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## The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives

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**THE USE OF COERCION IN THE CHILD MALTREATMENT  
INVESTIGATION FIELD:  
A COMPARISON OF AMERICAN AND SCOTTISH PERSPECTIVES**

*Daniel Pollack, Kirsteen MacKay & Katie Shipp\**

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The intent of this article is to investigate legal precedents and principles, which yield plausible uses of coercion in the child maltreatment investigative context. In doing so, the goal is to contribute to the underlying legal philosophy and its practical application in the child maltreatment field. In particular, this article addresses the use of coercion in the child protective investigative setting from both an American and Scottish perspective.

## I. INTRODUCTION

The often-quoted introduction of John Stuart Mills' classic work, *On Liberty*, provides a philosophical perspective that may be said to underpin child protective services:

"The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part, which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."<sup>1</sup>

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Governmental coercion is actual and not merely metaphorical, although there are limits to its use. Our discussion is on the application of coercion as a justifiable daily occurrence in the applied child protection services (CPS) context. From this perspective, CPS coercive authority is a means of merely reinforcing parental behaviors that promote the welfare of the child. Simultaneously, we acknowledge that the unnecessary and excessive use of coercive force by CPS ultimately undermines its own inherent authority and the functionality of the state's citizens.

The key role of the CPS investigator is to determine if a child is at risk of harm. When a child is in immediate danger, CPS and/or law enforcement work to ensure the child's safety. A safety plan is often developed, which will keep a child safe at home. When that is not possible, the child may be taken into protective supervision. CPS professionals agree that a child may be removed on an emergency basis if the assessment unequivocally indicates a high risk of danger. When that determination is uncertain and the evidence is not incontrovertible, the investigator may nonetheless believe it would be prudent for the child to go elsewhere temporarily, or to make certain changes in the household. Towards that end, the investigator may try to influence, encourage, or persuade the caregiver to take certain actions for the child's betterment. If that influence, encouragement, and persuasion crosses the line into coercion, has the investigator behaved unethically or illegally? Are all or just some forms of coercion unethical or illegal?<sup>2</sup>

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<sup>1</sup> JOHN STUART MILL, *ON LIBERTY* 9 (Will Johnson, CreateSpace Independent Publishing Platform 4th ed., 2014).

<sup>2</sup> Daniel Pollack, *Coercion and Child Protective Services Investigations*, Policy & Practice 71(6), 30-31 (Dec. 2013), available at [http://www.youthlaw.org/uploads/pics/APHSA\\_Coercion\\_and\\_child\\_protective\\_services\\_investigations.pdf](http://www.youthlaw.org/uploads/pics/APHSA_Coercion_and_child_protective_services_investigations.pdf).

Michael Bayles writes, "a person is not injured by actions contrary to his interest if he voluntarily participates in the activity of which they are a part."<sup>3</sup> The question then becomes: At what point does "voluntary" become "coercion"? Perceived coercion by a caregiver results in the caregiver involuntarily accepting the terms of a CPS investigator, or the caregiver correctly feeling that what is being requested allows for no alternative response. Such coercion may be indicated when there is evidence of a relatively short period of time between the CPS investigator's alleged coercive requests and the caregiver's acquiescence to those requests.

Generally, our default stance is to have the unencumbered choice of the individual be condoned by society. Society only interferes when absolutely necessary – hence the justification for legal coercion. Broadly speaking, coercion seeks to restrict another person's options. Commonly though, we ascribe the term with a *prima facie* negative connotation. Coercion implies that one person attempts to gain the compliance or cooperation of another. Failing to gain that compliance or cooperation results in a unilateral action by the coercer.

In the CPS context, coercion may at times be viewed as having a neutral aspect. Coercive behavior by an investigator seeks to influence the caregiver's decision-making by linking possible sanctions to the caregiver's actions or inactions. Imagine a CPS investigator saying, "Unless there is enough food for your children, we are going to have to temporarily place them elsewhere." While admittedly coercive in either the negative or neutral sense, is this statement unethical or illegal? Ostensibly the intent of the coercion is legitimate and laudatory – to prevent harm to a child. Coercion that does not stem from redeeming intentions and has improper aims is illegitimate, is possibly illegal, and is therefore to be avoided. In any event, because of the unique nature of each CPS investigation any alleged coercion must be evaluated in context and with regard to all of the circumstances of the particular case.

Legislation proscribing or prohibiting action by the state must be precise.<sup>4</sup> Child maltreatment statutes and definitions can be

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<sup>3</sup> MICHAEL D. BAYLES, *PRINCIPLES OF LEGISLATION: THE USES OF POLITICAL AUTHORITY* 105 (1st ed. 1978).

<sup>4</sup> This fundamental principle was enunciated by Justice Sutherland in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926): "[T]he terms of a penal statute

notoriously vague. What exactly is “neglect?”<sup>5</sup> To what extent does a claim of neglect reflect disapproval of parental choices as opposed to noncompliance with an understandable definition of legally acceptable parenting? We defer to dubious parental choices but not to illegal ones. Practically, competing nuanced interpretations of “neglect,” “abuse,” “risk,” and similar terms are what CPS investigators face on a daily basis.

It is quickly evident that coercion is a highly subjective and contextualized term, and we are without the luxury of a consensually established precise definition in the CPS context. Some CPS investigators may conclude that not only is coercion sometimes permissible, it is their right and duty to use coercion in order to impose compliance with the child protection laws they have pledged to uphold. In other words, they are using their best professional judgment and concluding that the child’s well-being is at stake and some degree of coercion is necessary. While the foregoing thinking may at times seem intuitively defensible, it may occasionally lead to an unbridled, unauthorized, unethical, and illegal use of coercion. CPS workers must always hold themselves accountable to larger legal duties, including due process. These duties take precedence over every aspect of the child protective endeavor.

Fifteen years ago, in his commentary on the topic, “How We Can Better Protect Children From Abuse and Neglect,” Leroy H. Pelton wrote, “[t]he fundamental structure of the public child welfare system is that of a coercive apparatus wrapped in a helping orientation.”<sup>6</sup> Agree or not, what are the nature and parameters of

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[...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

<sup>5</sup> The American Professional Society on the Abuse of Children, in its practice guideline series, *CHALLENGES IN THE EVALUATION OF CHILD NEGLECT* (2008), page 4, notes that “Many express concerns that cultural, socioeconomic, ethnic and racial biases influence the decision regarding the presence and severity of neglect in a family. ... As the Child Protective Services and law enforcement responses are triggered by critical events, the very nature of neglect poses inherent difficulties in recognition and appropriate response.”

<sup>6</sup> Leroy H. Pelton, Commentary, *Four Commentaries: How We Can Better Protect Children from Abuse and Neglect*, *THE FUTURE OF CHILDREN*, 126 (1998) available

that coercion? The following working definition is offered: In the CPS context, coercion (condoned or not), requires that the CPS investigator (1) explicitly or implicitly indicate that a suggestion or demand be carried out by the caregiver, and (2) that if the suggestion or demand is not complied with (3) either the suggestion or demand or some more onerous action may be carried out.

Parts I and II of this note delve into the American and Scottish legal perspectives of the use of coercion in the CPS context. Part III offers a brief conclusion. One caveat: We do not purport to address the large question regarding the proper use and limits of law in the broad theoretical sense; nor do we attempt to apply forensic linguistic principles and theory. CPS, like every other professional discipline, uses its own language to ease communication within the profession. Nonetheless, that language must be understandable by the general population. In the end, we doubtlessly raise as many questions as we answer.

#### PART I. AMERICAN LEGAL PERSPECTIVE

It is well established that the Due Process Clause of the Fourteenth Amendment protects the parent-child relationship from undue government interference. As the Supreme Court stated in *Troxel v. Granville*, “[t]he liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>7</sup> Nevertheless, a parent’s right to the care and custody

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at

[http://futureofchildren.org/futureofchildren/publications/docs/08\\_01\\_Commentaries.pdf](http://futureofchildren.org/futureofchildren/publications/docs/08_01_Commentaries.pdf).

<sup>7</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court further explained: More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” We explained in *Pierce* that “[t]he child is not the mere creature of the State; those

of their child is limited when the family becomes involved in a child abuse and neglect investigation. As stated by McGrath, “[w]here a child’s safety is at risk or has already been compromised, the state has a strong and legitimate interest in protecting the child, which justifies piercing the cloak of privacy that typically surrounds the life of a family.”<sup>8</sup> Just how far this limitation goes is unclear.

The Supreme Court has not weighed in definitively on the constitutionality of warrantless searches and seizures of children in connection with abuse and neglect investigations and the Circuit Courts have produced conflicting opinions.<sup>9</sup> Additionally, the “voluntary track” that is available in most states for some child abuse and neglect investigations is often criticized as not being entirely voluntary but rather a coercive way to circumvent a parent’s rights.<sup>10</sup>

This part is subdivided into two parts. The first part addresses the constitutionality of searches and seizures of children in connection with abuse and neglect investigations. It discusses the “special needs” doctrine and whether CPS can speak with, search, or remove a child without first obtaining a warrant or effective consent by the parent. The second part discusses whether parent cooperation with CPS can ever truly be voluntary.

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who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.*, at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary \*66 function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.*, at 166, 64 S.Ct. 438.

<sup>8</sup> Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 636-37 (2012).

<sup>9</sup> Teri D. Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 WM. & MARY BILL RTS. J. 125, 127 (2012).

<sup>10</sup> McGrath, *supra* note 8, at 633.



