

Restoring Equipose to Child Welfare

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Since the Supreme Court's widely criticized decision in DeShaney v. Winnebago County Department of Social Services, the principle that the Constitution affords no relief for a social worker's failure to prevent harm to a child has been described as a "staple of our constitutional law." Whatever might be said about this principle on its own terms, it produces very troubling incentives for social workers, who may still face constitutional tort liability when they act affirmatively to intervene in troubled families—the unjustified removal of a child from her parents' custody, after all, is the sort of infringement proscribed by our Constitution's charter of negative liberties. This Article is the first to argue that this imbalance should be taken into account in determining the level of immunity to which social workers ought to be entitled when their conduct is challenged in federal court. In a world where social workers cannot be held liable in federal court for leaving an endangered child in the care of her parents, it is unacceptable to allow social workers to face liability for wrongfully removing a child from a dangerous home. In this Article, I offer a reluctant defense of absolute immunity for social workers initiating child dependency proceedings, arguing that such immunity can correct a perilous imbalance.

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INTRODUCTION: TWO TYPES OF ERROR

Imagine a child protection worker assigned to handle the following case:¹ A seven-year-old boy arrives at school one day with extensive bruising and swelling over his face and arms. The case worker goes to the home to investigate, and is told by the mother that the boy fell off his bicycle. The boy gives the same explanation for his injuries. At the social worker's request, the mother agrees to have her son evaluated by a doctor. The doctor tells the social worker² that the injuries could not

1. This example is modeled after a vignette described in THEODORE J. STEIN & TINA L. RZEPNICKI, *DECISION MAKING IN CHILD WELFARE SERVICES: INTAKE AND PLANNING* 69 (William J. Reid ed., 1984), which is offered to illustrate the importance of obtaining diagnostic assistance from third parties.

2. In this Article, I use the terms "child protection worker," "social worker," and "caseworker" interchangeably to denote an individual who is employed by the agency that provides child protective services for the relevant jurisdiction, is tasked with investigating reports of child abuse and neglect, and is entrusted with some decisionmaking authority about the appropriate level of intervention, if any, for the agency to pursue. Although this usage does not distinguish between caseworkers who have

have been sustained in the manner described by the mother. On this conflicting and incomplete record, should the child be removed from the mother's care? The social worker must weigh the risk to a young child's safety against the trauma and disruption of family separation, making a high-stakes decision with grossly inadequate information.³

This is the essence of child protection decisionmaking, in case after case after case.⁴ If it were possible even to envision a social worker whose decisionmaking across her entire caseload reflected only the exercise of professional judgment in its ablest, most objective form, we would have to conclude that errors are inevitable.⁵ In the example given, the physician could simply be wrong—the bruises and swelling might have been caused in the manner proffered by the child and his mother, and thus, a removal would be not only unnecessary, but wrong—a type of error classically delineated as Type I error.⁶ If the bruises reflect a pattern of physical assault that the mother will not acknowledge and the

degrees in social work and those who do not, the convention is fairly common among commentators and virtually ubiquitous among courts. *See, e.g.*, JOHN M. HAGEDORN, FORSAKING OUR CHILDREN: BUREAUCRACY AND REFORM IN THE CHILD WELFARE SYSTEM 23–29 (1995); JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 5–6 (1998).

3. As one group of researchers has described the problem,

Overestimating the degree of danger could needlessly shatter a family and rupture the child's closest relationships. Underestimating the danger could mean suffering or even death. The decisions caseworkers make every day would challenge King Solomon, yet most of them lack Solomon's wisdom, few enjoy his credibility with the public, and none command his resources.

Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE OF CHILDREN no. 1, 1998, at 4, 4.

4. In 2008, an estimated 3.3 million referrals, which included approximately 6 million children, were made to state child welfare agencies. ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2008, at xii (2010) [hereinafter CHILD MALTREATMENT 2008]. Of these referrals, about 37% were screened out, meaning that they received no investigation or assessment. *See id.* An estimated 772,000 children were found to be victims of maltreatment—about a fifth of those who received an investigation. *See id.* at 23. Of these children,

71.1 percent of victims experienced neglect, 16.1 percent were physically abused, 9.1 percent were sexually abused, 7.3 percent were psychologically maltreated, [] 2.2 percent were medically neglected . . . [and] 9.0 percent of victims experienced such "other" types of maltreatment as "abandonment," "threats of harm to the child," or "congenital drug addiction."

Id. at 26. There is also evidence that a "substantial amount" of child abuse goes undetected by Child Protective Services ("CPS"). Some of these incidents are not recognized by anyone who might be able to make a report; some are simply unreported, and others, although reported to CPS, "are erroneously not substantiated upon investigation due to some overlooked or misinterpreted evidence." Robert J. Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System*, 5 RUTGERS J.L. & PUB. POL'Y 177, 217–18 (2007).

5. Stein and Rzepnicki note that the judgments made by child welfare workers tend to involve "estimates of frequency, probability, and causality." STEIN & RZEPNICKI, *supra* note 1, at 21.

6. Type I error is used to describe a false positive, whereas Type II error refers to a false negative. *E.g.*, Lukens, *supra* note 4, at 210–11.

child is afraid to reveal, accepting the bicycle explanation and concluding that the case does not warrant state intervention would be erroneous in the opposite way—Type II error.⁷

Although it is plain that both false positives and false negatives can pose significant risk of harm to the child's well-being,⁸ these errors are treated very differently in constitutional law. The social worker who resolves the uncertainty by removing the child may be asked to defend her decision in federal court;⁹ if she is unable to demonstrate that her error was a reasonable one, she may face liability for interfering with parental rights that are constitutionally protected against unwarranted state intrusion.¹⁰ The social worker who resolves the uncertainty by leaving the child in the home faces no such risk: Even if her decision results in the child's death, she will not have run afoul of her constitutional obligations, as the Supreme Court currently sees them.¹¹ In short, the social worker is expected not only to make an incredibly difficult and consequential decision with imperfect information, but to do so in a legal framework that provides dramatic incentives for inaction.

The failures of the child welfare system are too well documented¹² for us to be sanguine about these perverse incentives for inaction. By its

7. *Id.* Perhaps most challenging, the bruises might have been the product of an isolated incident, a loss of control brought on by an unprecedented combination of stressors that are either unlikely to occur again or that can be mitigated with assistance from the State in some manner other than removing the child. Experts can (and do) disagree about what would be most beneficial to the child in such a case, but for the sake of argument, we might be willing to characterize a removal on these facts as erroneous—a Type I error, unnecessary removal.

8. *See infra* Part III.

9. Many states have severely restricted or eliminated liability for child welfare workers. For example, a number of states provide statutory immunity to their caseworkers for actions taken in good faith. *See, e.g.*, FLA. STAT. ANN. § 39.203 (West 2010); MINN. STAT. ANN. § 626.556(4) (West 2009); OHIO REV. CODE ANN. § 2151.421(G) (West 2005); S.D. CODIFIED LAWS § 26-8A-14 (1999). In Colorado, public employees are immunized from liability for all tort claims. *See* COLO. REV. STAT. ANN. § 24-10-118(2)(a) (West 2008). Connecticut provides immunity where government officials act within their discretionary, as opposed to ministerial, authority. *See* CONN. GEN. STAT. ANN. § 52-557n(b)(7) (West 2005). Caseworkers in some states enjoy judicially granted immunity. *See, e.g.*, *Martin v. Children's Aid Soc'y*, 544 N.W.2d 651, 655 (Mich. Ct. App. 1996).

10. *See Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court has recently suggested that “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.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

11. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989).

12. States reported 1730 child maltreatment fatalities in 2007; in 2008, an estimated 1740 children “died from abuse or neglect,” over 79% of whom were under four years old. CHILD MALTREATMENT 2008, *supra* note 4, at 55. Shockingly, 15% of these victims were from families who were already known to CPS agencies: 13.1% from families that “had received family preservation services” in the five year period preceding the child's death, and another 2% who had been in foster care and then were reunited with their families prior to the fatality. *Id.* at 57. Some studies suggest that as many as “30–55% of all child fatalities attributed to abuse or neglect involve children previously reported to a child protective agency.” Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*,

very nature, the system serves society's most vulnerable and dependent members, and it is overburdened, underfunded, and utterly ill-equipped to predict, much less prevent, the harm that it is designed to address.¹³ A system that has been characterized as approaching, at, or past the breaking point should not be further stressed with a legal framework that skews the incentives for its decisionmakers by punishing only erroneous decisions to act.

