, generally.** [This sub-subsection orients the reader to the theoretical motivations for CPS investigations, including by sharing numbers and underlying cross-purposes of the investigations as set out by CAPTA]

State statutes across the country⁶ - incentivized by federal dollars⁷ - require child protective services (CPS) agents to investigate each and every allegation of child maltreatment.⁸ Generally, states set up a centralized hotline⁹ where reports come in from one of two sources: "mandated reporters"¹⁰ - professionals who are legally responsible, as part of their job, to lodge concerns of child maltreatment - or from the general public.¹¹ Mandated reporters include a wide swathe of the public and private work force¹² -

⁶ State statute info regarding the requirement to investigate.

⁷ CAPTA info regarding requirement to investigate.

⁸ Most states do this intake in a two step process, filtering out those cases, for example, which don't allege child maltreatment under the state's statute, or where the child in question is over the age of 18. For 2018, the total number of child maltreatment calls was 4,327,000. About 1,924,000 (~44%) were filtered out. The remaining 56%, 2,402,827, were investigated.

⁹ [childwelfare.gov stat on #](http://childwelfare.gov/staton/)

¹⁰ Mandated reporter info, state by state.

¹¹ <http://www.nysmandatedreporter.org/MandatedReporters.aspx>;
https://www.michigan.gov/mdhhs/0,5885,7-339-73971_7119_50648_44443-157836--,00.html; <https://mandatedreporter.ca.com/about/faq>;

¹² In New York City, for example TK% of the workforce are mandated to report suspected

teachers, doctors, social workers, dentists, criminal police, therapists, clergy, to name just a few examples¹³ - and account for the majority of calls to state child maltreatment hotlines¹⁴ which lead to investigations. Among the general public, anonymous sources make up the biggest plurality¹⁵ of calls. All 50 states have codified some form of immunity from prosecution for mandated reporters¹⁶. In 40 states, a mandated reporter can be charged with a misdemeanor for failing to report suspected child maltreatment;¹⁷ in Florida, a failure to report as required by law is a felony.¹⁸

Investigations into neglect constitute the vast majority of child welfare investigations in the United States. In 2018, for example, 61.6% of all investigations were into allegations of neglect alone, compared to 10.7% into physical abuse.¹⁹ Neglect and abuse are defined differently by each state, but are tethered to a federal definition in the Child Abuse Prevention and Treatment Act (CAPTA), which sets up the incentive structure for investigating and prosecuting allegations of neglect and abuse.²⁰ Allegations of abuse, which involve serious physical injury to or sexual exploitation of a child, frequently result in criminal charges and prosecution, and therefore frequently involve the criminal police.²¹ Allegations of neglect, on the other hand, result in criminal prosecution far less often, and less frequently involve the police.²² Neglect investigations frequently involve *concerns*: concerns

child maltreatment to the Administration for Children's Services, on threat of professional consequence. [Insert language re: %age of public workforce that is a mandated reporter, and private work force. This number could be obtained - at least in New York - by a rudimentary tally based on mandated supporter titles]

¹³ Cite to state statutes/guidelines on mandated reporters. NY example:

<https://ocfs.ny.gov/main/publications/Pub1159.pdf>

¹⁴ In 2018, approximately 20.5% (or around 492,0000) of the reports which led to investigations came from school employees. Another 449,000, or 18.7%, came from criminal law enforcement personnel.

<https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

¹⁵ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2020), available at <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

¹⁶ <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/?CWIGFunctionsaction=statestatutes:main.getResults>

¹⁷ Id.

¹⁸ [Penalties for Failure to Report and False Reporting of Child Abuse and Neglect](#)

(Feb. 2019) <https://www.childwelfare.gov/pubpdfs/report.pdf>

¹⁹ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau at 40. (2020), available at <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

²⁰ CAPTA definition of abuse and neglect: *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.*

(P.L. 100-294), as amended by the CAPTA Reauthorization Act of 2010 (P.L. 111-320)

²¹ Statistic on use of police in abuse proceedings, and criminal charges alleging abuse.

²² Statistic on use of police in neglect proceedings, and criminal charges resulting from

regarding a child's frequent tardiness or absence from school or about a child's presence at home alone, even for a few hours; concerns regarding scratches or bruises on a child's body or a parent's use of drugs, including the use of legal drugs such as marijuana or alcohol; concerns regarding a parent's mental health; concerns regarding a child's frequent emotional outbursts.

CPS, and the Federal Children's Bureau which sets federal standards for the detection, prevention, and elimination of child maltreatment, claim three bases for its investigations. Agents are required to investigate a family in order to determine (1) whether a family requires "resources" which the reporter would have been otherwise unable to provide;²³ (2) whether the allegations in the underlying report meet a statutory standard of maltreatment;²⁴ and (3) what degree of intervention is necessary to safeguard the interests of the child²⁵ (and, some statutes say, the family.)²⁶

(1) *Providing 'Resources' - Imagining Help*. The first line of offense is benevolence.²⁷ In addition to their legal mandate, reporters frequently turn to CPS because they do not have the time, expertise or resources necessary to accommodate the perceived needs of a family.²⁸ A teacher whose student appears hungry may not know where to get her a regular meal; a doctor whose patient comes in with tattered jeans may not know how to secure him money for clothing; a neighbor who hears shouting in the apartment next-door may think, in his non-professional opinion, that the parents next door need counseling. Reporters often believe that CPS is more likely to have each of those assets as an institution built to respond to their concerns about children and family dynamics.²⁹ Often, reporters do not take into account the harm done, the surveillance wrought, or punitive outcomes possible by virtue of CPS involvement.³⁰ Those mandated to report are infrequently trained to do so.³¹

Still, upon conducting an investigation, a CP agent is meant to take

neglect

²³ State statutes and CAPTA

²⁴ State statutes and CAPTA

²⁵ State statutes and CAPTA

²⁶ State Statutes and CAPTA

²⁷ "Nevertheless, '[o]f all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience.'" *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2d Cir. 1977) (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*.)