A.     Constitutionality of Child Abuse and Neglect Investigations

The Fourth Amendment “special needs” doctrine is described as distinguishing “between searches and seizures that serve the ‘normal need of law enforcement’ and those that serve some other special need, excusing non-law-enforcement searches and seizures from the warrant and probable cause requirements.”<sup>11</sup> It is still unclear whether child welfare officials investigating allegations of child abuse and neglect are bound by the probable cause and warrant requirements of the Fourth Amendment or qualify for the “special needs” exception.<sup>12</sup> However, the issue has been addressed in several Supreme Court and Circuit Court decisions.

The special needs doctrine was established in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*<sup>13</sup> He explained, “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”<sup>14</sup> The *T.L.O.* case involved a warrantless search of a student’s purse by school officials.<sup>15</sup> The Court applied a two-prong reasonableness analysis.<sup>16</sup> The Court first asked if the “state’s action was ‘justified at its inception,’” or, stated otherwise, whether the “state had ‘reasonable grounds for suspecting that the search will turn up evidence’ prior to conducting the search.”<sup>17</sup> Secondly, the Court asked whether the means used to conduct the search was “‘reasonably related to the objectives of the search’ such that the search [was] not ‘excessively intrusive in light of the age and sex of

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<sup>11</sup> Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 353 (2012).

<sup>12</sup> Adam Pié, Note, *The Monster Under the Bed: The Imaginary Circuit Split and the Nightmares Created in the Special Needs Doctrine’s Application to Child Abuse*, 65 VAND. L. REV. 563, 565 (2012).

<sup>13</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

<sup>14</sup> *Id.* at 351.

<sup>15</sup> *Id.* at 328-29.

<sup>16</sup> *Id.* at 341.

<sup>17</sup> Pié, *supra* note 12, at 572.

the student and the nature of the infraction.”<sup>18</sup> However, Justice Blackmun believed that the Court omitted an important first step and stated that an exceptional need must first be found.<sup>19</sup>

In *O'Connor v. Ortega*, the Supreme Court embraced Justice Blackmun's opinion that the special needs doctrine only applies when the government's interest is “substantially different from ‘the normal need for law enforcement.’”<sup>20</sup> The Court stated, “[a]dditionally, while law enforcement officials are expected to ‘school[] themselves in the niceties of probable cause,’ no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard.”<sup>21</sup>

In *Ferguson v. City of Charleston*, the Supreme Court stated that the special needs doctrine does not apply to a policy developed by a state hospital and police, which required the hospital to turn over positive drug tests of pregnant women to the police.<sup>22</sup> The Court explained that in other earlier cases where the special needs doctrine did apply, the “‘special need’ that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement.”<sup>23</sup> However, in *Ferguson*, “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”<sup>24</sup> Further, the Court stated, “[w]hile the ultimate goal of the program may well have been to get

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<sup>18</sup> *Id.*

<sup>19</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Justice Blackmun stated “I write separately, however, because I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable-cause. The Court correctly states that we have recognized limited exceptions to the probable-cause requirement “[w]here a careful balancing of governmental and private interests suggests that the public interest is best served” by a lesser standard. *Ante*, at 743. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with ‘a special law enforcement need for greater flexibility.’”)

<sup>20</sup> *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987).

<sup>21</sup> *Id.* at 724-25 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1994)).

<sup>22</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 69 (2001).

<sup>23</sup> *Id.* at 79.

<sup>24</sup> *Id.* at 80.

the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes to generate evidence *for law enforcement purposes* in order to reach that goal.”<sup>25</sup> The Court recognized that the “threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose was of [the] policy was to ensure the use of those means.”<sup>26</sup> As such, the Court held that the special needs doctrine did not apply and rather the Fourth Amendment’s “general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy.”<sup>27</sup> Therefore, the decision in *Ferguson* “creates a legal incentive to develop policies that avoid excessive entanglement between a legitimate special need and law enforcement.”<sup>28</sup>

In *Safford Unified School District v. Redding*, the school principal ordered a thirteen year old girl to strip down to her underwear and “pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree.”<sup>29</sup> This search occurred because of a report that the young girl was distributing medicine to other students.<sup>30</sup> The Court applied the rule of reasonableness, as stated in *T.L.O.*, and found that the search violated the Fourth Amendment because “the content of the suspicion failed to match the degree of intrusion.”<sup>31</sup> This case makes clear that “in order to perform a highly intrusive search, the state must have a very strong interest in performing the search, and the information supporting the search must specifically be linked to the intrusive search.”<sup>32</sup>

In 2012, the Supreme Court granted certiorari in *Camretta v. Greene*, a case involving an in-school warrantless interview of a suspected child abuse victim.<sup>33</sup> However, the Court was unable to

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<sup>25</sup> *Id.* at 82-83.

<sup>26</sup> *Id.* at 83-84.

<sup>27</sup> *Id.* at 86.

<sup>28</sup> Gupta-Kagan, *supra* note 11, at 390.

<sup>29</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 369 (2009).

<sup>30</sup> *Id.* at 368.

<sup>31</sup> *Id.* at 375.

<sup>32</sup> Pié, *supra* note 12 at 576.

<sup>33</sup> *Id.* at 566.

address the issue because the Court dismissed the case, finding the case-in-controversy moot.<sup>34</sup> Therefore, it is still necessary to look at the varying decisions by the United States Circuit Courts.

Although most Circuit Courts have addressed the issue to some degree, they have not developed a consensus. A brief overview of some Circuit Court decisions is necessary to understand the varying application, or lack thereof, of the special needs doctrine. Some courts have adopted the doctrine, others have rejected it, and a few have chosen not to apply it in the case before them, but left open the option for future application.

In the 1999 case *Tenenbaum v. Williams*, the Second Circuit refused to apply the special needs doctrine while still recognizing that it may apply in other child abuse cases where the child is subject to immediate danger.<sup>35</sup> In *Tenenbaum*, the Court considered a case where a young girl was suspected to be a victim of abuse.<sup>36</sup> After an unsuccessful attempt to interview the child at school, the caseworkers removed her from the classroom without a warrant or parental consent and took her to the hospital to test for sexual abuse.<sup>37</sup> The court found that requiring the state to seek judicial approval “makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the state.”<sup>38</sup> Similar to the Second Circuit, the Fifth Circuit in 2002 did not apply the special needs doctrine in *Roe v. Texas Department of Protective and Regulatory Services*, but did not explicitly endorse a position on the doctrine itself.<sup>39</sup> The case involved a young girl who was acting inappropriately at day camp and was reported as a possible victim of sex abuse.<sup>40</sup> The caseworkers visited the home and, after discussing the report with her mother, removed the child’s clothes to look for marks and to take photos.<sup>41</sup> The Court limited its inquiry to strip searches and found that the caseworker violated the Fourth

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<sup>34</sup> *Id.*

<sup>35</sup> *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999).

<sup>36</sup> *Id.* at 588-89.

<sup>37</sup> *Id.* at 591.

<sup>38</sup> *Id.* at 604. See also Pié, *supra* note 12, at 590-91.

<sup>39</sup> *Roe v. Texas Dep’t of Protective and Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002); see also Pié, *supra* note 12, at 591-93.

<sup>40</sup> *Roe*, 299 F.3d at 398.

<sup>41</sup> *Id.* at 399.

Amendment by conducting the search without demonstrating probable cause, obtaining a search warrant, obtaining parental consent, or acting under exigent circumstances.<sup>42</sup>

The Third Circuit did not even mention the special needs doctrine in *Good v. Dauphin County Social Services for Children and Youth* in 1989.<sup>43</sup> In *Good*, the Court considered a case where a young child was allegedly chased and stripped searched by a policewoman despite no signs of abuse.<sup>44</sup> The Court stated, “[t]he Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the assessment of the gravity of society risk involved.”<sup>45</sup> The Ninth Circuit also rejected the special needs doctrine in *Calabretta v. Floyd* in 1999.<sup>46</sup> In *Calabretta*, the Court considered a case where a caseworker was initially denied access to the home.<sup>47</sup> Subsequently, the caseworker entered the home with a police officer without the consent of the parent, interviewed the children, and required the mother to remove the child’s clothing for a body search.<sup>48</sup> The Court stated, “[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.”<sup>49</sup> Further, the Court found, “[t]he reasonable expectation of privacy of individuals in their homes includes the interests of both parents and children in not having government officials coerce entry in violation of the Fourth Amendment and humiliate the parents in front of the children.”<sup>50</sup> The Court held that under these circumstances consent or a warrant was required for

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<sup>42</sup> *Id.* at 407-08.

<sup>43</sup> *Good v. Dauphin Cnty. Soc. Servs. for Children and Youth*, 891 F.2d 1087 (3d Cir.1989); *see also* Pié, *supra* note 12, at 587-88.

<sup>44</sup> *Good*, 891 F.2d at 1089-90.

<sup>45</sup> *Id.* at 1094.

<sup>46</sup> *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *see also* Pié, *supra* note 12, at 588-90.

<sup>47</sup> *Calabretta*, 189 F.3d at 810-12.

<sup>48</sup> *Id.* at 811-812.

<sup>49</sup> *Id.* at 820.