In arguing this proposition, I draw from, but do not take sides in, the ongoing battle among family law scholars as to whether child welfare workers should do more or do less. This is a deliberately crude characterization of the debate—the dispute has been more elegantly framed as one between the “child protectionists” and the “family preservationists,”¹⁴ and some very persuasive attempts have been made to transcend it¹⁵—but I choose it to emphasize that in its many variations, the debate considers whether social workers are too quick or too hesitant to intervene in troubled families and whether their interventions are too aggressive or too timid.¹⁶ I argue here that this dispute is one of choice-

8 VA. J. SOC. POL'Y & L. 165, 192 (2000). Because maltreatment tends to be underreported on death certificates, the real toll is likely much higher than official reports suggest. Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590, 601 (2005).

13. See, e.g., Lukens, *supra* note 4, at 180 n.8 (“The almost universal opinion of critics and supporters alike is that the child welfare system is tragically broken and something must be done to fix it.” (citing INSOO KIM BERG & SUSAN KELLY, *BUILDING SOLUTIONS IN CHILD PROTECTIVE SERVICES* 3 (2000); Jane Waldfogel, *New Perspectives on Child Protection: Protecting Children in the 21st Century*, 34 FAM. L.Q. 311, 311 (2000))).

14. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 639 (2006). Huntington describes family preservationists as “those who disfavor state intervention with a bias toward removal” and characterizes their central claim as the contention that “a misconstrued articulation of children’s rights and de-emphasis of parents’ rights results in too much intervention in the home in the form of removal (or threatened removal).” *Id.* at 639–40. Huntington describes child protectionists as “those who favor aggressive state intervention, even if it leads to removal” and presents their central claim as the contention that “too much emphasis on parents’ rights and a misconstrued articulation of children’s rights results in too little intervention in the home.” *Id.*

15. See *id.* at 652–55 (canvassing alternatives to the preservationist-protectionist dualism); *id.* at 672–99 (arguing that families would be better served by a problem-solving model rather than the adversarial, rights-based model that characterizes the current system); see also Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1487–88 (2007).

16. See, e.g., ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 24 (1999); Margaret F. Brinig, *Choosing the Lesser Evil: Comments on Besharov’s “Child Abuse Realities”*, 8 VA. J. SOC. POL'Y & L. 205, 209 (2000); Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 542 (2004); Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 443 (2000) (“The child welfare system needs to . . . intervene in fewer families, to close cases more quickly, to recognize the damage done by its very attempts to help children as well as by its authoritarian meddling and bureaucratic self-preservation. It needs, in far more cases than it does now, to do nothing.”); James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 455 (2008); Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 96 (1999); Martin

of-error: no family preservationist would insist that children remain in the home of parents who starve, beat, and rape them,¹⁷ nor would the most fervent child protectionist suggest that a child should be removed from a family that poses less of a threat to the child's well-being than the trauma and disruption of removal.¹⁸ Essentially, the dispute is whether it is better to engage in removal that turns out to be unnecessary or in delay that turns out to be tragic—again, typically shorthanded as Type I or Type II error. I do not take a position on which type of error we should prefer,¹⁹ but instead assert that it does not make sense to subject

Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000) (reviewing BARTHOLET, *supra*).

17. Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1775–76 (1987) (“Few would dispute that state intervention on behalf of the child is justified in cases of parental abandonment, intentional infliction of serious injuries, sexual abuse, or other behavior that creates grave risks of death or serious physical harm. All current jurisdictional statutes permit state intervention in these circumstances, and every minimum intervention advocate has agreed that they should.”); *see also* DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 255 (2002) (“I do not argue that Black children who are abused and neglected should never be removed from their parents. Surely Black children deserve the same protection from injury as others.”).

18. There is real disagreement over the extent to which children should be removed from their parents for neglect. Some scholars argue that neglect-based interventions take children away from parents whose primary sin is poverty, many of whom could be loving and responsible caretakers if they were provided material assistance in the form of housing, child care, and the like. *See, e.g.*, Guggenheim, *supra* note 16, at 1724. Others emphasize that neglect should not be minimized as a basis for state intervention, because neglect can be very harmful for children. Bartholet, for example, argues as follows:

Many who concede the seriousness of physical and sexual abuse contend that the neglect category sweeps in all sorts of “minor problem” and “mere poverty” cases. Family preservation advocates often treat it as self-evident that neglect cases are insufficiently serious to warrant state intervention, citing the fact that neglect accounts for a majority of all substantiated cases as proof that the CPS system intervenes unduly in the family.

... But available evidence indicates that the great preponderance of today's neglect cases pose extremely serious threats to children's welfare.

BARTHOLET, *supra* note 16, at 66–67. For discussions of the effect of neglect on childhood development, see Rachael Kelly, *Childhood Neglect and its Effects on Neurodevelopment: Suggestions for Future Law and Policy*, 8 HOUS. J. HEALTH L. & POL'Y 133 (2007); Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561 (2000).

19. For an exposition of the view that social workers should be more concerned about avoiding Type II errors, see John R. Howard, *Rearguing DeShaney*, 18 T.M. COOLEY L. REV. 381, 406 (2001). Howard asserts:

Resolution of the dilemma about choice of error should be a function of (1) the cost of the error, and (2) the capacity of the parties to defend themselves. Application of this formula requires resolution of ambiguity in favor of the child.

For a type-one error, the price paid by the child for the state's failure to intervene is loss of life or limb or the eternal twilight of Joshua DeShaney. For a type-two error, the costs to the parent where intervention was not necessary may be mental anguish, loss of reputation, and loss of time resolving the matter. These are serious costs, to be sure, but less serious than death, brain damage, or permanent disability. The parent or guardian harmed by an

only one type of social worker error to after-the-fact legal scrutiny. After *DeShaney v. Winnebago County Department of Social Services*, social workers do not have to answer for Type II error as a matter of substantive constitutional law.²⁰ What then, is the virtue of requiring them to answer for Type I error? How can we justify a legal scheme in which a social worker can be held liable in federal court for removing a child from his home, but not for leaving him there? I argue that the persistence and intensity of the scholarly debate over state intervention counsel against accepting this imbalance.

Let me also clarify at the outset that I do not intend to suggest that this is the most important obstacle bedeviling the child welfare system, much less the only one. Rather, I focus on it here because it is a problem created by the federal courts and one they have the power to correct. As I have no expectation that the Supreme Court will correct this inequity by revisiting *DeShaney*, I propose instead a different way of restoring equipoise to child welfare: I argue that we must account for *DeShaney* when we assess the level of immunity to which social workers should be entitled when their conduct is challenged in federal court, a question that has received surprisingly little attention from scholars.²¹

For more than sixty years, the Supreme Court has been fretting about the possibility that public officials will be unduly hamstrung in the exercise of their duties by concerns about personal liability.²² The Court has thus developed a set of immunities that, to varying degree, shield public officials from liability for constitutional tort suits brought under 42 U.S.C. § 1983.²³ At the very least, public officials may invoke the

incorrect decision has a chance to be made whole. The battered child—the Joshuas, the Jessica Cortezes, and the Michael Bakers—do not.

... Certainly the social work profession ought to maintain a preference for preservation of the family and should not precipitously separate parents from their children. But in a world of ambiguity where danger looms, doubt should be resolved in favor of the child.

Id.

20. 489 U.S. 189, 202–03 (1989).

21. Cf. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473, 499–500 (2008); Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases*, 59 *SMU L. REV.* 265, 286–90 (2006); H.W. Mondros, *Austin v. Borel: Louisiana Child Protection Workers Enjoy Only Qualified Immunity from Section 1983 Actions*, 62 *TULANE L. REV.* 1453, 1453–59 (1988); Eric P. Gifford, Comment, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 *TEX. TECH L. REV.* 1013 (1995).

22. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators.”).

23. These immunities are not to be found in the text of 42 U.S.C. § 1983, which is silent on the matter. Indeed, the plain text of § 1983 imposes liability on

[any] person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United

defense of qualified immunity, which forecloses the imposition of liability unless the official violated a constitutional right that was clearly established at the time of the challenged conduct.²⁴ While qualified immunity is the norm for executive officers,²⁵ the Supreme Court has identified a subset of officials whose “special functions require a full exemption from liability.”²⁶ I propose that social workers be included in the narrow group of officials who are entitled to absolute immunity for certain categories of conduct.²⁷

In Part I, I set forth the constitutional framework, tracing *DeShaney*'s distorting effect on the landscape of child welfare decisionmaking. I argue that the particular vulnerability of endangered children requires an effort to equalize the incentives that confront a social worker on the threshold of a removal decision. I argue that because *DeShaney* completely eliminates liability for social workers who decide against intervention, no matter how egregious or unjustifiable the failure, social workers should enjoy a commensurately absolute immunity when they decide that intervention is warranted. In Part II, I turn to the doctrine of official immunity and explain why extending absolute immunity to social workers is more or less consistent with the Court's current immunity jurisprudence, in large part because this doctrine is substantially predicated on exactly the sort of policy concerns that animate my proposal. In Part III, I acknowledge that the policy considerations undergirding official immunity doctrines rest on assumptions about deterrence for which we have no empirical evidence, and I explain why that is not fatal to my proposal. In Part IV, I address the concern that the extension of absolute immunity to social workers creates an unacceptable barrier to compensation for those families harmed by affirmative social worker misconduct. In Part V, I sketch out

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws

42 U.S.C. § 1983 (2006). When confronted with a suit brought under § 1983 against state legislators, however, the Supreme Court refused to conclude that Congress had intended with this broad language to abrogate those immunities, such as the legislative privilege, that had existed at common law. *See Tenny v. Brandhove*, 341 U.S. 367, 379 (1951).