²⁸ Kelley Fong.

²⁹ Kelley Fong.

³⁰ Cite.

³¹ Cite to NY mandated reporter training, Kelley Fong article.

stock of the family's ability to meet the basic needs of the children living in the home, and to address those needs with what CPS often calls 'resources' or 'services'.³² CPS involvement unlocks access to a host of benefits that a family in need may not otherwise have access to. In New York City, for example, parents who are investigated by the Administration for Children's Services (ACS) are entitled to free or subsidized childcare;³³ a parent whose child was removed by ACS for want of 'stable housing' jumps to the front of the New York public housing waiting list with an ACS priority.³⁴ Beyond providing the support a parent or family may request, CPS agents often have their own opinions about the sorts of services that a parent or family requires. To that end, even before making a decision on an underlying allegation — and even if CPS agents ultimately determine that the underlying allegations are not founded — CPS may 'refer' a parent to services which its agents recommend, including 'parenting skills' training, drug testing or rehabilitation, or mental health counseling.³⁵ Each of these services is staffed by mandated reporters who maintain a legal obligation to report any concerns regarding abuse to CPS offices.

By accepting resources, including at an early stage of an investigation, families are often also accepting (wittingly or otherwise) additional entanglement with CPS, and further surveillance. In practical terms, the provision of resources acts as a way for CPS to prolong an investigation which is usually time-limited by statute³⁶, because a condition of accepting the resources provided is often continued 'visitation' from CPS agents to the family's home to ensure continued compliance and progress in the services

³² Cite to state websites/statutes.

³³ <https://www.dccnyinc.org/families/what-to-look-for-in-a-program-provider/subsidized-child-care/>

³⁴ <https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Priority-Codes-Revised-04-1-2018.pdf>

³⁵

https://www1.nyc.gov/assets/acs/pdf/child_welfare/investigation/guide/ParentsGuide.pdf;
<https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page#b>

³⁶ 28 states set time limits on their investigations

(<https://www.childwelfare.gov/pubPDFs/repproc.pdf>)

30 days - CA

(http://m.policy.defs.lacounty.gov/Src/Content/Disposition_of_Allegatio.htm); GA (DHS CW Man. Ch. 2 §2.5; 2104.1); MI (https://www.michigan.gov/mdhhs/0,5885,7-339-73971_7119_50648_7193-159484--,00.html); TX

(<https://www.dfps.state.tx.us/Investigations/>)

45 days - OH (<http://codes.ohio.gov/oac/5101%3A2-36>)

60 days - FL (<https://m.flsenate.gov/statutes/39.301>); IL

(<https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1460&ChapterID=32>); NY (SSL §424(7)); PA

(http://www.pacwrc.pitt.edu/Curriculum/411OverviewofChildWelfareandFiscal/Hndts/HO09_TheCswrkPrccs.pdf - preference for 30)

that were recommended.

(2) *Substantiating Reports - Keeping the Record.* Beyond resource provision and concomitant surveillance, a parallel purpose of CPS investigations is to determine if a reporter's suspicions of child maltreatment in a particular home are warranted. If CPS determines that there is sufficient evidence to substantiate the report of maltreatment, agents mark the report accordingly. A "substantiated" or "indicated" report is recorded in a database, often called a "central register" of child maltreatment at the state level³⁷. Reports in the state central register are made accessible to childcare, educational, and health-care employers when they are considering a candidate for hire. CPS, foster care, and adoptive agencies consider substantiated reports heavily when deciding whether to certify a person for future child-rearing responsibilities. Substantiated leads can stay in a state register for decades.³⁸ Unsubstantiated reports have similar staying power, and under many state statutes, can be dredged up upon the filing of a new lead.³⁹ While most state statutes provide a mechanism for parents to remove their names for a central register, those mechanisms are cumbersome and can often be foregone or overlooked without meaningful legal support, which is unavailable to the vast majority of parents subject to CPS investigations.

An initial report — what I am calling a "lead" — to a state hot-line for child maltreatment is most often fielded by a child protective agent, whose primary duties are to gather as much information as possible regarding the alleged maltreatment,⁴⁰ and then to determine whether the allegation should be "screened in" or "screened out." In 2018, CPS agencies across the country received approximately 4.3 million leads;⁴¹ 1.9 million were screened out because they did not rise to the level of the state's definition of maltreatment, because the children involved were over the age of 18, or because the tips did not contain enough information to investigate (think "I saw a woman on the street yelling at her son.")⁴² The remaining 2.4 million leads were screened in and assigned to a local CPS office for investigation.⁴³ In many states, leads are further screened into "differential response systems" which nominally

³⁷ Child Welfare Gateway.

³⁸ <https://www.childwelfare.gov/pubPDFs/registry.pdf>

E.g. American Samoa - 10 years after youngest turns 18; Arizona 25 years after report; Iowa 24 years after report; Kentucky 7 years;

Unsubstantiated: ME - 18 months; AL - 5 years; CA - 10 years

³⁹ Child welfare gateway.