<sup>50</sup> *Id.*

entry into the home.<sup>51</sup>

However, unlike the Second, Third, Fifth, and Ninth Circuits, the Seventh Circuit applied the special needs doctrine to investigations of child abuse in *Darryl H. v. Coler* in 1986.<sup>52</sup> *Darryl H.* involved two consolidated cases that involved caseworkers coming to the school to interview children who were suspected victims of abuse.<sup>53</sup> The caseworkers also had each of the children disrobe to inspect them for signs of abuse.<sup>54</sup> The Court stated, “we cannot say that the Constitution requires that a visual inspection of the body of a child who may have been the victim of child abuse can only be undertaken when the standards of probable cause or a warrant are met.”<sup>55</sup> Further, the Court explained, “while the visual inspection of the child’s body may eventually result in a criminal prosecution against a child abuser, that contingency is certainly of secondary importance to the [child abuse investigation] at the time the search is conducted.”<sup>56</sup> The Fourth Circuit adopted the Seventh Circuit’s reasoning in *Wildauer v. Frederick County* in 1993.<sup>57</sup>

#### B. Voluntary Parental Cooperation in Investigations and Due Process

The United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects the parent-child relationship from arbitrary governmental interference.<sup>58</sup> “The Due Process Clause protects parents’ property interest in the care, control, and custody of their children.”<sup>59</sup> “It protects procedural

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<sup>51</sup> *Id.* at 813, 817.

<sup>52</sup> *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986); *see also* Pié, *supra* note 12, at 581-84.

<sup>53</sup> *Darryl H.*, 801 F.2d at 894.

<sup>54</sup> *Id.* at 896.

<sup>55</sup> *Id.* at 902.

<sup>56</sup> *Id.* (emphasis removed).

<sup>57</sup> *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 373 (4th Cir. 1993).

<sup>58</sup> *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (Souter, J., concurring in judgment); *see also* Nicole Stednitz, Note, *Ending Family Trauma Without Compensation: Drafting 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 OR. L. REV. 1423, 1431 (2012).

<sup>59</sup> Nicole Stednitz, Note, *Ending Family Trauma Without Compensation: Drafting 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 OR. L. REV.

rights, which include notice and the opportunity to be heard, and substantive rights to make decisions on behalf of their children.”<sup>60</sup> This is one of the oldest unenumerated rights recognized by the Court under the Due Process Clause.<sup>61</sup> Further, the Court has described the right of parents to make decisions concerning the upbringing and education of their children as the tradition in the “history and culture of Western civilization.”<sup>62</sup>

However, it is also recognized that these rights have limitations when a child’s safety is in jeopardy. As described by Soledad A. McGrath, “[w]here a child’s safety is at risk or has already been compromised, the state has a strong and legitimate interest in protecting the child, which justifies piercing the cloak of privacy that typically surrounds the life of the family.”<sup>63</sup> The family often has the option to cooperate and voluntarily consent to services offered by the Child Protection Agency rather than proceed down the traditional investigatory pathway. The voluntary track is meant to be a non-adversarial approach to helping families who may just need support and services.<sup>64</sup>

When parents consent to participate in services offered by the Agency, they effectively waive the Agency’s obligation to follow procedural safeguards.<sup>65</sup> Parents agreeing to participate in voluntary services forgo their right to court hearings, are not entitled to an attorney, and there is no judicial or administrative mechanism to determine whether their participation is truly voluntary.<sup>66</sup> Some parents have explained their motivation to consent as the fear that “failure to consent ‘will only add the curse of ‘uncooperative’ to the

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1423, 1431 (2012).

<sup>60</sup> Nicole Stednitz, Note, *Ending Family Trauma Without Compensation: Drafting 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 OR. L. REV. 1423, 1431 (2012). See also *Troxel*, 530 U.S. at 65-66 (2000) (plurality opinion); see also Stednitz, *supra* note 58, at 1432.

<sup>61</sup> *Troxel*, 530 U.S. at 65 (plurality opinion); see also Stednitz, *supra* note 58, at 1432.

<sup>62</sup> *Troxel*, 530 U.S. at 65 (plurality opinion) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)); see also Stednitz, *supra* note 58, at 1432.

<sup>63</sup> McGrath, *supra* note 8, at 636-637.

<sup>64</sup> *Id.* at 642.

<sup>65</sup> *Id.* at 637-38.

<sup>66</sup> *Id.* at 666-67.

list of their sins when the case comes to court. . . ."<sup>67</sup> While not directly addressing this issue, the Supreme Court has stated, "(...) it has been said that many voluntary placements are in fact coerced by threat of neglect proceedings and are not in fact 'voluntary' in the sense of the product of an informed consent."<sup>68</sup> However, the Circuit Courts have differed on the issue.

In *Croft v. Westmoreland County Children and Youth Services*, the Children's Bureau had received a call that Dr. Croft was sexually abusing his daughter.<sup>69</sup> The caseworker and police officer went to the home to investigate and Dr. Croft consented to be interviewed.<sup>70</sup> After the interview, the caseworker informed the parents that the child would be placed in foster care that night unless the father left the home and did not have contact with the child until the investigation was complete.<sup>71</sup> In considering whether the caseworker's ultimatum was an abuse of government power, the Third Circuit explained, "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse."<sup>72</sup> The focus was "whether the information available to the defendants at the time would have created an objectively reasonable suspicion of abuse justifying the degree of interference with the Croft's rights as Chynna's parents."<sup>73</sup> The Court stated, "[a]n anonymous tip may justify investigation but will not provide reasonable grounds for removal of a family member absent independent, articulable criteria of reliability; and certainly not when all evidence is to the contrary."<sup>74</sup> Further, the Court rejected the Defendant's allegation that Dr. Croft voluntarily left the home.<sup>75</sup> Instead, the Court found the threat of placing his daughter in foster care as "blatantly coercive."<sup>76</sup>

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<sup>67</sup> *Id.* at 670.

<sup>68</sup> *Smith v. Org. of Families for Equal. & Reform*, 431 U.S. 816, 834 (1977).

<sup>69</sup> *Croft v. Westmoreland Cnty. Children and Youth Servs.*, 103 F.3d 1123, 1124 (3d Cir. 1997).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1126.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Mill*, *supra* note 1, at 1127.

<sup>76</sup> *Id.*



In *Dupuy v. Samuels*, the Seventh Circuit addressed whether the Illinois Department of Children and Family Service's use of safety plans was coercive and violated parents' due process rights.<sup>77</sup> The Court explained that the state sometimes offers parents, in lieu of immediately removing the child from the home, the option of agreeing to a safety plan, which imposes restrictions short of removal until the completion of the state's investigation.<sup>78</sup> "The plan might require that one of the parents leave the house where the child is living, or that he keep out of the child's presence unless a designated family member is present as well, or that the child be sent to live with other family members."<sup>79</sup> The Court found that parents are not entitled to a hearing before they are offered the option of agreeing to a safety plan and that such plans are not coercive.<sup>80</sup> Specifically, it stated,

"[t]here is no right to a hearing when no substantive right has been infringed or is threatened with being infringed. The state does not force a safety plan on the parents; it merely offers it. Parents are entitled to a hearing if their parental rights are impaired, but the offer of a settlement no more impairs those rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury."<sup>81</sup>

Further, it found,

[i]t adds nothing to say as the plaintiffs do that they did not really consent- that the state 'coerces' agreement to safety plans by threatening to remove the child from his parents custody unless they agree to the plan. It is not a forbidden means of 'coercing' a

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<sup>77</sup> *Dupuy v. Samuels*, 465 F.3d 757 (7<sup>th</sup> Cir. 2006); see also Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 678-679 (2012).

<sup>78</sup> *Dupuy*, 465 F.3d at 760.

<sup>79</sup> *Id.* at 761.

<sup>80</sup> *Id.* at 761-62.

<sup>81</sup> *Id.* at 761.

settlement to threaten merely to enforce one's legal rights.<sup>82</sup>

Additionally, it stated,

There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse, and even in that case the ordinary prerequisite to a finding of duress—that the person have no effective legal remedy against the threat—would be missing, since if a child is actually taken, the parents have a very prompt legal remedy.... We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options.<sup>83</sup>

While the Court recognized that evidence of misrepresentation or use of improper means by the state might have led to a different outcome, it held that the plaintiffs were not entitled to relief.<sup>84</sup>

Similarly, the Sixth Circuit, in *Smith v. Williams-Ash*, held that the temporary removal of the children from the home after the parents consented to a safety plan did not violate due process.<sup>85</sup> Due to unsanitary and dangerous living conditions, the caseworker persuaded the parents to consent to a safety plan that removed the children from the home and placed them at a friend's home in the neighborhood.<sup>86</sup> Under this safety plan, the parents were able to maintain close contact and visit regularly.<sup>87</sup> The Court adopted the reasoning set forth in *Dupuy* and found that the parents remained in the safety plan voluntarily at all times.<sup>88</sup> Further, the Court explained, "[w]e do not doubt that the Smiths, as any parents likely

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<sup>82</sup> *Id.* at 762.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Smith v. Williams-Ash*, 520 F.3d 596 (6<sup>th</sup> Cir. 2008); see also McGrath, *supra* note 77, at 678-79.

<sup>86</sup> *Smith*, 520 F.3d 598.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 600.

would, resented the safety plan from the beginning. But mere displeasure and frustration fails to negate their consent.<sup>89</sup>

Therefore, what exactly constitutes consent varies among the courts. Some Courts have found that a parent may be said to execute effective consent while others have found such circumstances to be inherently coercive. While the voluntary track may have advantages, there are also several procedural safeguards parents relinquish when they comply.

## PART II. SCOTTISH LEGAL PERSPECTIVE

While the United States has a written Constitution, the nations that make up the United Kingdom do not. This section on the child protection system in Scotland therefore begins by describing what may instead be said to comprise the 'constitution of the United Kingdom' and its relevance to state interference in family life. It then proceeds to identify those responsible for child protection investigations in Scotland, the processes they use, and the legislation that investigators rely on to effect this protection. Embedded within this is a discussion of the extent to which coercion plays a part in the child protection endeavor and the features of the investigative process, which act as checks to this coercion to prevent its inappropriate or excessive exercise.