24. *See Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

25. *See Malley v. Briggs*, 475 U.S. 335, 340 (1986) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)).

26. *See Butz v. Economou*, 438 U.S. 478, 508 (1978).

27. As I will explain in detail in the following Parts, some circuits have extended absolute immunity to social workers for conduct that can be analogized to the functions of a prosecutor. In the Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, social workers are extended the same sort of immunity enjoyed by prosecutors: They cannot be held liable for conduct that is intimately associated with the judicial phase of the child protection process, no matter how egregious the constitutional violation. *See infra* note 98.

the parameters of my proposal, and finally, I conclude my reluctant defense of absolute immunity.

I. *DESHANEY'S* AFTERMATH: ONLY ONE TYPE OF LIABILITY

The principle that the Constitution affords no relief for a social worker's failure to prevent harm to a child unless the state created or amplified the danger has become "a staple of our constitutional law."²⁸ The origin of this principle is *DeShaney*, in which the Supreme Court considered whether a child's right to due process was violated by the Department of Social Services' (DSS) repeated failure—in the face of overwhelming evidence—to protect him from his father's violence.²⁹ Joshua DeShaney was three years old when his stepmother first complained to the police that his father was hitting him.³⁰ Randy DeShaney denied the allegations, and the DSS took no further action until it was notified a year later that Joshua had been admitted to the "hospital with multiple bruises and abrasions."³¹ DSS obtained an order placing Joshua in the temporary custody of the hospital, but then recommended that Joshua be returned to his father's custody after the county's Child Protection Team concluded there was insufficient evidence of abuse.³² Although the DSS caseworker was informed a month later by emergency room personnel that Joshua had again sustained suspicious injuries, she "concluded that there was no basis for action."³³ Over the next six months, she visited the DeShaney home monthly. During this time, she "observed a number of suspicious injuries on Joshua's head" and "dutifully recorded" her suspicions that Joshua was being physically abused at home.³⁴ DSS was notified in November 1983 that Joshua had been admitted to the hospital a third time for injuries that medical staff believed had been caused by child abuse.³⁵ On the caseworker's next two visits to the DeShaney home "she was told that Joshua was too ill to see her," and several months later, Randy beat Joshua into a life-threatening coma.³⁶ The damage to Joshua's brain, caused by traumatic injuries inflicted over a long period of time, would require that Joshua be institutionalized for the rest of his life.³⁷

28. See *Estate of Bennett v. City of Philadelphia*, 499 F.3d 281, 287 (3d Cir. 2007).

29. 489 U.S. 189, 194 (1989).

30. *Id.* at 192.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 192–93.

35. *Id.* at 193. These injuries included a "cut forehead, bloody nose, swollen ear, bruises on both shoulders." ROBERT G. MEYER & CHRISTOPHER M. WEAVER, *LAW AND MENTAL HEALTH: A CASE-BASED APPROACH* 340 (2006).

36. *DeShaney*, 489 U.S. at 193.

37. *Id.*

A divided Court affirmed the dismissal of Joshua's § 1983 complaint, explaining that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."³⁸ The Court explained,

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.³⁹

Nor does the State trigger such an obligation simply by becoming aware of a child's plight and "proclaim[ing], by word and by deed, its intention to protect him."⁴⁰

The intervening years have illustrated in acute detail the harshness of *DeShaney's* decree.⁴¹ Even where a social worker's failure to protect a child from almost certain harm can be said to rise to the level of recklessness, plaintiffs have been largely unsuccessful in characterizing the State's involvement as having created or exacerbated the harm.⁴² Whatever might be in evidence regarding a child's vulnerability, the quantum of certainty that might be ascribed to the social worker, or the horror of the violence to which the child was ultimately subjected, constitutional tort actions filed on behalf of abused children continue to yield the same result.⁴³ In the face of gruesome fact patterns, courts

38. *Id.* at 195.

39. *Id.*

40. *Id.* at 197.

41. See Howard, *supra* note 19, at 382 ("*DeShaney* has become a rock on which many a case has foundered in the decade since it was decided."); Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1173 (2005) ("*DeShaney* seems to have sealed the fate of children's protection claims against child welfare systems.>").

42. See, e.g., S.S. *ex rel.* Jervis v. McMullen, 225 F.3d 960, 962-63 (8th Cir. 2000). A three-year-old child was taken into protective custody by the Missouri Division of Family Services after reports that her father smeared feces on her face, locked her in her bedroom for periods of time, and that the child previously suffered sexual abuse. *Id.* at 964-65 (Gibson, J., dissenting). The social workers assigned to her case learned that the father was closely associated with a convicted sex offender named Griffiths; in fact, the father brought Griffiths with him on several of his supervised visits with the child. *Id.* at 965. The social workers also learned from numerous sources that the child's father had allowed contact between Griffiths and the child on multiple occasions. *Id.* Despite their knowledge that the child had a yeast infection and complained of vaginal pain, and contrary to the warnings of the doctor who conducted a psychological evaluation on the father, the social workers nonetheless released the child to her father's care. *Id.* Less than three months later Griffiths sodomized her, which caused her to be hospitalized for a week. *Id.* at 966. Nevertheless, the majority held that "[w]hile the state did do something here . . . in the peculiar circumstances of this case the state's act is the same as if it had done nothing." *Id.* at 963 (majority opinion).

43. See *Estate of Bennett v. City of Philadelphia*, 499 F.3d 281, 285 (3d Cir. 2007) (describing an autopsy report, which concluded that the plaintiff had died of malnourishment, laceration of the liver, and blunt force injuries located all over her body); *Powell v. Ga. Dep't of Human Res.*, 114 F.3d 1074, 1076-77 (11th Cir. 1997) ("The baby's treating physicians described the baby's case as one of the worst

remain confident that they are faithfully adhering to *DeShaney's* mandate, applying the law rather than reacting to the emotion engendered by a child's suffering.⁴⁴

Beginning with *DeShaney's* passionate dissenters,⁴⁵ a well-developed body of criticism exposes the majority opinion's many failings.⁴⁶ Contrary to the original intent of the drafters of the Fourteenth Amendment, who contemplated a federal constitutional right to protection from private violence,⁴⁷ the majority insists that the Constitution operates only to constrain—and never to compel—government action.⁴⁸ As Susan Bandes has argued so forcefully, the majority imbues with “talismanic” significance a rigid distinction between action and inaction “that is far too arbitrary and simplistic to describe the complex web of acts and omission through which the government conducts its business.”⁴⁹ A close reading of *DeShaney* itself reveals the failure of this distinction: In characterizing the case as one in which the State merely stood by ineffectually in the face of private violence, leaving Joshua “in no worse position” than if the State had never become aware of Joshua's existence, or had never existed itself,⁵⁰ the majority presents a distorted version of

instances of child abuse they had ever seen.”); Tony L. *ex rel. Simpson v. Childers*, 71 F.3d 1182, 1184 (6th Cir. 1995) (“[Plaintiffs] experienced from an early age onward some of the most despicable acts of sexual and physical abuse imaginable.”).

44. *See, e.g.*, *Wooten v. Campbell*, 49 F.3d 696, 701 (11th Cir. 1995) (“In applying the law, however, we cannot be guided by emotions.”).

45. Justice Brennan wrote a dissent, in which Justices Marshall and Blackmun joined. 489 U.S. at 203. Justice Blackmun also wrote a separate dissenting opinion. *Id.* at 212.

46. *See, e.g.*, Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983–95 (1996) (canvassing the range of “impassioned and unequivocally negative” criticisms and noting that the scholarly response to *DeShaney* has been “nearly universal condemnation”); *see also* Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 98 (1994) (“[N]either the text of the Fourteenth Amendment nor precedent compelled this result. . . . [T]he Court. . . turned the state action component of the Fourteenth Amendment into a forceful shield for the state.”); Aviam Soifer, *Moral Ambition, Formalism, and the “Free World” of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1514 (1989) (“Chief Justice Rehnquist’s opinion for the majority in *DeShaney* is an abomination. It is illogical and extremely mechanistic; it also abuses history, fails to consider practical impact, and demonstrates moral insensitivity. Not only that, it is wrong.”); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 9–10 (1989) (characterizing the majority’s view of the State as “stilted” and “primitive”).