⁴⁰ Training manual with info on what to gather.

⁴¹ <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf> at p. 8

⁴² <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf> at p. 8; training document containing bases for screening out.

⁴³ Id.

sort cases into two categories based on a safety assessment conducted by the intaking CPS agent. Allegations presenting a “high risk of harm” to the child are assigned for “investigation,” the focus of which is “determining the nature extent and cause of the abuse or neglect and identifying the person responsible for the maltreatment.”⁴⁴ Those allegations presenting a lower risk of harm are assigned for “assessment,”⁴⁵ the focus of which “is more on engaging the family to identify strengths and service needs.”⁴⁶ In some states where assessments are conducted, CPS does not make a maltreatment determination, instead conducting an investigation and continuing engagement once a family has agreed to CPS involvement.⁴⁷ Despite these nominal differences, for reasons further described in Section I.B. below, this article refers to all assessments of “screened-in” allegations as investigations.

Investigative CP agents (and, in some states, other members of an investigative team, including representatives of criminal law enforcement, criminal prosecutors’ offices, and health and mental services providers)⁴⁸ are tasked with determining if there was maltreatment by the alleged perpetrator. The evidentiary standard — and the terminology — for this determination varies on a state by state basis. 38 states require only a preponderance of the evidence that maltreatment has been committed before a report can be substantiated; 13 states require ‘credible’ or ‘reasonable’ evidence to substantiate a report. And just one state requires probable cause.⁴⁹ Across maltreatment types, the vast majority of CPS investigations — more than 80% — do not substantiate the underlying report⁵⁰. In 2018, 17% of all leads investigated by CPS resulted in a determination that the allegations in the lead had some basis in fact.⁵¹ More than half of that 17% substantiated allegations

⁴⁴ Child Welfare Information Gateway. (2017). *Making and screening reports of child abuse and neglect*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau at p. 4. <https://www.childwelfare.gov/pubPDFs/repproc.pdf>

⁴⁵ Child Welfare Information Gateway. (2017). *Making and screening reports of child abuse and neglect*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau at p. 4. <https://www.childwelfare.gov/pubPDFs/repproc.pdf>

⁴⁶ Id.

⁴⁷ <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf> at p. 17

⁴⁸ Child Welfare Information Gateway. (2017). *Making and screening reports of child abuse and neglect*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau at p. 3. <https://www.childwelfare.gov/pubPDFs/repproc.pdf>

⁴⁹ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau. (2020). *Child Maltreatment 2018* at 28. Available from <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

⁵⁰ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau. (2020). *Child Maltreatment 2018* at 28. Available from <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

⁵¹ U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau. (2020). *Child Maltreatment 2018* at 28. Available from <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>

of neglect alone, usually based on a preponderance of the evidence standard. 3% of all leads investigated resulted in substantiated allegations of abuse of any kind, under the same evidentiary standards.⁵²

(3) *Escalation — Intervention.* Beyond a decision on whether to substantiate the underlying allegations, CPS investigators are tasked with making decisions regarding the type and degree of state intervention into the family necessary in light of the risks that they have identified. If agents do not believe a parent is likely to comply with the services or resources they deem necessary for the well-being of a child, or if they believe that the child is at significant risk of harm, CPS can refer the case to prosecutors who will file a petition before a judge in family or juvenile court.⁵³

As will become evident in the coming section, CPS wields significant coercive power over a family before seeking the court's added heft. CPS agents have unique statutory authority to unilaterally enforce family separation prior to seeking a court order, if they determine there is significant enough risk to the child;⁵⁴ they are empowered by statute and other guidance to seek the involvement of other state agencies, including the criminal police⁵⁵ whose involvement can have its own ramifications on a case; and they have the power to escalate the investigation to a judge. There are no legal restrictions on whether or how CPS agents convey this coercive authority to the subject of an investigation — they are neither required to provide a *Miranda*-style warning to parents with whom they are interacting that their words or consent may result in a form of punishment, nor are they legally restricted from threatening these outcomes to a parent who they deem to be insufficiently compliant.⁵⁶

The prospect of judicial involvement is a key tool of coercion — while a CPS agent may compel compliance through soft power, a judge has hard power that she might use to enforce a CPS agents' recommendations: judicially mandated family separation, judicially mandated services as a condition of a family arrangement, and contempt of court, to name a few. Ultimately, the specter of the termination of parental rights lords over each referral to a family court judge.

⁵² <https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf> at 40.

3% = (72,814 (PA ONLY) + 47,124 (SA ONLY) / 677,529 (ALL SUB)) x 17 (% of cases substantiated)

⁵³ Section 3.3.2 - [x-scrivener-item:///Users/tzi/Library/Mobile%20Documents/com~apple~CloudDocs/Documents/CW%20and%20Home%20Searches-1.scriv?id=24B0558A-3BE3-43B4-B70E-9D82DC9E93F8](https://www.scribbr.com/library/mobile/documents/com-apple-cloud-docs/documents/cw%20and%20home%20searches-1.scriv?id=24B0558A-3BE3-43B4-B70E-9D82DC9E93F8)

⁵⁴ State statutes authorizing warrantless removals without court order.

⁵⁵ State statutes regarding requirements to collaborate with law enforcement.

⁵⁶ Ohio Supreme Court case.