### A. The "Constitution" of the United Kingdom

The United Kingdom is comprised of England, Scotland, Wales and Northern Ireland. The constitution is "made up of the body of rules and arrangements concerning the government of the country."<sup>90</sup> There are documents, however, which form a part of this 'body of rules' such as the Magna Carta of 1215 and the Bill of Rights in 1689 (England) and the Claim of Right 1689 (Scotland). The Magna Carta included a declaration of the liberties to be enjoyed by 'freemen of the realm' and the Bill of Rights made it illegal for a monarch to pass laws without Parliament's consent. It also sets out other fundamental protections such as forbidding the state from imposing excessive fines and from cruel and unusual punishments. Key

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<sup>89</sup> *Id.* at 601.

<sup>90</sup> COLIN R. MUNRO, STUDIES IN CONSTITUTIONAL LAW 1 (2d ed. 2002).

principles arising from the collective body of rules making up the 'constitution of the UK' are that of the 'rule of law,' 'parliamentary sovereignty' (which limits the prerogative of the monarch) and the 'separation of powers' (the separation of the Legislature from the Judiciary).

In the early 18<sup>th</sup> century two further documents became part of what may collectively be called the 'constitution of the UK': the Act of Union with Scotland 1706, which was passed by the English Parliament, and the Act of Union with England 1707, which was passed by the Scottish Parliament. Under these Acts the Scottish and English Parliaments united to form the one Parliament of Great Britain and became based in the Palace of Westminster in London. Prior to this union the two nations had been separate states, with separate legislation, although they came to share the same monarch at the time of the Union of the Crowns in 1603.<sup>91</sup>

For nearly 300 years – up until 1999 – the Parliament of the United Kingdom of Great Britain passed all law applicable to Scotland as well as those applicable to England. However it is important to note that Scots law (based on a mix of legal systems including feudal, Civil and Canon law) continued to apply in Scotland (as did a separate court structure). As a result, in many significant areas of law the UK Parliament in London had to pass separate legislation for Scotland. This often took the form of separate Acts of Parliament (such as the Children (Scotland) Act, 1995) or separate statutory provisions applicable to Scotland that were included within the one Act of the UK Parliament.<sup>92</sup>

In 1998, following a referendum within Scotland the previous year,<sup>93</sup> an Act of the UK Parliament, the Scotland Act 1998, established a Scottish Parliament in Edinburgh and devolved to it the

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<sup>91</sup> When King James VI of Scotland inherited the English throne after the death of his distant relative, Queen Elizabeth I of England. BRADLEY, A., EWING, K., CONSTITUTIONAL AND ADMINISTRATIVE LAW 37 (Longman, 14<sup>th</sup> ed. 2006).

<sup>92</sup> *Id.* At 38.

<sup>93</sup> In which 74% of voters supported a Scottish Parliament. HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 374 (Cavendish Publishing 4<sup>th</sup> ed. 2002).

power to legislate for Scotland on most matters except taxation, welfare spending and defense.<sup>94</sup>

At a further referendum in September 2014, the people of Scotland narrowly voted to remain part of the United Kingdom, following promises from the UK Parliament that additional powers will be devolved to the Scottish Parliament. This means that, as the United Kingdom is a member state of the European Union, Scotland remains a part of the European Union. As such, all legislation passed by either the UK Parliament or the Scottish Parliament has to be compliant with European Union Law. The European Union is a rich source of law in respect of the rights of individuals and family members within the member states, reflecting the origins of the EU as a reaction against the atrocities of World War II and motivated by the will to unite the countries of Europe so as to avoid a recurrence.<sup>95</sup>

All States that are members of the European Union are signatories to the Convention for the Protection of Fundamental Freedoms and Human Rights ("ECHR") (1950). Key among the eighteen rights and freedoms within the Convention are the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to liberty and security, the right to a fair trial and no punishment without law, the freedom of thought, conscience and religion, the freedom of expression, and the freedom of assembly and association. Of particular importance to the focus of this article, under Article 8 the ECHR states:

Everyone has the right to respect for his private and family life, his home and his correspondence<sup>96</sup>

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security,

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<sup>94</sup> Scotland Act 1998, §29(2)(b) and Schedule 5.

<sup>95</sup> In 1949 the Council of Europe was established as the first pan-European organization and continues to exist. All States that are members of the European Union are also a member of this Council of Europe as are a number of States that are not a part of the European Union. For more information see the website of the European Union at: [http://europa.eu/about-eu/eu-history/index\\_en.htm](http://europa.eu/about-eu/eu-history/index_en.htm)

<sup>96</sup> European Convention on Human Rights art. 8, para. 1.

public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others<sup>97</sup>

Citizens of States who are signatories to the ECHR can appeal to the European Court of Human Rights ("ECtHR") in Strasbourg if they believe agents of the State in which they reside have breached their human rights. In the case of *A v. the United Kingdom*,<sup>98</sup> a nine-year-old boy who had been repeatedly beaten by his stepfather with a garden cane claimed that the subsequent acquittal of his stepfather, based on grounds that the beating was 'reasonable chastisement,' represented a breach of his ECHR Article 3 right to freedom from 'torture, inhumane and degrading treatment. . . .' The ECtHR agreed that the UK Government had not provided the boy with adequate protection against ill treatment contrary to Article 3 and the United Kingdom Government accepted that the law required amendment and paid compensation to the now-adult victim.<sup>99</sup>

The ECHR has also successfully been founded upon to plead that the state's failure to intervene in a family, when the state knew or ought to have known that the children were being maltreated, was similarly a breach of the children's Article 3 right to 'freedom from torture or inhumane or degrading treatment.'<sup>100</sup>

As well as being a member of the EU, the United Kingdom is also a member of the United Nations (UN) and has ratified the

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<sup>97</sup> *Id.* at para. 2.

<sup>98</sup> *A. v. the United Kingdom*, 90 Eur. Ct. H.R. 2692 (1998).

<sup>99</sup> Since this case, the ECHR has become part of the domestic law of the United Kingdom via an Act of the UK, and citizens can therefore plead within the domestic courts of the UK that their human rights have been breached – rather than having to take the case all the way to the ECtHR in Strasbourg. Human Rights Act, 1998, c. 42 (U.K.). Since 2003 in Scotland, under criminal law, it is now the case that if a person claims that something done to a child was physical punishment carried out in the exercise of a parental right the court *must* decide that what was done was *not* a justifiable assault if it included a blow to the head, or shaking or the use of an implement – although the court still maintains the power to determine on 'whatever other grounds it thinks fit.' Criminal Justice (Scotland) Act, 2003, (A.S.P. 7), §51.

<sup>100</sup> *Z and others v. United Kingdom*, App. No. 29392/95, 34 Eur. H.R. Rep. 97 (2002).

United Nations Convention on the Rights of the Child ("UNCRC").<sup>101</sup> The UNCRC requires that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind."<sup>102</sup> Children are defined as individuals up to the age of eighteen years unless the age of majority is attained earlier within their nation state.

Under the UNCRC, children are not to be separated from their families unless necessary for their welfare:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.<sup>103</sup>

The UNCRC also gives children who are capable of forming their own views the right to express those views freely in all matters affecting the child.<sup>104</sup> This right expressly extends to "judicial and administrative proceedings affecting the child," wherein they are afforded a right to either put their views either "directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."<sup>105</sup>

Both the ECHR and the UNCRC have had significant impact on the process of child maltreatment investigations in Scotland. Adults and children have a right to a family life and *also* have a right to protection from abusive treatment. Thus state intervention has to

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<sup>101</sup> The only members of the UN not to have ratified the UNCRC are the United States of America and Somalia.

<sup>102</sup> Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc A/44/25, at 167 (Nov. 20, 1989).

<sup>103</sup> *Id.* at 168.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

balance these possibly conflicting rights at the level of the individual as well as at the level of family members in relation to each other. Intervention in family life by the state will be lawful as long as it is proportionate to the harm it is seeking to prevent. For example, a parent may claim it is an infringement of his or her “right to a family life,” if his or her child is removed into care, whereas the state party seeking to protect the child (or even the child seeking to protect him or herself) could be found on the child’s right to be protected from “inhumane and degrading treatment.”<sup>106</sup>

When such conflict exists between the rights of parents and the rights of a child, in principle it is the welfare of the child that is paramount.<sup>107</sup> Thus, for example, in the recent case of *A v. H*,<sup>108</sup> the court concluded that reduction of a mother’s contact with her child who was currently in care was:

no breach of [mother’s] art.8 rights where it was clear that all actions had been prompted by the application of the principle that [the child’s] welfare was the paramount consideration, therefore, interference with [the mother’s] private and family life was proportionate and justified in the circumstances, and the sheriff had been entitled to so conclude.

Consistent with Article 12 UNCRC, in Scotland, children’s views are regularly sought in cases concerning them.<sup>109</sup> However, it remains extremely rare for children to raise an action founding on their own right to protection from abuse at the hands of their parents.

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<sup>106</sup> Children in Scotland may instruct a solicitor in any civil matter if they have “a general understanding of what it means to do so” and are presumed to have such an understanding from the age of twelve. Age of Legal Capacity (Scotland) Act, 1991, c. 50, § 2.

<sup>107</sup> Children (Scotland) Act, 1995, c. 36, § 11(7). *But see* *Oyeneyin v. Oyeneyin* (1999) G.W.D. 38-1836 (Scot.) (determining that the parent’s ECHR Article 6 right to a fair trial may trump a child’s welfare in the context of that children wish their views on contact with a non-resident parent to be kept confidential in a child contact dispute).