47. Steven Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) (“A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons. . . . The debates in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the constitutional right to protection was understood to include protection against private violence.” (footnote omitted)).

48. *DeShaney*, 489 U.S. at 195–96.

49. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273, 2279 (1990).

50. 489 U.S. at 201.

the State's relationship with Joshua that obscures the full sequence of the State's choices⁵¹ and the attendant consequences.⁵² This elision of the affirmative aspects of the State's involvement with Joshua smoothes the way for the majority to distinguish the relationship Joshua has with the State from those "limited circumstances" in which "the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."⁵³ The opinion then explains that the State owes these duties only to those individuals in its physical custody, such as prison inmates or patients of mental institutions.⁵⁴

In limiting affirmative state obligations to custodial contexts involving tangible physical restraint, the opinion fails to acknowledge the condition of dependence, which justifies and demands positive state assistance for one who has been affected by catastrophically inept state decisionmaking.⁵⁵ The failure to grapple with Joshua's dependence as a fact of constitutional significance is expressed most revealingly in the reference, as cruel as it is absurd, to Joshua's existence "in the free world."⁵⁶ Painfully absent from the majority opinion is an acknowledgement that a three-year-old returning to an abusive home is as dependent on the State for protection from harm as any prison inmate or mental patient in the State's custody.⁵⁷

DeShaney, for all these reasons, is wrong on its own terms. But especially in light of the vulnerability of the children who depend on state assistance, it is particularly troubling to eliminate social worker liability for failures to intervene where the law continues to allow social workers to be held liable for affirmative conduct. Substantive constitutional doctrine tells us that the removal of a child from her parent's care is an exercise of state power that implicates constitutionally protected liberty interests in family integrity.⁵⁸ In fact, although much

51. See Bandes, *supra* note 49, at 2288–90.

52. I have tried to capture this dynamic by raising the possibility that the state's pattern of act and omission may indeed have been the most dangerous possible sequence for Joshua:

[T]he stress of intermittent monitoring and potential punitive sanction by the state can aggravate tensions within a household; an abusive parent may very well blame the child for the state's involvement, causing increased frequency and severity of abuse. If the state then turns around and abandons the child after having thus made him more vulnerable, "inaction" hardly captures the blameworthiness of the state's capricious involvement.

Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 233–34 (2006).

53. *DeShaney*, 489 U.S. at 198.

54. *Id.* at 198–200.

55. See Bandes, *supra* note 49, at 2296.

56. *Id.* at 201.

57. See Blumoff, *supra* note 46, at 130 ("These chilling allusions to freedom and the 'free world' lack all coherence in reference to a brain damaged four year old. . . . What is the 'free world' that these decision-makers envision?").

58. See *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("Here we are concerned with

remains unclear about the precise parameters of parental rights,⁵⁹ the Supreme Court has characterized the “interest of parents in the care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁶⁰ When social workers intercede in a troubled family, seeking custody of a child over a parent’s objections, they must tread carefully lest they engage in the sort of affirmative state conduct proscribed by a charter of negative liberties.⁶¹

This is as it should be,⁶² except for the perverse effect it produces in concert with *DeShaney*. After *DeShaney*, as Thomas Eaton and Michael Wells have stated so plainly, “the decision to do nothing is beyond challenge in constitutional tort. *DeShaney* tells the social worker that it is safer from a standpoint of personal liability to leave an endangered child in the home than to attempt to remove him.”⁶³ Margo Schlanger has captured this dynamic as well, noting that “[p]olice or welfare agencies may be able to avoid constitutional liability by doing less, because their constitutional duties are negative. That is, doing nothing may be bad policing or may provide bad child protection, but it’s not unconstitutional.”⁶⁴

Doing nothing, of course, is *terrible* child protection in many circumstances, as *DeShaney* itself demonstrates so dramatically. That is not to say that inert or lackadaisical policing is unproblematic. But police officers, for the most part, discharge their duties in a general way, to the public at large. Unlike social workers, they simply do not develop particular relationships with at-risk individuals who will bear the brunt of an official’s refusal to take action in the face of private violence. The children who suffer when social workers do nothing occupy the extreme

the most essential and basic aspect of the familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state. . . . [This right] has received consistent support in the cases of the Supreme Court.”).

59. See *infra* Part IV.

60. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

61. This notion of constitutional obligation was articulated by Judge Posner in *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). In asserting that the Constitution is “a charter of negative rather than positive liberties,” he explained that “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much.” *Id.*

62. I am sympathetic to the critique espoused by several prominent theorists that negative liberty, by defining private spheres in which the state may not intrude, creates a privilege for the strong to exploit or subordinate the weak without state sanction. See Robin West, *Introduction to INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY (SECOND SERIES): RIGHTS*, at xi, xiv–xix (Robin West, ed., 2001) [hereinafter West, *RIGHTS*] (summarizing the key arguments of the “rights critique”). But as Robin West has argued, the most inspiring prospects for ameliorating this dynamic lie in recognizing positive rights alongside negative liberties, rather than abandoning negative liberties altogether: In short, I share the premise that “[t]o accord all individuals dignity, concern, and respect sometimes requires the state to refrain from acting, and sometimes to act.” *Id.* at xx.

63. Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107, 131–32 (1991).

64. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1674 (2003).

end of the vulnerability spectrum. They are peculiarly dependent on vigorous, unimpeded decisionmaking that is unsullied, to the greatest extent possible, by external considerations such as the social worker's own liability calculus.

In a world where *DeShaney* came out differently, in which social workers had some sort of constitutional duty to protect or rescue a specific child assigned to their care and known to them to be in grave danger,⁶⁵ they could face federal liability for an unjustified removal *or* for an unjustified failure to act. Even if the affirmative constitutional duty for social workers were as modest as it is for the administrators of mental health facilities, who must show the exercise of professional judgment,⁶⁶ on the threshold of decision, their personal liability would be in equipoise. In the world that we have, however, in which every indication is that *DeShaney*'s central premise is here to stay, we must find another way to restore that equipoise. In the Part that follows, I argue that we can draw from the Supreme Court's immunity jurisprudence to confer upon social workers the sort of protection for their affirmative conduct that is as robust as that which *DeShaney* provides for their omissions.

II. EQUALIZING SOCIAL WORK INCENTIVES WITH ABSOLUTE IMMUNITY

Absolute immunity for social workers is not so much a departure from as it is an extension of the Supreme Court's existing immunity jurisprudence. The Court's early immunity decisions reflected an interpretive method that began with an assessment of the scope of immunity accorded to a particular type of public official at common law.⁶⁷

65. Susan Bandes exposes the frailty of "slippery slope" arguments that justify *DeShaney*'s central premise by proclaiming the impossibility of drawing a line between what government is and is not constitutionally required to do. Bandes, *supra* note 49, at 2332. She notes that "the proposed duty, as in *DeShaney*, is usually narrowly defined, and would obligate an existing public agency to perform a specific (and often, already promised or statutorily mandated) action on behalf of an identified individual or class." *Id.* She posits,

In the *DeShaney* case, . . . it would have been consistent with due process for the Court to construct a narrow holding that the state had abused its power by failing to provide statutorily required services to the plaintiff when it promised to do so, had notice of his life threatening situation and had indeed contributed to that situation when it returned him to his violent home.

Id. at 2333.

66. See *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). Prison officials can be held liable under the Eighth Amendment if it can be proved that they knew inmates faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

67. See *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) ("[Each decision] was predicated upon a considered inquiry into the immunity historically accorded to the relevant official at common law and the interests behind it."). This of course rests on the assumption that Congress, without saying so, intended § 1983 to be read as having incorporated existing common law immunities.