2. **Legal framework** [This sub-subsection outlines the legal framework for CPS investigations by first examining CAPTA and the federal guidances promulgated by HHS and the Children’s Bureau, and then moving on to an empirical analysis of state statutes. The section folds in some state-level handbooks as well, which I am still gathering as part of my research. There is also a piece in here about the relationship to other federal law enforcement strategies that I’m unsure whether I will keep]

A child welfare investigation is fulsome, by dint of statute, regulation⁵⁷, guidelines and practice.

Federal framework - At the federal level, CAPTA sketches out a skeletal framework for reporting and investigation⁵⁸ of maltreatment allegations, requiring each state which receives federal funding to have a plan for: reporting, including mandated reporting⁵⁹; “immediate screening, risk and safety assessment, and prompt investigation of such reports”⁶⁰; and what the statute calls “triage procedures” for referral of lower risk cases to “community-linked services.”⁶¹ From its initial version in 1974, CAPTA has had a basic requirement that CPS promptly investigate reports of maltreatment.⁶² Statutory requirements around investigations in CAPTA have swung back and forth like a pendulum: in 1996, Congress added a provision mandating states to require cooperation with criminal law enforcement officials in the “investigation, assessment, prosecution, and treatment of child abuse or neglect.”⁶³ 2003 amendments to CAPTA took an ostensibly more right-protective tone. State CPS would be required to advise the subjects of CPS investigation as to the nature of the allegations against them, and to train CPS agents regarding their “legal duties...in order protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment”.⁶⁴

As mandated by CAPTA, the Children’s Bureau of the Department of Health and Human Services also regularly publishes advisory materials on best practices for child protective caseworkers, including in-depth guidance

⁵⁷ Relevant state statutes. This paper examines the statutes of the states with the 10 most active child protective offices in the country which make up for TK% of investigations nationwide.

⁵⁸ 42 U.S.C. 5106a(a)(1)

⁵⁹ 42 U.S.C. 5106a(b)(2)(B)(ii)

⁶⁰ 42 U.S.C. 5106a(b)(2)(B)(iv)

⁶¹ 42 U.S.C. 5106(a)(2); 42 U.S.C. 5106a(b)(2)(B)(v)

⁶² CAPTA 1974 (b)(2)(A)(ii)

⁶³ CAPTA 1996 (b)(2)(A)(vii)

⁶⁴ CAPTA 2003 (b)(2)(A)(viii), (xix).

on assessments and investigations.⁶⁵ The most recent federal manual for caseworkers, published in 2018, directs CPS works to conduct an “initial assessment/investigation” after a lead is screened in.⁶⁶ According to the 2018 guide, the core elements of every CPS investigation are: (1) interviews with the child identified in the report, their siblings, and any other children living in the home; (2) interviews of all adults living in the home, nonresident parents, and the alleged maltreating parent;⁶⁷ (3) observation of the ‘interactions among the child, siblings, and parents’ (4); observation of the ‘home’, ‘neighborhood,’ and ‘general climate of the family’s environment’; and (5) compiling information from other sources who may have information about the alleged maltreatment, family dynamics, or the risk and safety of the children.⁶⁸

The federal caseworker guide is fairly specific in the detailed investigative protocols it suggests. It contemplates fact-gathering interviews designed to “understand the circumstances related to the alleged maltreatment” and to “gather information related to the safety and risk of the child”⁶⁹, and provides suggested interview protocols for the various interviewees., including for the ‘alleged child victim’, their siblings, adults living in the home, nonresident parents, and, of course, the ‘alleged maltreating parent.’⁷⁰ As part of an investigation into reported maltreatment, the guide also instructs CPS agents to observe the ‘physical condition of the child, including any observable effects of maltreatment’⁷¹, the ‘physical condition of the parents, including any observable disabilities or impairments’,⁷² the ‘emotional and behavioral status of the parents and other adults during the interviewing process’,⁷³ the ‘physical statutes of the home,

⁶⁵ See, e.g. Diane DePanfilis, “*Child Protective Services: A guide for Caseworkers*”, Children’s Bureau (2018) [x-scrivener-item:///Users/tzi/Library/Mobile%20Documents/com~apple~CloudDocs/Documents/CW%20and%20Home%20Searches-1.scriv?id=24B0558A-3BE3-43B4-B70E-9D82DC9E93F8](https://www.fda.gov/oc/privacy-policy)

⁶⁶ Id. at 20, §2.5.2.

The guide suggests that the terms “assessment and investigation” are used interchangeable in many state statutes, but that they are not synonymous. “Investigation,” the guide says, “encompasses the efforts of the CPS agency to determine if abuse or neglect has occurred. Assessment *goes beyond* this concept to evaluate a child’s safety and risk and to determine whether and what strategies or interventions are needed to ameliorate or prevent child abuse and neglect.”

⁶⁷ Note here that this paper uses the term “parent”, but many states conduct CPS investigations into non-parent caregivers, as well.

⁶⁸ Id. at 65, §6.1

⁶⁹ Id. at 66, §6.1.3

⁷⁰ Id.

⁷¹ Id. at 76, §6.13

⁷² Id.