<sup>108</sup> *A v. H* (2013) G.W.D. 32-634 (Scot.).

<sup>109</sup> The Children’s Hearings System has a form called “All About Me” which is included in the papers put before the hearing whenever it is practicable to do so. This form can be accessed from: [http://www.scra.gov.uk/home/all\\_about\\_me\\_form.cfm](http://www.scra.gov.uk/home/all_about_me_form.cfm)



More often, they may enter as a party minuter in an action between the parent and a state party (such as a local area authority).<sup>110</sup>

B. Those responsible for child protection in Scotland

In 1884, the first UK Society for the Prevention of Cruelty to Children was established in London, followed shortly afterwards by branches in Scotland, leading to the Prevention of Cruelty to Children Act in 1889. By 1921, the Scottish organization became the Royal Scottish Society for the Prevention of Cruelty to Children ("RSSPCC") and investigated child abuse and neglect. This continued until 1968 when the Social Work (Scotland) Act vested responsibility for child protection in local authority social workers.

Since then, a far greater emphasis has come to be placed on coordinated multi-agency work, particularly the sharing of information between state agencies so that children at risk of harm do not fall through the safety net.<sup>111</sup> The Police, the National Health Service (NHS),<sup>112</sup> and the thirty-two local authorities that run state schools and employ social workers are all "key agencies and have the

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<sup>110</sup> In one case the parents of children aged 14 and 11 told their son he was disabled and had to go to a specialist high school. He had actually been assessed as not having any additional support needs. The parents refused to accept local authority concerns about their child's welfare and appealed to the court. Consistent with their Article 12 UNCRC right, the children entered as parties to the action and were represented in court by their own solicitor (representing their wishes) as well as by a 'safeguarder' (representing their best interests). The court determined that the children *were* at risk of harm and the case was remitted to the Children's Hearings System (CHS). This happened in the Scottish case of *BR v Grant* 2000 Fam. L.R. 2

<sup>111</sup> This practice builds on the findings of a number of Serious Case Reviews (SCR) undertaken after the death of children due to maltreatment which concluded that had all the separate pieces of information held by different agencies been shared, action would have been more likely and the child might have been saved. See MARIAN BRANDON ET AL., ANALYSING CHILD DEATHS AND SERIOUS INJURY THROUGH ABUSE AND NEGLECT: WHAT CAN WE LEARN? A BIENNIAL ANALYSIS OF SERIOUS CASE REVIEWS 2003-2005 (DCSF Publications 2008).

<sup>112</sup> This agency provides free medical and surgical care to all residents of the UK at point of need.

responsibility for working together to identify and commission child protection activity.”<sup>113</sup>

How these agents of the State go about this task is informed by the Scottish Government’s child welfare policy known as Getting it Right for Every Child (“GIRFEC”), first published in 2008. This policy document is further augmented by the Scottish Government National Guidance for Child Protection in Scotland, published in 2010 and ‘refreshed’ in 2014.<sup>114</sup> This guide sets out how the multi-agency approach should be put in to effect. It is required to have a named professional (usually a social worker) to take a lead role in the joint working so that diffusion of responsibility does not inadvertently place the child at greater risk. Further, “where evidence suggests that a coordinated plan involving two or more agencies will be necessary, a “Child’s Plan” should also be drawn up.”<sup>115</sup> This plan should “comprise a single plan of action” which is reviewed at a meeting involving all relevant agencies. Within the specific context of child protection concerns, the Child’s Plan becomes known as the “Child Protection Plan.” The single meeting is referred to as a “Child Protection Case Conference” where:

[i]t will be for the chair of the meeting to ensure that the discussion stays focused on specific concerns about the safety of the child, the actions required to reduce risk and whether the case should be referred to the Children’s Reporter.<sup>116</sup>

All children who are the subject of an inter-agency Child Protection Plan have their names placed on a “Child Protection Register” for as long as they are deemed to be at significant risk. The

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<sup>113</sup> *Protecting children and young people: child protection committees*, SCOTTISH EXECUTIVE, 1 (2005),

<http://www.scotland.gov.uk/Resource/Doc/36496/0023577.pdf>.

<sup>114</sup> The Scottish Government, *National Guidance for Child Protection in Scotland 2014* WWW.SCOTLAND.GOV.UK (2014), <http://www.scotland.gov.uk/Resource/0045/00450733.pdf>. [Hereafter, *National Guidance*, 2014].

<sup>115</sup> The Scottish Government, *National Guidance for Child Protection in Scotland (2010)*, WWW.SCOTLAND.GOV.UK, 47, (2010), <http://dera.ioe.ac.uk/15026/1/0109279.pdf>. [Hereafter, *National Guidance*, 2010].

<sup>116</sup> *Id.* at para. 49.

register “has no legal status but provides an administrative system for alerting practitioners that there is sufficient professional concern about a child to warrant an inter-agency Child Protection Plan.”<sup>117</sup>

As well as a multi-agency approach, GIRFEC emphasizes the need for “early, proactive intervention in order to create a supportive environment and identify any additional support they [family members] may need as early as possible.”<sup>118</sup> The aspiration for early support to families is in the hope that will prevent the need for emergency interventions at a later stage and may enable family members to remain together.

This early intervention aspiration is set within the context that all families in Scotland benefit from free universal provision of health services, which includes a health visitor<sup>119</sup> being assigned to every new mother and her child. The health visitor visits the mother in her own home and her role is “to provide support during the antenatal period,” to “teach parents how to meet the nutritional needs of their infants and young children and develop healthy lifestyles, to enable parents in the most need to develop parenting skills and confidence and to connect them to further sources of support,” to “monitor and assess the development, health and wellbeing of all infants and young children to [detect] early any issues which require further action.”<sup>120</sup> More importantly health visitors also act as the named professional and first point of contact

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<sup>117</sup> *Id.* at para 54;

There were 7,386 children in Scotland on the Child Protection Register at the 31<sup>st</sup> July, 2013. The key recorded reason was ‘neglect’ for 1,029; ‘emotional abuse’ for 1,027; ‘Parental substance abuse’, 993; ‘Domestic abuse’, 888; ‘Parental Mental illness’, 600; ‘Physical abuse’, 537; ‘non-engaging family’ 548; ‘Sexual abuse’, 208. For the full list of statistics see *Child Protection Register Statistics Scotland: 2009-2013*, NSPCC, (2014), <http://www.nspcc.org.uk/globalassets/documents/statistics-and-information/child-protection-register-statistics-scotland.pdf>.

<sup>118</sup> *National Guidance*, 2010, *supra* note 115, para. 10.

<sup>119</sup> A health visitor is a specialist-trained nurse.

<sup>120</sup> The Importance for Scotland of Health Visiting in the Early years, RCN SCOTLAND, (Jan. 6, 2014), [http://www.rcn.org.uk/\\_\\_data/assets/pdf\\_file/0010/499843/Joint\\_briefing\\_on\\_health\\_visitors.pdf](http://www.rcn.org.uk/__data/assets/pdf_file/0010/499843/Joint_briefing_on_health_visitors.pdf).

for all health and well-being and child protection issues for children under five.<sup>121</sup>

In addition to such health staff, local authorities, established by Acts of Parliament, have specific duties to children, particularly to those who fall within the definition of being “in need.”<sup>122</sup> This term is defined by statute to include children who “are unlikely to achieve or maintain a reasonable standard of health or development without local authority assistance”; “children whose health or development is likely to be significantly impaired without such assistance”; “disabled children” and children “affected by the disability of another member of the family.”<sup>123</sup> The support given to children “in need” most usually takes the form of supporting the family to care for them (such as taking a child to and from nursery care for a mother who is overwhelmed by caring for newborn twins) but it can include cash assistance in emergency circumstances.<sup>124</sup> However, when a parent is unable to care for their child at all,<sup>125</sup> the local authority must provide that child with accommodation.<sup>126</sup> Such a child then becomes “looked after” by the local authority and the local authority becomes subject to specific duties to safeguard and promote the child’s welfare, to promote contact between the child and his or her parents and to take into account the views of the child and of the parents when making decisions in respect of the child.<sup>127</sup> Children who are removed from their family homes as a result of child protection investigations also fall within the statutory definition of being “looked after” by the local authority.<sup>128</sup>

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<sup>121</sup> Key elements of the GIRFEC approach to supporting families is now enshrined in the Children and Families (Scotland) Act 2014, which *inter alia* requires every child in Scotland to have such a ‘named person’ acting as a first point of contact for all wellbeing and protection issue *throughout* their childhood with nursery and school staff taking over from health visitors for older children.

<sup>122</sup> Children (Scotland) Act, 1995, § 22.

<sup>123</sup> *Id.* at § 17.

<sup>124</sup> *Id.* at § 22(3)(b)

<sup>125</sup> There is universal provision of free health care in Scotland (including all meals while in hospital). Those who cannot afford to cost of travelling to hospital can also claim this cost of this expense from the state.

<sup>126</sup> *Id.* at § 25.

<sup>127</sup> *Id.* at § 17.

<sup>128</sup> *Id.* at § 17(6).