The Court purported to be doing the same⁶⁸ when it considered whether prosecutors were shielded by the sort of absolute immunity enjoyed by legislators⁶⁹ and judges,⁷⁰ or by the more limited immunity applicable to police officers.⁷¹ The Court concluded that prosecutors are entitled to absolute immunity, but its effort to cast the decision as grounded in the common-law immunity historically afforded to prosecutors⁷² was not entirely convincing. All the cases the Court relied on to reach the conclusion that absolute prosecutorial immunity was “well settled” at common law were decided after the enactment of § 1983,⁷³ making them essentially irrelevant to a determination of congressional intent.⁷⁴

A. FROM CONGRESSIONAL INTENT TO CONSIDERATIONS OF POLICY

The Court was considerably more transparent in discussing the public policy implications of prosecutorial immunity,⁷⁵ expressing its

68. *Id.*

69. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

70. See *Pierson v. Ray*, 386 U.S. 547, 553 (1967). The Supreme Court announced that it had “no difficulty” accepting the proposition the judges were entitled to absolute immunity. *Id.* The Court began by observing that “[f]ew doctrines were more solidly established at common law than the immunity of judges for damages for acts committed within their judicial jurisdiction.” *Id.* at 553–54. Noting that the immunity is so absolute as to extend even to a judge accused of acting “maliciously and corruptly,” the Court explained that the doctrine “is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.” *Id.* at 554 (quoting *Scott v. Stansfield*, 3 L.R. Ex. 220, 223 (1868)) (internal quotation marks omitted). Imposing something like a clear statement rule, the Court found in the legislative record “no clear indication that Congress meant to abolish wholesale all common-law immunities,” and concluded by presuming “that Congress would have specifically so provided had it wished to abolish the doctrine.” *Id.* at 554–55.

71. See *id.* at 557. In *Pierson*, the Court held that police officers did not share the “absolute and unqualified immunity” enjoyed by judges, but could invoke “good faith and probable cause” as a defense to § 1983 actions. *Id.* at 555. This would, over time, broaden into a qualified immunity protecting all public officials from liability for constitutional torts as long as their conduct did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For an argument that *Pierson* was driven solely by policy concerns, see Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. REV. 123, 125–26 (1999) (“[*Pierson* used] a policy-driven analysis which was largely uninfluenced by any controlling law . . .”).

72. *Imbler*, 424 U.S. at 427.

73. The *Imbler* Court noted that the first American case on the matter was *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896), but did not explain what we were to make of the fact that *Griffith* was decided twenty-five years after the enactment of § 1983, *Imbler*, 424 U.S. at 421, a discrepancy noted quite pointedly by critics of absolute prosecutorial immunity. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 108.

74. Johns explains that the American criminal justice system in 1871 was in the midst of a transformation from a system in which private prosecutions were common to one in which crimes were prosecuted primarily, and then exclusively, by public officials. Johns, *supra* note 73, at 108–13; see also *Burns v. Reed*, 500 U.S. 478, 499 (1991) (Scalia, J., concurring in part and dissenting in part). In short, prosecutorial immunity was indeed well established in the common law by the time the Supreme Court decided *Imbler*; but it simply was not at the time that Congress enacted § 1983.

75. See *Imbler*, 424 U.S. at 424–27.

concern that qualified immunity was simply an insufficient protection to prevent the threat of § 1983 suits from undermining the performance of a prosecutor's duties. The Court began by observing that "[s]uch suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate."⁷⁶ Simply being made to answer in court each time such a suit was brought would require a prosecutor to divert "energy and attention" away from "the pressing duty of enforcing the criminal law."⁷⁷ The Court noted that those suits that survived the pleading stage would often require a "virtual retrial" of the underlying criminal proceeding, and that even the honest prosecutor, acting under "serious constraints" of time and information, might have greater difficulty meeting the standards of qualified immunity than other executive and administrative officials.⁷⁸ This would create "unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials."⁷⁹ The Court closed its policy discussion by agreeing with Judge Learned Hand that "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."⁸⁰

The question then was how to "delineate the boundaries" of the immunity.⁸¹ The Court seized upon the appellate court's observation that the prosecutor's challenged conduct—most notably, the prosecutor's knowing use of perjurious testimony—was "an integral part of the judicial process."⁸² The Court explained that this focus on the "functional nature of the activities," rather than the prosecutor's title or status, was to illuminate when prosecutors enjoy the "absolute immunity associated with the judicial process," as opposed to the good faith defense that accompanies investigative functions.⁸³

76. *Id.* at 425.

77. *Id.*

78. *Id.*

79. *Id.* at 425–26. The Court further reasoned that the possibility of personal liability for prosecutors would ultimately inure to the detriment of criminal defendants, because prosecutors might be motivated to withhold "evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. Judges reviewing the fairness of the trial in appellate and collateral review might have their "focus . . . blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427.

80. *Id.* at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)) (internal quotation marks omitted).

81. *Id.* at 430.

82. *Id.* (quoting *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974)).

83. *Id.*

B. FOCUS ON FUNCTION RATHER THAN TITLE

This functional assessment of the official activities upon which a § 1983 plaintiff's claims are predicated remains the touchstone of the Court's absolute immunity analysis. In *Burns v. Reed*, it was the basis for the Court's refusal to extend absolute immunity to prosecutors for authorizing police officers to obtain a confession from a hypnotized suspect, because this conduct was deemed investigative.⁸⁴ On the other hand, the Court did grant absolute immunity to the prosecutor for using the very same confession at the probable cause hearing, because this conduct was deemed prosecutorial.⁸⁵

Essential for evaluating the status of social workers in this framework is that the Supreme Court has explicitly relied on this functional analysis to extend absolute immunity to administrative officials who lack the judicial or prosecutorial title but engage in analogous tasks. In *Butz v. Economou*, the Court considered entitlements to immunity arising out of an administrative proceeding in which the Department of Agriculture sought to revoke or suspend a company's registration as a commodity futures commission merchant.⁸⁶ After attempting unsuccessfully to have the administrative proceeding enjoined, the head of the company sought damages against the Secretary and Assistant Secretary of Agriculture, the Judicial Officer and Chief Hearing Officer, and the Agriculture Department Attorney who prosecuted the enforcement proceeding, asserting that his constitutional rights had been violated.⁸⁷

Beginning from the premise that qualified immunity "should be the general rule for executive officials charged with constitutional violations," the Court proceeded to review the distinct status of those officials "whose special functions require a full exemption from liability."⁸⁸ The Court focused on parties participating in the judicial process, reiterating previously articulated principles regarding the need to insulate judges, grand jurors, prosecutors, and witnesses from a fear of harassment or retaliation that would undermine their independence.⁸⁹

Providing a distinct rationale for extending absolute immunity to those participants, the Court reasoned that the "safeguards built into the judicial process tend to reduce the need for private damages actions as a

84. 500 U.S. 478, 493 (1991).

85. *Id.* at 492 ("[A]ppearing at a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process.' It is also connected with the initiation and conduct of a prosecution" (quoting *Imbler*, 424 U.S. at 430)).

86. 438 U.S. 478, 480 (1978).

87. *Id.* at 481–82.

88. *Id.* at 508.

89. *See id.* at 508–11.

means of controlling unconstitutional conduct.”⁹⁰ The Court cited “[t]he insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal” as “just a few of the many checks on malicious action by judges.”⁹¹ Advocates, on the other hand, are “restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court.”⁹² Jurors are screened for bias, and witnesses are subject to cross-examination and penalties for perjury.⁹³ In the Court’s view “these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process,” thus reducing the “need for individual suits to correct constitutional error.”⁹⁴

The Court held that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process to produce the same immunities, as the role of a modern administrative decisionmaker “is ‘functionally comparable’ to that of a judge,”⁹⁵ and “[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor’s decision to initiate or move forward with a criminal prosecution.”⁹⁶ The Court thus concluded that these officials, along with the agency attorney responsible for presenting evidence during the administrative proceeding, were entitled to absolute immunity from suit for adjudicating, initiating, or conducting agency proceedings.⁹⁷

C. APPLYING THE FRAMEWORK TO CHILD WELFARE: “FUNCTIONAL ANALOGIES” AND “SPECIAL FUNCTIONS”

In the absence of a Supreme Court pronouncement on the scope of immunity afforded to social workers,⁹⁸ this framework yields two

90. *Id.* at 512.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 513.

96. *Id.* at 515.

97. *Id.* at 517.