⁷³ Id.

including cleanliness, structure, hazards or dangerous living conditions, signs of excessive alcohol use, and use of illicit drugs or misuse of legal medications'⁷⁴ and the 'climate of the neighborhood, including [the] level of violence or support, and accessibility of transportation, telephones, or other methods of communication.'⁷⁵

State Statutes - In implementing federal requirements and suggested best practices, states set out their own, unique statutory investigative schemes for CPS agents which incorporate much of the federal guidance. While each state requires some form of investigation of a screened-in lead, the statutory requirements for a CPS investigation vary substantially in their specificity, and in the invasiveness anticipated for each search. [This section will include detail based on findings of 50-state statute research]

Home Searches - The "home" is mentioned in TK state statutes. Some state statutes explicitly require⁷⁶ a search of (or the less-intrusive-sounding "visit to") the home as part of an investigation, some only authorize such a search, and other states do not mention home searches whatsoever in their state code. Even if state statutes do not make specific mention of a search of the home, though, every state's investigative statute or implementing regulations suggests the home as a site of potential risk to the child. By requiring a CPS agent to "interview every child in the home" or to "speak with every adult who lives in the home", states which are not explicit about the search requirement make the situs of investigation and inquiry very specific: CPS is concerned about what is happening in the place where the child lives, and should investigate accordingly.

Interviews -Most state statutes require interviews of the child mentioned in the report, and every other child living in the home, while some states suggest that it is a best practice to conduct such interviews. Some states also anticipate and explicitly permit more specific evaluation of a child, including physical, psychological, or psychiatric examinations. As part of a CPS investigation, some states also explicitly require interviews of the adults living in the home, including the parents, caretakers, and the alleged perpetrator of the maltreatment if such a perpetrator has been specifically identified in the lead. Others, again, suggest it as a best practice. TK state statutes require CPS to inform the parents of the accusations levied against them.

Assessments/Preliminary Investigations - As mentioned at Part I.A., above, some states also create a stratified scheme - a differential response

⁷⁴ Id. At 77

⁷⁵ Id. At 77, §6.1.7

⁷⁶ The footnotes in this and the following section will be the product of ongoing research I'm conducting.

system for handling screened-in leads, sorting those cases where a CPS agent has determined there to be less evidence of risk to the child into an “assessment” bucket, and those in which there is more evidence of risk to the child into an “investigation” bucket. [Include here numbers from differential response statute report in Child Welfare Gateway] Theoretically, assessments are used as a means of determining which resources are necessary to support a family - “assessing” the family’s needs; investigations, on the other hand, are intended to determine whether the underlying allegation of maltreatment is substantiable - “investigating” the lead. Still, regardless of the response triggered, in each state the investigative tools available to a CPS agent under each rubric are virtually identical. For those states that create a statutory distinction between the two, agents who are required or permitted to deploy certain techniques (home searches, child interviews/examinations, or parent interviews) are required or permitted to do so under both the auspices of an assessment and an investigation.

The distinction between assessments and investigations finds a parallel in another, more traditionally understood law enforcement context - The Federal Bureau of Investigation.⁷⁷ In its Domestic Intelligence Operations Guidance (DIOG), the FBI sets forth an investigative regime with familiar striated investigation levels: assessments and investigations (which are in turn broken down into preliminary and full investigations.) The DIOG is designed to afford agents more investigative tools as agents’ suspicion unlawful activity is substantiated by more and more evidence.

Assessments,⁷⁸ which were introduced into the FBI’s investigative scheme in October 2008, in the waning days of the George W. Bush administration⁷⁹, are carried out in the interest of “detecting and interrupting criminal activities at their early stages, and preventing crimes from occurring in the first place.”⁸⁰ Assessments were designed to give agents more investigative flexibility and they require no evidence of unlawful activity; they allow agents to “seek information, proactively or in response to investigative leads relating to activities constituting violations of Federal criminal law or threats to the national security.”⁸¹ In conducting assessments, agents are allowed to obtain and scour publicly available information, to interview the subject or any other person without identifying themselves as agents, and to conduct ‘consent searches’ without⁸² any articulable basis

⁷⁷ DIOG.

⁷⁸ The DIOG provides for various types of Assessments ()

⁷⁹<https://www.nytimes.com/2009/10/29/us/29manual.html>; <https://theintercept.com/2017/01/31/based-on-a-vague-tip-the-feds-can-surveil-anyone/>

⁸⁰ DIOG 5.2 Purpose and Scope of Assessments

⁸¹ DIOG 5.4.1 Assessment Types

⁸² DIOG 5.9 Authorized investigative Methods in Assessments

(“reasonable suspicion” or “probable cause”) for suspecting unlawful behavior.⁸³ FBI investigations, on the other hand, are seen as more invasive, and therefore require a degree of evidentiary substantiation. With “information or an allegation”⁸⁴ indicating the existence of unlawful activity, an agent can start a preliminary investigation which entitles her to investigative tools like the acquisition of phone records, internet activity, and recorded surveillance from a public place⁸⁵. Only with an “articulable factual basis”⁸⁶ that unlawful activity is taking place, can an agent can begin to seek court orders to conduct searches of the home or other loci of suspected unlawful activity.⁸⁷

Criminal Law Enforcement - The role of criminal law enforcement — the police — varies by state as well. Many states’ CPS investigation schemes anticipate an active investigative role for criminal law enforcement in particular instances — when the alleged maltreatment rises to the level of a serious offense like sexual abuse,⁸⁸ for example, when the alleged perpetrator is not the child’s parent,⁸⁹ or when the alleged perpetrator is a state employee.⁹⁰ A few⁹¹ states require CPS agents to ensure evidence is preserved for purposes of criminal prosecution, in addition to prosecution of the maltreatment case in family or juvenile court, but only **TK** states actually require criminal law enforcement officers to be present at each CPS investigation.⁹² In some fact-specific circumstances, state CPS investigation regimes require CPS to coordinate their investigative design with criminal law enforcement agencies. As required by CAPTA, CPS investigation statutes also include possible involvement with our intervention of other government entities, as deemed necessary by the CPS agents investigating the case.