The local authorities in Scotland that maintain the Child Protection Register for their area and all local authorities also have a Child Protection Committee made up of chief officers of the agencies involved in child protection work. The committees operate as the "key local bodies for developing and implementing child protection strategy across and between agencies."<sup>129</sup> Members have to have sufficient authority within their organization that they are able to implement the required policy and resource commitments agreed by the Child Protection Committee. One primary function is to raise awareness of child protection issues within communities, and to promote the work of agencies that protect children to the public at large so that members of the public know what to do if they have concerns about a child.<sup>130</sup>

However, although members of the public, such as neighbors, may report concerns, they are not under a legal duty to do so in contrast to social workers and, of course, the police. Under the Police (Scotland) Act 1967, the police have a duty "to guard, patrol and watch so as—(i) to prevent the commission of offences, (ii) to preserve order, and (iii) to protect life and property."<sup>131</sup> While, under the Children's Hearings (Scotland) Act 2011, a local authority that considers "(a) that the child is in need of protection, guidance, treatment or control, and (b) that it might be necessary for a compulsory supervision order to be made in relation to the child," "must make all necessary inquiries into the child's circumstances."<sup>132</sup> In this way, the child may become the subject of a Child Protection Case Conference and/or may be referred to the Children's Hearings System where such a "compulsory supervision order" may be made. It is to the process for making a "compulsory supervision order" in respect of children that this paper now turns.

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<sup>129</sup> *Protecting Children and Young People* at 9, *supra* note 113.

<sup>130</sup> *Id.*

<sup>131</sup> Police (Scotland) Act, 1967, § 17. Police also have the statutory duty to give all relevant information on a child to the Children's Hearings System if they believe that a 'compulsory supervision order' may need to be made in relation to a child. Children's Hearings (Scotland) Act, 2011, (A.S.P. 1), § 61.

<sup>132</sup> Children's Hearing (Scotland) Act at § 60.

### C. The Child Protection System in Scotland

The child protection system in Scotland is unique and significantly different from the other nations making up the UK because it is underpinned by a separate legal tradition, separate court structure and especially because of the existence of the Children's Hearings System which may grant a "compulsory supervision order." The processes described in this paper should not therefore be assumed to apply anywhere else within the UK.

The child protection system in Scotland is also one that has a high level of regulation. This regulation may be said to have twin functions. It exists to protect family members from unnecessary or disproportionate intrusion into their private and family life; but also, conformity to the procedural rules and regulations and protects those whose job it is to investigate child maltreatment from any possible allegations of malpractice (or neglect of duty) in the event that a child known to them as being at "risk of harm," is actually harmed.

#### 1. *Children's Hearings System (CHS)*

Anyone who has concerns over the welfare of a child can make a referral to a Reporter of the Children's Hearing System, which deals with cases where a child is thought to be in need of care and protection, as well as in cases where a person under the age of 16 has committed an offence or is regularly truant from school.<sup>133</sup> It is the Reporter's role to determine if there is sufficient evidence to support a claim that the child needs what is called a "compulsory supervision order" and, if so satisfied, the parent(s) and/or the child will appear before a panel of three trained volunteers from the local community whose role is to decide what form the "compulsory supervision order" should take. Children, as well as parents, are given the opportunity to express their views. Attendance at a hearing is compulsory and warrants can be issued by a court in the event of non-attendance.

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<sup>133</sup> This system which is unique to Scotland was established by the Social Work (Scotland) Act 1968 following the 'Kilbrandon Report' (1964), which removed child welfare cases from the civil courts in Scotland and all but the most serious cases of juvenile offending (ie: rape or murder) from the criminal courts.

The panel may decide that the child can remain within their family home but under the supervision of a social worker, who will visit the child to monitor the circumstances of the child.<sup>134</sup> Alternatively, the panel may decide the child requires to be placed within the care of extended family members or foster careers, or indeed that he or she should reside within a residential unit or secure accommodation (these latter options usually only apply to older children referred to the CHS as they have committed an offence).

The law pertaining to the Children's Hearings System (CHS) is now contained within the Children's Hearings (Scotland) Act 2011 and it is here that the grounds for referring children to the Reporter are listed. The Reporter can only arrange for a Children's Hearing if at least one of the seventeen grounds listed in the 2011 Act is satisfied by the available evidence. Key among these grounds of referral are: "the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care" the child has been a victim of a "schedule 1" (sexual) offence;<sup>135</sup> and the child either is, or is likely to, have a close connection with a person who has committed a "schedule 1 offence" or has carried out domestic abuse. Children who have committed an offence or misused alcohol or drugs or who are beyond the control of a relevant person, as well as those who are at risk of being pressured into marriage can also be referred to the CHS.

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<sup>134</sup> The panel of the CHS can be quite specific in recommending that the local authority must provide some particular service to support the family and the local authority faces penalties if it does not then implement the terms of the "compulsory supervision order." *Id.* at §146. This power was introduced as local authorities did not always implement the terms required by the CHS on the basis of a lack of available resources.

<sup>135</sup> Meaning an offence under Part I of the Criminal Law (consolidation)(Scotland) Act 1995 including: any offence against children under the Sexual Offences (Scotland) Act 2009 and offences under the Children and Young Persons (Scotland) Act 1937 (neglect likely to cause unnecessary suffering or injury to the child's health, causing and allowing children to be used for begging, exposure of children under 7 to risk of burning, children under 16 taking part in performances endangering life and limb); Prohibition of Female Genital Mutilation (Scotland) Act 2005; Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and s52 of the Civic Government (Scotland) Act 1982 (indecent photography of child under 17 years).

Against the background that Scotland has a population of just one million children,<sup>136</sup> in 2012-2013, 22,561 children in Scotland were referred on at least one occasion to the CHS, the vast majority being referred on care and protection grounds, 20,308, rather than on grounds that they had committed an offence.<sup>137</sup> And, 79.4% of the referrals were made by the police.<sup>138</sup> As of March 2013, there were 12,514 children in Scotland who were the subject of a “compulsory supervision order” (representing 1.3% of children in Scotland). Following the intervention of the CHS, a significant number of these 12,514 children remained living with their parent(s) (5,952), with the next highest number being placed in foster care (3,187) or with a relative or friend (1,312).<sup>139</sup>

It is vitally important to note that that the CHS is embedded within civil process and does not function to determine the “guilt” or otherwise of any person, nor to pass judgment or sentence. Rather, the focus is on obtaining the best outcome for the child, although reports made into the circumstances of a child who has been referred to the CHS may be requested by a criminal court should a criminal charge be brought by a procurator fiscal in respect of an offence against a child.<sup>140</sup>

## 2. *Emergency Interventions*

When children are believed to be at immediate risk of significant harm there may not be time to refer the child to the Reporter in order to secure their protection and emergency measures are in place; therefore, allowing for the removal of a child from his or

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<sup>136</sup> National Records of Scotland, Mid-2011 & Mid-2012 Population Estimates Scotland, <http://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-estimates/mid-year-population-estimates/2012/list-of-tables> (then scroll down and click the PDF file for Table 1b)..

<sup>137</sup> SCRA Annual Report, Changing for Children and Young People, SCOTTISH CHILDREN’S REPORTER ADMINISTRATION, 19 (2012-2013), [http://www.scra.gov.uk/sites/scra/cms\\_resources/Annual%20Report%20201213.htm](http://www.scra.gov.uk/sites/scra/cms_resources/Annual%20Report%20201213.htm)

<sup>138</sup> *Id.* at 20.

<sup>139</sup> *Id.* at 24.

<sup>140</sup> See Children’s Hearings (Scotland) Act at § 17(1)(b), 61. Under s61 of the 2011 Act – if a constable has written a report for a procurator fiscal in respect of a child (under s. 17(1)(b)) then he has to refer the child to the children’s reporter also.



her home. Detailed legislation exists to regulate the manner in which this may be undertaken.

Most police in Scotland are unarmed and do not have an automatic right to force entry into properties either at common law or under statute.<sup>141</sup> Nor do they have the right to search private premises without a warrant, "excepting in exceptional and urgent circumstances, and as subsequently agreed by courts on a case by case basis."<sup>142</sup> This is within the context that only approximately 1.3% of citizens are licensed owners of firearms.<sup>143</sup>

Once a police officer has entered a property either by the consent of the occupier or on the basis of a warrant, and that officer develops a "reasonable grounds to believe" that a child has been, or is likely to be, neglected or treated in such a way that the child is likely to suffer significant harm, the officer may take a child to a place of safety. This provided it is not "reasonable" to first obtain a specific court order for this action. As would be the case if the courts are closed for the day or weekend.<sup>144</sup> Under statute, the child can only be kept in the place of safety for up to 24 hours and "as soon as is

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<sup>141</sup> Although specialist firearms officers exist who can respond to urgent or unexpected threats.

<sup>142</sup> Justice Committee, Criminal Justice (Scotland) Bill, (as introduced)(May 6, 2014), [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/CJ16\\_Police\\_Scotland.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ16_Police_Scotland.pdf).

<sup>143</sup> A report published in May 2013 stated that there were 25,702 certified firearms holders and 48,168 shotgun holders in Scotland (Scottish Government (2013) Firearm Certificate Statistics Scotland 2012. Available at: <http://www.scotland.gov.uk/Resource/0042/00423374.pdf>). This is against the background that as of the 8<sup>th</sup> August 2013 the population of Scotland was 5,313,600 (National Records of Scotland (2012) Mid-2011 and Mid-2012 Population Estimates; available at <http://www.gro-scotland.gov.uk/files2/stats/population-estimates/mid2012/mid-2011-2012-pop-est.pdf>). NOTE: The laws on firearms were tightened following the massacre of sixteen young children in their school in Dunblane, Scotland and offences in which a firearm was allegedly involved has been falling year on year in Scotland since 2008 (Scottish Government (2012) Recorded crimes and offences involving firearms Scotland 2011-2012. Available at: <http://www.scotland.gov.uk/Resource/0040/00409280.pdf>).