98. The Supreme Court has denied certiorari on the issue, with two Justices dissenting from the denial. *See Hoffman v. Harris*, 511 U.S. 1060, 1060, 1061 (1994). The federal appellate courts have endeavored to apply the framework developed in *Pierson*, *Imbler*, *Burns*, and *Butz* to constitutional claims arising from child dependency proceedings. *See, e.g., Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999). Citing *Imbler* and *Burns*, the Second Circuit commented that “[a]lthough absolute immunity has traditionally been applied in favor of judges, prosecutors, and other judicial officers, this logic dictates that anyone, even non-judicial officers (e.g., witnesses), must be assured complete protection to the extent that they are fulfilling functions ‘closely related to the judicial process.’” *Id.* at 97 (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991)). The majority of the circuits have concluded that a social worker who initiates judicial proceedings to obtain custody of an endangered

questions to guide the assessment: (1) whether social workers are engaged in conduct that is functionally analogous to that of a prosecutor, and (2) whether social workers are entrusted with “special functions [that] require a full exemption from liability.”⁹⁹

The analogy between criminal prosecutions and child protection proceedings is passable but imperfect. It rests on the idea that, like prosecutors making charging decisions, social workers are entrusted with the authority to exercise independent judgment in determining when to initiate dependency proceedings¹⁰⁰ and act as advocates for the state in a capacity “intimately associated with the judicial [process].”¹⁰¹ At this level of generality, the analogy holds, but a closer look at child protection proceedings reveals important differences that undermine the analogy to criminal prosecutions.¹⁰²

child engages in conduct that is functionally analogous to that of a prosecutor. *See Ernst v. Child & Youth Servs.*, 108 F.3d 486, 495 (3d Cir. 1997) (noting that it was joining the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits in extending absolute immunity to child welfare workers who initiate and prosecute dependency proceedings); *see also Beltran v. Santa Clara Cnty.*, 514 F.3d 906, 908–09 (9th Cir. 2008) (en banc); *Abdouch v. Burger*, 426 F.3d 982, 989 (8th Cir. 2005); *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 422–23 (6th Cir. 2001); *Millsbaugh v. Cnty. Dep’t of Pub. Welfare*, 937 F.2d 1172, 1176 (7th Cir. 1991); *Vosburg v. Dep’t of Soc. Servs.*, 884 F.2d 133, 135 (4th Cir. 1989).

99. *Butz*, 438 U.S. at 508.

100. *E.g.*, *Meyers v. Contra Costa Cnty. Dep’t of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987). The Ninth Circuit simply concluded, without much additional elaboration, that this “is not very different from the responsibility of a criminal prosecutor.” *Id.* Other circuits have followed suit without scrutinizing the analogy in its particulars. *See, e.g., Ernst*, 108 F.3d at 496 (quoting *Meyers*, 812 F.2d at 1157); *Vosburg*, 884 F.2d at 137 (quoting *Meyers*, 812 F.2d at 1157).

101. *Ernst*, 108 F.3d at 496 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)) (internal quotation marks omitted).

102. That is not to say that the circuits that have rejected the analogy have the better of the doctrinal argument. The courts in this group, the minority among the circuits, have not been considerably clearer in their reasoning. In *van Emrik v. Chemung County Department of Social Services*, for example, Connie and Richard van Emrik brought suit against two child protective caseworkers responsible for the temporary removal of their seven-month-old daughter. 911 F.2d 863, 865–66 (2d Cir. 1990). According to the court,

It is . . . undisputed that the [caseworkers] enjoy qualified immunity from liability for damages if at the time of the pertinent episode it was not clear that the actions they took violated established constitutional rights, or if it was objectively reasonable for them to believe that their actions did not violate such rights as were then clearly established.

Id. The Second Circuit has never squarely addressed whether absolute immunity is available for social workers who petition the court for custody of a child, leaving unanswered whether such a decision is “functionally similar to a prosecutor’s decision to institute a criminal proceeding.” *See Sutton v. Tompkins Cnty.*, 617 F. Supp. 2d 84, 98 (N.D.N.Y. 2007). The First Circuit has similarly applied qualified immunity to complaints against social workers, without addressing whether social workers might be entitled to absolute immunity for conduct that could be characterized as prosecutorial. *Cf. Carter v. Lindgren*, 502 F.3d 26, 30 (1st Cir. 2007); *Kauch v. Dep’t for Children, Youth, & Their Families*, 321 F.3d 1, 4 (1st Cir. 2003); *Hatch v. Dep’t for Children, Youth, & Their Families*, 274 F.3d 12, 19–20 (1st Cir. 2001).

Every state requires certain types of professionals to report suspected child abuse;¹⁰³ this will almost always include law enforcement officials, doctors and other medical personnel, teachers, counselors, child care providers, and other education workers.¹⁰⁴ Upon receiving a report of suspected child abuse from one of these mandated reporters—or from an individual reporting on a voluntary basis¹⁰⁵—the appropriate social services agency will assign a case worker to investigate¹⁰⁶ the allegations.¹⁰⁷

The social worker begins by knocking on the family's door and attempting to interview the parent and other adults that live in the household, as well as the child who is the subject of the report. If the child attends school, the social worker may go to the school to interview her. Depending on the nature of the allegations, the social worker may also talk to school personnel, medical providers, neighbors, or others who may have relevant information.¹⁰⁸

When the investigation substantiates¹⁰⁹ the report of abuse, social workers typically have two distinct types of authority. First, where the

103. Jose D. Alfaro, *What Can We Learn from Child Abuse Fatalities: A Synthesis of Nine Studies*, in *PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE* 219, 219 (Douglas J. Besharov ed., 1988) [hereinafter *PROTECTING CHILDREN*].

104. For an example, see ALA. CODE § 26-14-3(a) (LexisNexis 2009), which also extends the obligation to clergy.

105. CPS receives roughly an equal number of reports from those who are required to submit reports as it does from those who voluntarily submit reports. WALDFOGEL, *supra* note 2, at 112. Mandated reporters are, on average, “better” reporters in the sense that they are more likely to report cases that CPS subsequently determines to be genuine cases of abuse or neglect. *Id.*

106. Evaluating the extent to which it is appropriate for child protection agencies to conduct these investigations, one researcher has noted,

Child protection agencies do not have the investigative technology, training, and resources that are available to the police. They do not have crime laboratories, finger print identification equipment, highly trained and skilled criminal investigators who are familiar with the latest advances in forensic science. Child welfare social workers do not have the legal training, knowledge of court procedures and rules of evidence and other education that would enable them to effectively investigate and prosecute criminal behavior.

DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 173 (1994). On the other hand, they have “interviewing and assessment skills that are useful in determining whether abuse has occurred.” *Id.*

107. *E.g.*, ALASKA STAT. § 47.17.030(b) (West 2010); CONN. GEN. STAT. ANN. § 17a-101g(a) (West 2006). Some jurisdictions permit their hotline workers to screen out cases that seem inappropriate for investigation. See WALDFOGEL, *supra* note 2, at 5, 114; see also Lukens, *supra* note 4, at 201 (“After a report of suspected child abuse or neglect is made, either anonymously or by a mandated reporter, a social worker from CPS makes an initial determination whether the information provided in the report is sufficient to warrant further investigation. Most reports are screened out at this initial stage.”).

108. Amy Sinden, “*Why Won't Mom Cooperate?*”: *A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J.L. & FEMINISM* 339, 344 (1999).

109. “Substantiation” refers to an agency determination, after an investigation, that a report of abuse “is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.” VT. STAT. ANN. tit. 33, § 4912(10) (West 2001 & Supp. 2010).

child is thought to be in imminent risk of danger,¹¹⁰ a social worker may conduct an emergency removal.¹¹¹ Emergency removals have been criticized as terrifying and traumatic for children and, in many cases, unjustified by imminent danger.¹¹² In theory, emergency removals must be followed by a hearing within a specified period of time,¹¹³ but this requirement has often been flouted.¹¹⁴

Second, alternatively, social workers may initiate dependency proceedings to transfer custody—legal, physical, or both—of the child from the parent or guardian to the State.¹¹⁵ These dependency

110. This determination generally must be supported by probable cause or the equivalent. Chill, *supra* note 16, at 544 n.51; *see, e.g.*, FLA. STAT. ANN. § 39.401(1)(b) (West 2010) (probable cause); *cf.* CONN. GEN. STAT. ANN. § 17a-101g(b) (West 2006) (reasonable cause); DEL. CODE ANN. tit. 16, § 907(a) (West 2003) (reasonable suspicion); 325 ILL. COMP. STAT. ANN. 5/5 (West 2008) (reasonable belief). *But cf.* ARIZ. REV. STAT. ANN. § 8-821(B) (2007 & Supp 2010) (clear necessity).

111. *See, e.g.*, CAL. WELF. & INST. CODE § 306(a)(2) (West 2008) (“[A social worker may] [t]ake into and maintain temporary custody of a minor [if the social worker] has reasonable cause to believe that the minor has an immediate need for medical care or is in immediate danger of physical or sexual abuse or the physical environment poses an immediate threat to the child’s health or safety.”); CONN. GEN. STAT. ANN. § 17a-101g(e) (West 2006); MONT. CODE ANN. § 41-3-301(1) (2009); VA. CODE ANN. § 16.1-251(A)(1) (2010) (authorizing the department of social services to take a child into immediate custody upon obtaining an emergency removal order, which may be issued *ex parte* upon sworn testimony that the child would be subjected to “imminent threat to life or health” to the extent that “severe or irremediable injury” would be likely to result if the child were returned to or left in the custody of his parents, and permitting emergency removal orders after the child is taken into emergency custody); VA. CODE ANN. § 63.2-1517(A)(1) (2007) (authorizing a physician, law enforcement official, or child protective services worker to take a child into custody for up to seventy-two hours where a court order is not immediately obtainable).