3. Training and practice [This sub-subsection examines how the theoretical and legal frameworks describes above play out in practice, by examining CPS training regimes and accounts of CPS investigations from scholarship and practice]

Training with law enforcement, like law enforcement - Today’s CPS

⁸³ DIOG 5.5. Standards for Opening or Approving an Assessment

⁸⁴ DIOG 6.5 Predication of Preliminary Investigation

⁸⁵ DIOG 6.9 Authorized Investigative Methods in Preliminary Investigations

⁸⁶ DIOG 7.5 Predication of Full Investigation

⁸⁷ DIOG 7.9 Authorized Investigative Methods in Full Investigations

⁸⁸ Cite state statute research.

⁸⁹ Cite state statute research.

⁹⁰ Cite state statute research.

⁹¹ Cite state statute research.

⁹² Cite state statute research.

agents train for investigation side by side with police departments. Reacting to popular and political pressure brought on by tragic events,⁹³ CPS agencies erect more and more police-like investigative tactics, which have sprawling impacts on every family within CPS's purview. In New York, for example, following the tragic death of two young children in 2017, an internal investigation determined that the Administration for Children's Services may have altered their fate with more robust policing of the family. While these deaths were devastating, they were ultimately outliers⁹⁴ - reducing the risk of these tragedies to zero would require immense tradeoffs for families and communities touched by ACS. Still, ACS immediately ramped up its investigative tactics to look more like their NYPD counterparts. New ACS agents began receiving training at the NYPD Training Academy in order to improve their investigative skills⁹⁵, by attending the NYPD's Criminal Investigator's Course - "an intensive two-week class that often draws representatives from law enforcement agencies throughout the world."⁹⁶ One year later, in addition to the NYPD training program, ACS set up their own facilities for investigation training. Modeled on an NYPD facility colloquially called "the Fun House," ACS set up a mock multi-room apartment, with hired actors for ACS officers to train on how to conduct home searches and investigative interviews. This practice was not exclusive to New York.

In Texas, the Department of Family and Protective Services hires "Special Investigators" to train, consult with, and provide feedback to CPS staff on forensic interviewing skills and techniques.⁹⁷ Special investigators serve a "mentoring role" for Texas CPS investigations.⁹⁸ They are retired police, brought on for their experience "with primary duties involving the use of forensic investigatory methods" – including "experience interviewing perpetrators, children and witnesses", "crime scene analysis including photographic and written documentation", and "experience obtaining reliable victim, witness, and suspect statements and report writing."⁹⁹ [Include here research on other jurisdictions' training]

CPS agents in the field - As required by state and federal law,¹⁰⁰ when a CPS office is contacted with a report of suspected maltreatment, a local CPS

⁹³ Link to Zymere Perkins and increased policing.

⁹⁴ Data on fatalities at national level, and in New York.

⁹⁵<https://www1.nyc.gov/assets/acs/pdf/PressReleases/2018/SimulationCentersRelease.pdf>;

⁹⁶ <https://www.nydailynews.com/new-york/acs-staffers-nypd-investigator-article-1.3518025>

⁹⁷ https://www.dfps.state.tx.us/Jobs/CPS/special_investigator.asp

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⁹⁹ https://www.dfps.state.tx.us/Jobs/CPS/special_investigator.asp

¹⁰⁰ See Part TK, supra.

agent is dispatched to investigate. While most state statutes provide for a mechanism by which agents can seek judicial authorization to conduct a home search or other invasive investigative technique (see more *supra* at part I.B.), they rarely do.¹⁰¹ Whether this is because they are *not* statutorily required to obtain such authorization before conducting an investigation, or because they *are* statutorily required to deploy the very same investigation techniques which they would be seeking judicial permission to conduct, CPS agents more often opt to simply approach a parent at their home to investigate the allegation¹⁰², counting on training and experience which dictates that a parent will consent to a search without a judicial order. To that end, the Department of Health and Human Services guidance for caseworker investigations does not contemplate seeking permission from a judge to conduct a home search of the subject of a CPS investigation, instead describing guidelines for “managing ambivalence and resistance” that include “open-ended questions”, “affirmations,” and “reflections.”¹⁰³

Federal requirements, state statutes, and investigative training practices are borne out on all families policed by CPS agents, regardless of the underlying allegation. When a CPS agent arrives at a home, they sometimes describe the allegations, and sometimes not. No state statute requires a CPS agent to inform a subject of an investigation that they can refuse entry, of course. Agents usually keep records of their investigations in hand written notes, which are then transferred to a central digital repository. These notes can be maintained for years,¹⁰⁴ regardless of whether the allegations in the lead are ultimately substantiated. A CPS agent’s notes reflect the observations that they are required to maintain, and often demonstrate the banality of a home search, which can often take the form of full inventory of the space. The content and upkeep of the kitchen cabinets and what’s in the refrigerator; the tidiness and cleanliness of the home and shared spaces, and the contents and condition of private bedrooms; whether there are beds, and how many; the status of the fire alarms and carbon monoxide detectors; whether there are guards on the windows; the working order of the bathroom sinks and toilets; the presence or absence of clutter — all manage to make their way into CPS notes. Additionally, CPS agents are trained to look for and record the presence of any seemingly unlawful activity - firearms, illegal drugs, evidence of abuse of (or the pejorative implications of the presence of) legal drugs, or any other dangerous paraphernalia.