<sup>144</sup> Children's Hearings (Scotland) Act at § 56. Children removed by police officers have to be referred to the Reporter of the CHS as soon as practicable. There is a similar provision for any 'person' (which includes local authorities) to apply to a Justice of the Peace when it not 'practicable' to apply to a court due to court. *See also* Children's Hearings (Scotland) Act at § 55.

practicable” the officer has to inform the Principal Reporter of the CHS,<sup>145</sup> who has the power to give notice to the police constable to “release the child.”<sup>146</sup>

It is more usual for police or social workers to obtain a court order for the purpose of the compulsory removal of children without parental consent.<sup>147</sup> There are two main types of order: Child Assessment Orders (CAO) and Child Protection Orders (CPO).<sup>148</sup> Both court orders may only be obtained on the basis that there are reasonable grounds to believe the child is or has been suffering “significant harm”. The legislation does not define the term “significant harm,” but the Scottish National Guidance for Child Protection gives a definition that emphasizes the impact on the individual child:

“Harm” means the ill treatment or the impairment of the health or development of the child, including, for example, impairment suffered as a result of seeing or hearing the ill treatment of another. In this context, “development” can mean physical, intellectual, emotional, social or behavioural development and “health” can mean physical or mental health. Whether the harm suffered, or likely to be suffered, by a child or young person is “significant” is determined by comparing the child’s health and development with what might be reasonably expected of a similar child.<sup>149</sup>

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<sup>145</sup> S56(2) and s56(3) Children’s Hearings (Scotland) Act 2011.

<sup>146</sup> A similar but probably little known procedure also exists whereby ‘any person’ can apply to a justice of the peace for an order requiring a child to be delivered to a specified person (or preventing the removal of the child from any place where the child is staying). Again this is for a period of up to 24 hours and can only be obtained when it is not practicable to apply to the court and the Reporter has to be informed. S55 Children’s Scotland (Act) 2011.

<sup>147</sup> While Justices of the Peace in Scotland may also authorize the removal of the child. s. 55, Children’s Hearings (Scotland) Act 2011.

<sup>148</sup> S 35 Children’s Hearings (Scotland) Act 2011 - Child Assessment order and s. 37 Children’s Hearings (Scotland) Act 2011 – child protection order.

<sup>149</sup> *National Guidance*, 2014, *supra* note 114, para. 42, at 13.

Although CPOs are emergency orders, parents have successfully appealed against court decisions not to let them be heard prior to the granting of CPOs. This may happen when it may be argued that the children were not at risk of harm at the time the order was made. This happened in the case of *NJ v. Lord Advocate*,<sup>150</sup> where the newborn infants of two mothers were still within the hospital at the time the orders were sought. The court determined that:

The considerations which had to apply before the extreme step of depriving the parent of the right to be heard were where a compelling case existed for applying without first giving the parent's notice and where there was an emergency or other great urgency, and in the present petitions, the degree of urgency could not be said to have amounted to an emergency: the children were secure in hospital.<sup>151</sup>

While the court will consider each application for a CPO on its merits, there is little doubt that the possibility that a local authority social work department may obtain such an order could have a coercive impact upon parent. Therefore a parent may agree to their child being assessed "voluntarily" or accommodated by the local authority.<sup>152</sup> Should a parent then later ask for their child to be returned to them, the local authority may at that point obtain a court order to ensure the child remains within the care system.<sup>153</sup> Nonetheless, safeguards against the *inappropriate* use of these court orders exist and require closer consideration.

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<sup>150</sup> *NJ v. Lord Advocate* [2013] CSOH 27.

<sup>151</sup> *Id.* at 32, 33.

<sup>152</sup> For example, in the case of *Aberdeen City Council v M*, 2010 G.W.D. 34-700, a child was said to have been 'voluntarily' placed into the care of the local authority, but this was within the context that the child's older three siblings had already been removed into care. The parents in this case were (unsuccessfully) seeking to prevent the subsequent adoption of this youngest child by his foster caregivers.

<sup>153</sup> This happened in the case of *Aberdeen City Council v M* 2010 G.W.D. 34-700.

### 3. *Child Protection Orders (CPO)*

Following a national child protection scandal in 1991, significant reform was made to the emergency child protection procedures in Scotland. The scandal occurred in one of the many islands of Orkney, off the northern coast of mainland Scotland, when nine children aged 8-15 years were removed on court order from their families in a synchronized dawn raid due to suspicions of ritual satanic child abuse. Whether or not the children were, in fact, victims of such abuse was never tested in court. This is because the sheriff hearing the parent's appeal against the ground for referral to the Children's Hearing System said that the case was "fatally flawed" due to the absence of the children in the court room at that appeal hearing. While the Reporter successfully appealed this decision, "the publicity surrounding the case had made a fair trial impossible."<sup>154</sup> A judicial enquiry followed, which led to a tightening of the statutory provisions regulating child protection procedures in Scotland – particularly the introduction of tight procedural timeframes.

Child Protection Orders can be obtained by a local authority or "any person," and may include a warrant for the child to be taken to a place of safety or authorize the prevention of removal of the child from a place where the child is staying. Alternatively, they may authorize the carrying out of an assessment of the child's health and development. When the application for a CPO is made by a local authority, in addition to being satisfied that the child is at risk of "significant harm," the court has also to be satisfied that the local authority is "making enquiries to allow it to decide whether to take action to safeguard the welfare of the child" and that "the enquiries are being frustrated by access to the child being unreasonably denied" and "access is required as a matter of urgency."<sup>155</sup>

The application to the court has to be accompanied by supporting evidence and, as soon as is "practicable" after the order has been made, the applicant must inform the following persons: the

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<sup>154</sup> *Sloan v. B.*, [1991] S.L.T. 530. The appeal judge was highly critical of the Sheriff's decision stating it "amounted to a serious breach of the rules of natural justice, which excluded him from any further involvement in the proceedings." For, at the time, it was permissible to dispense with the children's presence in court under Children (Scotland) Act, 1995, *supra* note 107, at s. 40(2).

<sup>155</sup> Children's Hearings (Scotland) Act, 2011, *supra* note 122, para. 38.

person who is required to produce the child and take that child to a place of safety, the parents,<sup>156</sup> the child, the Reporter and the local authority (if they are not the applicant) of the order. Once granted the CPO has to be implemented within 24 hours or it will lapse.<sup>157</sup> The Reporter then has to arrange for a hearing within the CHS and this must take place on the second working day after the child was taken to a place of safety.<sup>158</sup> This "initial hearing" will decide if the order should be continued and if so, a second hearing has to take place on the eighth working day after the order was made;<sup>159</sup> this second hearing will determine whether a compulsory supervision order should be made.

While the CPO can include a direction giving authority for a medical examination of the child and related treatment,<sup>160</sup> this medical examination cannot be carried out without the consent of the child.<sup>161</sup> In Scot's law, under the Age of Legal Capacity (Scotland) Act 1991, individuals under the age of 16 have the right to consent on their own behalf to any surgical, medical or dental procedure, or treatment, when a qualified medical practitioner considers s/he is capable of understanding the "nature and possible consequences of the procedure or treatment."<sup>162</sup> While the consent of the parent to a medical examination will in most instances also be sought for children under the age of 16 years, this can be dispensed with if it is "contrary to the safety and the best interests of the child."<sup>163</sup>

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<sup>156</sup> The 2011 Act actually uses the term 'relevant persons' rather than 'parents,' but under The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013, all parents are 'relevant persons' unless a court has removed their parental rights and responsibilities.

<sup>157</sup> *Id.* at para. 52(2).

<sup>158</sup> *Id.* at para. 45(3).

<sup>159</sup> *Id.* at para. 46.

<sup>160</sup> *Id.* at para. 37(2)(d).

<sup>161</sup> *Id.* at para. 186.

<sup>162</sup> Age of Legal Capacity (Scotland) Act, 1991, *supra* note 106, para. 2(4).

<sup>163</sup> *National Guidance*, 2010, *supra* note 115, para. 343. Similarly, "when a medical examination is thought necessary for the purposes of obtaining evidence in criminal proceedings but the parents/carers refuse their consent, the Procurator Fiscal may consider obtaining a warrant for this purpose," *id.* at para. 344.

#### 4. *Child Assessment Orders (CAO)*

Medical examinations of the child may also be authorized by a court, upon evidence, via a Child Assessment Order, when the local authority has reason to suspect that the child either has or is currently suffering from neglect or harm. This order specifically authorizes “an officer of a local authority or a person authorized by that officer to carry out an assessment of the child’s health or development, or the way in which the child has been or is being treated or neglected.”<sup>164</sup> The order can only be granted when the court is satisfied that it is unlikely that the assessment could be carried out, or carried out satisfactorily, unless the order was made. The order has to take effect within 24 hours of the order being granted and must not last longer than three days.<sup>165</sup>

In contrast to the natural investigation and treatment of a child who has been admitted to the hospital due to illness or injury, *non*-medical professionals coming into contact with a child they suspect may have been maltreated may not medically examine a child. Scottish National Guidance for Child Protection makes it clear that:

Decisions about whether or not a medical examination is required should not be taken by police and social work staff without consulting a suitably qualified health professional as identified and agreed locally ... discussion with Health staff colleagues is essential in order that the welfare needs of the child/young person are considered together with the need to collect forensic evidence. Decisions about the nature and timing of medical examinations should be made by appropriately trained pediatricians.<sup>166</sup>

The guidelines assert that this multiagency approach means that fewer children are subjected to medical examinations. They also emphasize that:

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<sup>164</sup> Children’s Hearings (Scotland) Act, 2011, *supra* note 122, para. 35(2).