112. Chill, *supra* note 16, at 540–41.

113. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-403(3.5) (West 2010) (seventy-two hours); TEX. FAM. CODE ANN. § 262.201(a) (West 2009) (fourteen days).

114. *See* Pamela B. v. Ment, 709 A.2d 1089, 1098 n.11 (Conn. 1998) (“[There is] widespread evidence that the 10 day hearing requirement is an issue of great difficulty in the courts due to crowded court calendars. We found evidence in interviews, focus groups, and a docket review of a widespread practice of convening the initial 10 day hearing within the statutory guidelines, introducing the parties into the record to formally initiate the hearing, and then continuing the hearing at a later date. The range of time for the completion of 10 day hearings spanned from 10 days to six months. This is a disturbing instance of compliance with the ‘letter’ rather than the ‘spirit’ of the law regarding temporary custody hearings.” (quoting EDMUND S. MUSKIE INST., UNIV. OF SOUTHERN MAINE, STATE OF CONN. CT. IMPROVEMENT PROJECT REPORT 39 (1996) (internal quotation marks omitted))).

115. *E.g.*, CAL. WELF. & INST. CODE § 325 (West 2008). In some states this authority is not vested exclusively in social workers; in Connecticut, for example,

Any selectman, town manager, or town, city or borough welfare department, any probation officer, or the Commissioner of Social Services, the Commissioner of Children and Families or any child-caring institution or agency approved by the Commissioner of Children and Families, a child or such child’s representative or attorney or a foster parent of a child, having information that a child or youth is neglected, uncared-for or dependent, may file . . . a verified petition.

CONN. GEN. STAT. ANN. § 46b-129(a) (West 2009). In Pennsylvania, a petition alleging that a child is dependent may be brought by “any person.” 42 PA. CONST. STAT. ANN. § 6334 (West 2000 & Supp. 2010). In Louisiana, by contrast, a child welfare worker whose investigation reveals reasonable cause to believe that a child is abused or neglected must report these findings to the District Attorney; the

proceedings vary not only from state to state, but also from case to case; they typically begin with a preliminary hearing, where the parent is advised of the allegations and of their right to counsel¹¹⁶ and given the opportunity to stipulate to a temporary transfer of custody to the State. A guardian ad litem is appointed for the child.¹¹⁷

District Attorney is given the authority to decide whether to file a petition to have the child adjudicated to be in need of care. *See Austin v. Borel*, 830 F.2d 1356, 1357 (5th Cir. 1987).

116. In *Lassiter v. Department of Social Services*, the Supreme Court considered whether an indigent parent facing the termination of parental rights is entitled to counsel under the Due Process Clause. 452 U.S. 18, 31 (1981). Using the balancing test developed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court decided that the Constitution did not provide for a per se right to counsel, but that in some circumstances parents involved in such proceedings might indeed have a constitutional right to have an attorney provided for them. *Lassiter*, 452 U.S. at 31, 33–34. The states have almost uniformly exceeded the constitutional floor, providing by statute for indigent parents to have court-appointed counsel as a matter of course. *See Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 367–68 (2005). The effectiveness of these attorneys is an entirely different matter. One scholar-practitioner has observed:

While many parents are represented with tremendous competence by public defender and legal services offices and by private attorneys, many others are appointed lawyers who only accept these cases because they are the only cases they can get. Non-paying clients involved in the family or juvenile court system because they have been accused of abusing or neglecting their children are among the lowest-status clients a lawyer can have. The hourly rate paid for this work is at the bottom of the scale and is capped at a level too low to allow for effective representation in many cases. While these cases attract their share of dedicated, zealous advocates, they attract more than their share of lawyers who are merely desperate for work.

Among these lawyers, I have witnessed a startling lack of professionalism. The low pay and the lack of commitment to the work inspires these lawyers to give little or no attention to the cases. They rarely make an effort to speak with their clients out of court, even those clients, such as incarcerated clients, who may not be readily available for consultation in court. They often show up after a hearing is over, so that they can receive credit (and therefore pay) for an appearance, regardless of their lack of actual participation. They readily confess their open dislike for their clients to their adversaries, and their satisfaction with court decisions strongly opposed by their clients. In their frustration, many parents declare that they would have done better to represent themselves. While they would not have done well, they might, indeed, have done better.

Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 437 (1996); *see also* Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 815 (2006) ("The legal delivery system employed in New York City has ensured that most parents are inadequately represented most of the time. Parents' lawyers in New York City have become, almost without exception, lawyers who practice exclusively in the Family Court with no law office of which to speak. They belong to a panel of attorneys who accept assignment. They are in court virtually every day. But, they do very little out of court work. In particular, they are rarely available to meet with their clients."); Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 283 (2007) ("Social workers assigned to work with families and attorneys representing parents and children are overwhelmed and rarely provide meaningful assistance.").

117. States must provide for these appointments as a condition of receiving federal funds. *See* Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(b)(2)(G), 88 Stat. 4, 7 (codified at 42 U.S.C. §§ 5106a(b)(2)(A)(xiii), 5106a(a)(2)(B)(ii) (2006)); *see also* George S. Mahaffey Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*,

Where a parent chooses to contest the transfer, the court may take evidence before issuing an order adjudicating the child neglected or dependent.¹¹⁸ Such a determination will typically be accompanied by what is initially a temporary transfer of custody to the State.¹¹⁹ In some cases, only legal custody is transferred, giving the agency the authority to monitor and supervise the family, provide (and usually require) various forms of counseling or treatment, and make periodic assessments of parental rehabilitation.¹²⁰ In other cases, physical custody of the child may be transferred to the agency, resulting in a kinship, foster care, or institutional placement.¹²¹ State agencies must make “reasonable efforts” to prevent the placement of a child in foster care and to reunite the child with her family should removal be necessary.¹²² States are exempt from undertaking such efforts in cases involving “aggravated circumstances,” such as torture or the killing of another child.¹²³ Dependency cases must receive periodic review, at least once every six months.¹²⁴ They conclude when the child is either returned to her family or freed for adoption following the termination of parental rights.¹²⁵

The question for the immunity analysis is whether this chronology of events is sufficiently analogous to a criminal prosecution to conclude that the social worker functions in the role of a prosecutor. At some level of generality, it is certainly fair to say that the filing of a dependency

4 J.L. & FAM. STUD. 279, 280 (2002); Nat Stern & Karen Oehme, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373, 398 (Winter 2003/2004).

118. *E.g.*, CONN. GEN. STAT. ANN. § 46b-129(g) (West 2009); 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 2007); 42 PA. CONS. STAT. ANN. § 6338(a) (West 2000).

119. *E.g.*, CONN. GEN. STAT. ANN. § 46b-129(b) (West 2009); 705 ILL. COMP. STAT. ANN. 405/2-10(2) (West 2007).

120. *E.g.*, 42 PA. CONS. STAT. ANN. § 6351(a)(2) (West 2000).

121. *E.g.*, 705 ILL. COMP. STAT. ANN. 405/2-10(2) (West 2007). As a matter of social work practice:

Three major directives are given to social workers involved in child protection. First, social workers are instructed to provide services to abusing or neglectful parents in the parents' own home. Removal of the child is a last resort: it is disruptive to the child and family and costly for the state. Second, social workers are told to make sure that children do not wind up in foster care “drift,” that is, remaining indefinitely in the foster care system and being constantly moved from one home to another. Third, there is a legitimate privacy right that families have. The unwarranted or premature intrusion of the government into the homes of nonabusive families is improper and unconstitutional.

DANIEL POLLACK, *SOCIAL WORK AND THE COURTS: A CASEBOOK* 38 (2d ed. 2003).

122. 42 U.S.C. § 671(a)(15)(B) (2006 & Supp. II 2008). These requirements are imposed as a condition of receiving federal funds. *See id.* § 671(a) (“In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary . . .”).

123. *Id.* § 671(a)(15)(D).

124. *Id.* § 675(5)(B).