¹⁰¹ Possible to find numbers for this?

¹⁰² Stats on use of judicial authorization v. Consent-based investigations.

¹⁰³ HHS Caseworker Guide (2018) at 43-44.

B. *Theoretical Restrictions on CP Investigations*

1. **Home searches and the Fourth Amendment - the warrant requirement**

[This subsection delves into the theoretical underpinnings for the usually strictly defined warrant requirement for home searches under the 4th Amendment, by examining Supreme Court precedent and relevant scholarship. In particular, this section sets out that a warrant is generally required when law enforcement intends to search an individual's home.]

2. **The consent exception to the warrant requirement**

[This subsection explains the most prominently invoked exception to the 4th Amendment warrant requirement — consent — and probes the traditional requirements for consent under Supreme Court jurisprudence: that the government bears the burden of demonstrating the voluntariness of the consent, and an individual's awareness of their right to refuse consent in the first place.]

3. **The special needs doctrine**

[This subsection describes an increasingly prevalent exception to the 4th Amendment warrant requirement - the special needs doctrine - which allows government officials to search without a warrant when “special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impracticable.”¹⁰⁵ It examines the origins and underlying bases of the special needs doctrine starting with *Camara*, through the special needs bubble (*New Jersey v. T.L.O.*; *O'Connor v. Ortega*; *Griffin v. Wisconsin*; *Skinner v. Ry. Lab. Executives' Ass'n*) to the Supreme Court special needs case most close to CPS investigations, *Ferguson v. City of Charleston* in 2001.]

C. *Protections Against CPS Overreach*

[Having examined the elements of a required CPS investigation, and the 4th Amendment restrictions which generally apply to law enforcement officers conducting home searches, this section rounds out the empirical analysis from sub-section A above, this time and finally examining when if at all CPS is required to seek judicial authorization to conduct a home search.]

¹⁰⁵ *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619 (1989)

II. COURTS HAVE NOT RESTRICTED CPS AGENTS

[Having laid the groundwork in Part I, Part II examines how courts have construed the constitutional limitations of CPS investigations. Subsection A analyzes federal courts' application of 4th Amendment precedent in claims against CPS caseworkers under 42 U.S.C. §1983, and concludes that federal courts have failed to come to a consensus on the applicable evidentiary standard in CPS investigations. This result is due to inconsistency about the applicability of the 4th Amendment special needs exception to CPS caseworkers, and because federal courts have not reckoned with the dynamics of compelled consent in CPS investigations. Subsection B then analyzes a cross-section of state courts' application of constitutional restrictions on CPS agents conducting investigations, comparing it to federal court constitutional jurisprudence on one hand, and state statutes contemplating judicial authorization for searches on the other. Subsection C then brings the article's thesis into focus: parents do not have a meaningful right to refuse consent to CPS investigations, in large part because courts and legislatures have not properly viewed CPS agents as law enforcement officers.]

A. *Federal Court Inconsistency*

1. **Federal courts: special needs and CPS investigations pre-*Ferguson***

[This subsection examines the history of federal 4th Amendment jurisprudence as applied to CPS investigations prior to the Supreme Court's 2001 decision in *Ferguson* across all 12 circuits. The section concludes that there was a split between those circuits which applied the special needs exception to CPS investigations, and those which did not. This section demonstrates that prior to *Ferguson*, though, even those courts which held that probable cause applied to CPS investigations were generally unwilling to hold that such a standard was clearly defined, and accordingly dismissed the majority of cases on qualified immunity grounds.]

2. **Federal courts: special needs and CPS investigations post-*Ferguson***

[This subsection follows the nearly 20 years of federal 4th Amendment jurisprudence as applied to CPS investigations that have accumulated since *Ferguson* was decided nearly 20 years ago. The section describes the continuing, significant disagreement on how and to what extent Fourth

Amendment protections apply in the context of CPS investigations.¹⁰⁶ The section highlights an important development in the wake of *Ferguson*, though: courts have refused to extend a special needs exception to CPS investigations because, they find, those investigations are “intimately intertwined” with law enforcement. This section demonstrates that this interpretation and application of *Ferguson* eschews the potential or actual harm visited upon families by CPS agents themselves, instead focusing only on the harms that law enforcement may cause in their investigations.]

3. Federal courts and consent in CPS investigations

[This subsection rounds out the federal court analysis by taking a closer look at how federal courts deal with (and often quickly dismiss) the question of consent in the context of 4th Amendment challenges to CPS investigations.]

B. *State Court Silence*

[This section analyzes a cross-section of state-court rulings on challenges to the constitutional sufficiency of CPS investigations, particularly examining those 10 states with the most numerous CPS cases in the most recently available numbers. The analysis is likely to be divided into two parts, one which examines the 4th Amendment (or equivalent state constitutional) evidentiary standard applied as it pertains to CPS investigations, the second which examines the extent to which state courts examine consent.]