<sup>165</sup> This is to prevent such orders being sought unless it is considered that there is *immediate* risk of significant harm.

<sup>166</sup> *National Guidance*, 2010, *supra* note 115, para. 306.

In planning any joint investigation, consideration should be given to: the child or young person's emotional state; whether an adult should be present to provide support and, if so, who this should be; any communication or interpreting facilities that may be required; any specialist input that may be needed; and any physical or mental health requirements.<sup>167</sup>

Once it is decided that such an examination is necessary, it then becomes necessary to obtain the appropriate court order where parental consent is not forthcoming. However, it is important not to lose sight of the fact that child protection investigators will usually first seek the co-operation of parents. The National Guidance on Child Protection states, "Decisions should be made with [parents] agreement, whenever possible, unless doing so would place the child at risk of suffering significant harm or impede any criminal investigation."<sup>168</sup> Consistent with this, social work practitioners and managers express the following view: "I suppose it's down to parental co-operation, isn't it. At the end of the day if you can negotiate something that keeps the child safe and you're not having to take the order, we know that's better."<sup>169</sup> Consistent with a practice that seeks to work *with* families, only 12% of the 22,561 children referred to the CHS in 2012-2013, were referred following the making of a CPO.<sup>170</sup> No statistics were available on Child Assessment Orders and it appears they may rarely be used.<sup>171</sup>

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<sup>167</sup> *Id.* at para. 309.

<sup>168</sup> *National Guidance*, 2014, *supra* note 114, para. 359.

<sup>169</sup> JOE FRANCIS ET AL., PROTECTING CHILDREN IN SCOTLAND: AN INVESTIGATION OF RISK ASSESSMENT AND INTER-AGENCY COLLABORATION IN THE USE OF CHILD PROTECTION ORDERS para. 4.23 (Scottish Executive 2006), *available at* <http://www.scotland.gov.uk/Resource/Doc/923/0038163.pdf>.

<sup>170</sup> Under the Children's Hearings Scotland Act 2011, a place of safety warrant is a type of CPO. 1,968 children were referred to the CHS after a place of safety warrant was granted by a court in respect of them, and a further 743 after a CPO, which did not include a warrant to remove the child to a place of safety (perhaps because the child was already out of the home that they were maltreated in). SCOTTISH CHILDREN'S REPORTER ADMINISTRATION, ONLINE STATISTICS 2012/2013 Tables 16-7 (2013), *available at*

D. Some observations on the use of coercion by agents of the state in child protection in Scotland

The fact that a person investigating child maltreatment can apply to a court for emergency measures of protection *if* prevented from assessing whether an intervention is necessary for the protection of the child inevitably gives them coercive power.

Further, the Scottish Government, National Guidance for Child Protection states:

Where agencies are acting in fulfillment of their statutory duties, it is not necessary or appropriate to seek consent – for example, where a referral is made to the Reporter under the Children (Scotland) Act 1995 or where a report is provided by the local authority in the course of an investigation by the Reporter under the Act. In such instances, the consent of a child and/or parents should not need to be sought prior to the submission of a report.<sup>172</sup>

Such coercive power can be argued to be justifiable on the basis that the investigator, as an agent of the State, is both under a statutory duty to promote the welfare of the child *and* is subject to the checks and balances of due process. As we have seen, he or she cannot, for example, obtain a Child Protection Order enabling the removal of the child from the family home unless the court is satisfied that the child is at risk of significant harm. Similarly, if the child is referred to the Reporter of the CHS, there will only be a Children's Hearing if the Reporter is satisfied that the grounds of referral exist. Only 20% of all children referred to the CHS went on to be the subject of a hearing before a panel.<sup>173</sup>

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[http://www.scra.gov.uk/cms\\_resources/SCRA%20Online%20Statistics%202012-13.pdf](http://www.scra.gov.uk/cms_resources/SCRA%20Online%20Statistics%202012-13.pdf).

<sup>171</sup> Children's Hearings (Scotland) Bill, 2010, (SP Bill 41), *available at* [http://www.scottish.parliament.uk/S3\\_Bills/Childrens%20Hearings%20\(Scotland\)%20Bill/b41s3-introd-pm.pdf](http://www.scottish.parliament.uk/S3_Bills/Childrens%20Hearings%20(Scotland)%20Bill/b41s3-introd-pm.pdf).

<sup>172</sup> *National Guidance*, 2010, *supra* note 115, para. 91.

<sup>173</sup> SCOTTISH CHILDREN'S REPORTER ADMINISTRATION, *supra* note 137, at 22.



Further, decisions taken by agents of the state have to be regularly reviewed, rather than say, children remaining long term on a compulsory supervision order without review.<sup>174</sup> A key example of this is that when a compulsory supervision order from the CHS is in place, the case has to be reviewed within a year, and parents may also request an earlier review at any point after three months have elapsed from the making of the order.<sup>175</sup> At the review, the compulsory assessment order can be continued, varied, or terminated by the panel. Because children who are the subject of a Child Protection Order are immediately referred to the CHS, their cases also fall to regular review by this panel. The actual CPO itself may only last a maximum of eight working days from the time of its granting by a court. While, as previously stated, a Child Assessment Order (CAO) may only last for a period up to three days.

Extensive rights of appeal also exist within the process for managing cases of child maltreatment. For example, appeals may be made to a court against the decision of a CHS;<sup>176</sup> while cases before the CHS will either be referred to a sheriff court or discharged if the parents (or the child) do not accept the grounds for referral to the CHS.<sup>177</sup> It is also possible for a person to appeal against the determination that they are not a "relevant person" in respect of the child and therefore, have no right to attend the CHS hearing;<sup>178</sup> or against a direction concerning contact between the child and that person which has been made by the CHS.<sup>179</sup>

Additionally, in Scotland, decisions made by public bodies can be challenged via a process of judicial review even when there is no statutory provision for appeal against a decision. Judicial review was developed "to ensure that public bodies which exercise law making power or adjudicatory power are kept within the confines of

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<sup>174</sup> The focus of this article is child maltreatment *investigations* rather than the role of the state in continued interference in family life following removal the actual removal of children into the care system (usually kinship or foster care). It is worthy of note however that there are additional review processes for children once in care in Scotland that are not covered in this paper.

<sup>175</sup> Children's Hearings (Scotland) Act, 2011, *supra* note 122, para. 132.

<sup>176</sup> *Id.* at para. 154(1).

<sup>177</sup> *Id.* at para. 93.

<sup>178</sup> *Id.* at para. 160.

<sup>179</sup> *Id.* at para. 161.

the power conferred.”<sup>180</sup> The basis for judicial review of the decision has to be based on the claim that the person or body who made the decision acted outside their powers, and the focus of the review is lawfulness of the decision making process. The case of *NJ v. Lord Advocate* discussed earlier is one such case.<sup>181</sup>

Clearly gaining the co-operation of parents is to be desired, rather than the imposition of compulsory interventions. However, it is important not to lose sight of the fact that non-compliance is a known risk factor for child maltreatment. As the National Guidance for Child Protection in Scotland states: “If there are risk factors associated with the care of children, risk is likely to be increased where any of the responsible adults with caring responsibilities fail to engage or comply with child protection services.”<sup>182</sup> This includes those parents who act with apparent compliance but fail to carry out the actions requested or prevent them from being effective.<sup>183</sup> It may also include those parents who do actually conform to requests for a period of time, in an attempt to end the interference in their family life by state officials, but who then return to their previous ways once they are no longer the focus of attention. Such “disguised compliance” has been found to be a feature of many serious case reviews undertaken following the death of a child.<sup>184</sup>

It would clearly render the child maltreatment investigation endeavor powerless in the face of parental opposition if agents of the state were not imbued with the power to coerce when necessary, so

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<sup>180</sup> HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 837 (Cavendish Publishing 4<sup>th</sup> ed. 2002).

<sup>181</sup> *NJ v. Lord Advocate* [2013] CSOH 27. In this case, the Child Protection Orders in question had long been terminated and superseded by further child protection procedures by the time the judicial review was undertaken by the court (as they only last a matter of days). However, despite the fact that there is a common law principle that a court will not entertain ‘hypothetical’ questions, the court exercised its long-standing discretion and addressed the issue of the lawfulness of the refusal to hear the mothers’ views at the time the CPO were granted.

<sup>182</sup> *National Guidance*, 2010, *supra* note 115, para. 436.

<sup>183</sup> In the literature this is oddly often referred to as ‘disguised compliance’ when what is really ‘disguised’ is the *non-compliance*.

<sup>184</sup> MARIAN BRANDON ET AL., ANALYSING CHILD DEATHS AND SERIOUS INJURY THROUGH ABUSE AND NEGLECT: WHAT CAN WE LEARN? A BIENNIAL ANALYSIS OF SERIOUS CASE REVIEWS 2003-2005 (DCSF Publications 2008).

that there may be an effective assessment of the circumstances of a child.

#### CONCLUSION

Whether in the United States or in Scotland, on a practical level, the distinction between coercion and persuasion has its roots in the attitude of the CPS investigator. In the final analysis, to minimize unnecessary coercion is to acknowledge that CPS investigators must see themselves defined less by their position, and more by someone whom others perceive as prudent, understanding, and reasonable. The key to getting the subject of an investigation to support an alternate perspective is to shift their focus from what they stand to lose, to what they stand to gain. As Benjamin Franklin said, "If you would persuade, you must appeal to interest rather than intellect." Persuasion is getting someone's voluntarily agreement. For the CPS investigator, the blunt instruments of authority are always available, but motivation often works better than coercion.