¹⁰⁶ Nine circuits have ruled on how the Fourth Amendment applies to child welfare investigations. Five have held that the Constitution requires CP agents to have a warrant to enter a home. *Southerland v. City of New York*, 680 F.3d 127 (2d Cir. 2012); *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003); *Good v. Dauphin Cty. Soc. Servs. for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989). In some federal circuits, it remains an open question as to whether a child protective services agent is required to obtain a warrant supported by probable cause to enter a home when conducting a child protective investigation. *Ross v. Klesius*, 715 Fed. App'x 224, 226 (4th Cir. 2017); *Wildauer v. Frederick County*, 993 F. 2d 369, 372 (4th Cir. 2003); *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012). One court opined that “state officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of ‘clearly established law.’” *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012) (*citing* *Foy v. Holston*, 94 F.3d 1528, 1537 (11th Cir. 1996))

C. Thesis: Parents Do Not Have a Meaningful Right to Refuse Consent to a CPS Investigation

1. A requirement to investigate

[This subsection describes how federal and state statutes governing the conduct of CPS investigative caseworkers, guidance at the federal and state level, CPS training, and practical experience (described as Background in Part I) interact with federal and state jurisprudence on the 4th Amendment limitations on CPS investigations (described above at Part II) to establish a structure which is nearly entirely reliant on parental consent for invasion of their privacy rights in order for CPS workers to conduct their statutorily mandated investigations.]

2. CPS as law enforcement: tools of coercion

[This subsection explains why the consent permitted, imagined and required by the interlocking regimes described in subsection 1 above is not freely given, but instead compelled by CPS investigators. CPS agents wield at least two tools which consciously and subconsciously coerce parents to consent to their investigative tactics. This coercive power is what makes CPS agents law enforcement officers.]

First, this section demonstrates that CPS agents bear as an investigative tool the moral construction of poverty, baked into the very definition of maltreatment, which aids in portraying parents' noncompliance as further evidence of their poor parental judgment, and therefore as evidence of maltreatment. Second, CPS agents further bear the tool or coercive power, which aids in implementing the moral construction of poverty. Not only are CPS agents able to characterize parents' behavior in their notes and case plans which define the relationship between CPS and a parent before ever seeing a courtroom, CPS also constantly wield and threaten - explicitly and subliminally - the power to remove children, to file a case in court, to force parents to participate in unwanted, unnecessary, or invasive services, to summon the involvement of criminal law enforcement and, ultimately, to initiate termination of their rights as parents. The concentration and awareness of this power in particular neighborhoods renders this coercive power even greater.]

III. CPS AGENTS AS LAW ENFORCEMENT

[Part III argues that to fully contend with the impact of CPS' function

described in Parts I and II, the mishmash of law and guidance around CPS investigations should be collapsed under one basic premise — CPS agents act with the power and mandate of law enforcement officers.

Subsection A begins to answer the *how* question, and argues that, as a starting point, communities organizing against invasive policing should arm parents with tools and support to refuse entry to CPS agents: basic Know Your Rights materials, community response plans and, importantly, attorneys and parent advocates willing and able to step in at the point of investigation. Parental defense organizations should work with parents to prepare for the sort of legal pushback that will inevitably follow, and begin to contemplate litigation which would force courts to reckon seriously with the standard properly applicable to CPS investigations. Subsection B discusses why embracing such a change in perspective is important. The liberty interests at stake in the context of CPS investigations are no less serious than those implicated in criminal or immigration settings; the stakes are just as high. By shifting the collective understanding of who CPS agents are, how they function, and the implications of their investigations, the perspective and experience of affected communities will be increasingly incorporated into important conversations around police funding and abolition. Rather than outsourcing police funding to CPS, then, a shift in the perspective makes it clear that shifting the funding to CPS does not meet demands for defunding, because CPS are also police. Subsection C raises possible legal implications of such a change in perspective, which I will explore in future scholarship.]

1. How to Treat CPS Agents as Law Enforcement

a. Know your rights with teeth

[This subsection begins by acknowledging that refusing consent to CPS agents is difficult and, by design (as described above) perceptibly impossible. With that in mind, this section argues that a first step to reimagining CPS as law enforcement officers is to treat them as such, and to build an infrastructure that supports communities struggling against sub-judicial surveillance. This means resourced institutions and communities organizing against policing should provide parents facings CPS investigations with the tools and support necessary to push back against CPS surveillance — not just know your rights presentations, but support from community members who take a similar approach, and meaningful access to attorneys and parent advocates who can intervene at the point of investigation.]

b. Defend

[This subsection argues that parental defense offices should also be prepared to defend parents who embrace the opportunity to refuse consent to CPS, and to avoid using language that plays into the moral construction of poverty in such a defense. Parental defense and civil rights organizations should work with parents to prepare for the inevitable pushback from CPS agencies, and to prepare for litigations which would force courts to meaningfully reckon with the realities of a CPS investigation, including the appropriate evidentiary standards, and the contours of consent and coercion.]

2. Why Treat CPS Agents as Law Enforcement

a. Protecting communities today

[This subsection argues that by building out a collective understanding that CPS agents act like law enforcement, the legal community would be catching up with the perception and lived experience of affected communities who experience reality of CPS investigations every day.]

b. Defunding the police means defunding *all* the police

[This subsection argues that a significant tangential upshot of embracing this understanding of CPS agents further incorporates the experiences of communities impacted by CPS investigations into the broader conversation around abolition. A definition of law enforcement which includes CPS, with or without the involvement of the criminal police in their investigations, forces a meaningful reckoning with the various ways in which communities are policed.]

3. What Does it Mean to Treat CPS Agents as Law Enforcement

[This subsection begins to anticipate what the implications of this shift in perspective and legal framework might be, including the introduction of an exclusionary rule into child welfare proceedings, for example, or the requirement that a *Miranda* type warning be given up the initiation of a home visit.]

IV. CONCLUSION

* * *