125. *See* Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 176 (2004) (“Once a child is placed in foster care, the inexorable progress of the case will presumably lead to only one of two options: return to the family of origin or termination of parental rights followed by permanent placement in another family.”).

petition by a child welfare worker initiates judicial proceedings of an adversarial nature in which the child welfare worker acts as an advocate for the state, making recommendations to a judge and urging the court to accept and act upon those recommendations.¹²⁶ And indeed,

[Dependency] proceedings . . . include most of the standard trappings of the traditional adversarial model of dispute resolution. The state must set forth its allegations in a petition and serve it on the parent. Cases are heard by judges. Witnesses testify under oath. A court reporter transcribes the proceedings. Rules of evidence apply, with some exceptions. The parties may be represented by lawyers and may appeal adverse decisions.¹²⁷

On closer inspection, however, the analogy to a criminal prosecution becomes weaker. Scholars have observed that the procedural safeguards that accompany judicial proceedings are often bypassed in “real life,”¹²⁸ and that for better or for worse, child welfare proceedings are characterized by pervasively informal extra-judicial interactions, decisions, and agreements.¹²⁹ To obtain the perceived benefit of being seen as cooperative, parents will often consent to “voluntary” arrangements without the benefit of counsel or judicial oversight.¹³⁰

Amy Sinden, who has represented parents in civil child abuse and neglect proceedings, notes that “social work norms and discourse predominate in this setting.”¹³¹ Sinden emphasizes the key role that “cooperation” plays in social work discourse: Because conflict is viewed as harmful to children, “the mother accused of child abuse who creates conflict by failing to ‘cooperate’ harms her child a second time.”¹³² While the term implies collaboration among equals who share the same goals—here, what is best for the children—it masks the significant coercive power that the social worker, and the agency that backs her, can bring to bear against a parent who disagrees with the caseworker’s view of what steps should be taken. Emily Buss, who has represented children in

126. See *supra* notes 98–102.

127. Sinden, *supra* note 108, at 348.

128. Huntington, *supra* note 14, at 658.

129. See Buss, *supra* note 116, at 433–34 (explaining how the child welfare system exerts a great deal of power outside the judicial system, because of coercive pressure on parents to submit to “voluntary placement agreements”).

130. See *id.* In *Nicholson v. Williams*, a federal civil rights suit brought against the New York Administration of Child Services (“ACS”) by women whose children had been removed from their care solely based on domestic violence against the mother. 203 F. Supp. 2d 153, 163–64 (E.D.N.Y. 2002). The Director testified that “there were instances where it might be appropriate to remove a child to ‘motivate’ the mother to cooperate with services offered by ACS.” *Id.* at 215. Defendants also admitted that some removals “are never brought before a court because mothers will usually agree to attend whatever services ACS demands once their children have been in foster care for a few days.” *Id.*

131. Sinden, *supra* note 108, at 353.

132. *Id.* at 354.

abuse and neglect proceedings, confirms that this power is not lost on the parents being urged to cooperate: Parents enter into “voluntary” placement agreements, pursuant to which children may be placed in foster care for up to six months, “for fear that failing to do so will only add the curse of ‘uncooperative’ to the list of their sins when the case comes to court.”¹³³

The divergence here from criminal proceedings is notable: Criminal defendants are simply not expected to cooperate with prosecutors in the manner that is demanded for parents accused of abuse and neglect. To be sure, plea bargaining in criminal cases is pervasive,¹³⁴ but it simply is not analogous to these extra-judicial agreements between parents and child welfare workers. An accused entering into an agreement with the prosecutor to plead guilty in exchange for a six-month sentence would have the right to effective assistance of counsel.¹³⁵ Before accepting the guilty plea, the court would have to provide specific advisements to the defendant and ascertain that the plea was knowing and voluntary.¹³⁶ These protections are absent for a parent who agrees to be separated from her child for six months under “voluntary” placement agreements.

At first blush, it seems that the widespread reliance among child protection agencies on informal agreements has no bearing on the immunity analysis, because these out-of-court arrangements, by their very terms, would not be considered “intimately associated” with the judicial process; as discussed previously, social workers therefore would not receive absolute immunity for that conduct.¹³⁷ But in the child welfare system, the discourse of cooperation retains its force even after legal proceedings have been formally initiated.¹³⁸ It remains a critical aspect of a social worker’s assessment of a parent’s fitness,¹³⁹ and judges often defer to social workers once these cases get to court.¹⁴⁰

133. Buss, *supra* note 116, at 434; *see also* ROBERTS, *supra* note 17, at 66 (“Caseworkers are instructed to treat the degree of parents’ cooperation as evidence of the child’s risk of harm. When reported families do not cooperate with the investigating agency, their case is more likely to be referred to court.”).

134. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992) (“Most criminal prosecutions are settled without a trial.”).

135. *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

136. *See* Boykin v. Alabama, 395 U.S. 238, 242–43 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

137. *See supra* notes 98–102.

138. *See* Ernst v. Child & Youth Servs., 108 F.3d 486, 489–90 (3d Cir. 1997) (“[The County] found Ernst to be uncooperative, antagonizing, and unwilling to acknowledge her parenting problems. . . . As [the] caseworkers became increasingly frustrated with Ernst, they sought and obtained restrictions on her visits with Susanne. Ultimately, with the approval of the Chester County Court of Common Pleas and the Superior Court of Pennsylvania, they changed [the] goal for Susanne from family reunification to long-term foster placement.”).

139. *See* ROBERTS, *supra* note 17, at 66 (“More critical than the mother’s attitude toward her child is the mother’s attitude toward the caseworker. Parents are expected to be remorseful and submissive.”).

What makes this dynamic even more difficult to analogize to a criminal prosecution is that it is the social worker and her agency who are entrusted with providing the family with the services they need to be reunited.¹⁴¹ If the basis for the dependency petition is that the parent is incapacitated by addiction or is having anger management issues, it is the agency's role to provide the parent with drug treatment or parenting classes.¹⁴² It is the parent, however, who is up against an unforgiving clock. This is because of the 1997 Adoption and Safe Families Act, which was enacted to remedy the problem of "foster care drift," or children languishing for years in foster care without being reunited with their families or freed for adoption.¹⁴³ Under the Act, as a condition of receiving federal funding, states must impose a presumption that a child who has been in foster care for fifteen of twenty-two consecutive months will be freed for adoption, and the biological parent's rights are terminated.¹⁴⁴ In contrast, throughout a criminal proceeding, it is the prosecutor who is running against the clock to comply with speedy trial rights.¹⁴⁵

Unlike a prosecutor, the social worker who files a dependency petition does more than just advocate for custody of an endangered child: She also must provide the parent with rehabilitative services, monitor the parent for progress, and initiate termination proceedings for parents who are unable to demonstrate improvement within the fifteen month period, working a radical and permanent transformation not just on the wrongdoing parent, but also on the lives of the affected children.¹⁴⁶

Any disagreement with the agency's proposed plan is reported as evidence of unwillingness to reform.").

140. Sinden, *supra* note 108, at 353.

141. See 42 U.S.C. § 671(a)(15)(B) (2006) ("[R]easonable efforts shall be made [by the agency] to preserve and reunify families . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and . . . to make it possible for a child to safely return to the child's home.").

142. See 42 U.S.C. § 629a(1)(E) (2006) ("The term 'family preservation services' means services for children and families designed to help families . . . at risk or in crisis, including . . . services designed to improve parenting skills (by reinforcing parents' confidence in their strengths, and helping them to identify where improvement is needed and to obtain assistance in improving those skills) with respect to matters such as child development, family budgeting, coping with stress, health, and nutrition . . .").

143. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 2 & 42 U.S.C.).

144. 42 U.S.C. § 675(5)(E) (2006 & Supp. III 2009).

145. And possibly statutes of limitation. For an overview of a criminal defendant's constitutional and statutory rights to a speedy trial, see Steven D. Feldman, *Speedy Trial*, 84 GEO. L.J. 1022, 1022-39 (1996).

146. See Garrison, *supra* note 12, at 595 ("[B]ecause of high caseloads and rapid staff turnover, case workers often failed to offer any meaningful assistance to parents or children . . ."); Ross, *supra* note 125, at 202 ("If the agency drags its feet, and fails to provide the parent with needed resources and support, fifteen months are likely to be consumed without any discernable change in the parent's circumstances.").

These aspects of a social worker's role are without analogue in the district attorney's office.

Thus, although social workers do indeed, in most jurisdictions, have the authority to initiate judicial proceedings against parents thought to be abusive or neglectful and to exercise independent discretion in making these decisions, they are enmeshed in a relationship with these parents that is in some ways fundamentally different from interactions between a prosecutor and a criminal defendant. Without guidance from the Supreme Court, it is difficult to tell how many points of similarity are necessary to build an analogy that triggers absolute immunity, or whether the analogy should be assessed on the basis of the child protection process as it exists *de jure* or *de facto*.¹⁴⁷ In short, the strength of the analogy to prosecutorial conduct has been underexamined and, upon inspection, is less than compelling.

But the "functionally analogous" inquiry is itself difficult to take seriously in some of its manifestations. The idea that, by layering analogy upon inference, the Court can effectuate congressional intent with respect to certain types of public officials that did not exist when § 1983 was enacted is a truly tenuous fiction.¹⁴⁸ What *Imbler v. Pachtman* so unmistakably communicates, despite the Court's protestations to the contrary,¹⁴⁹ is that absolute immunity is predicated on policy considerations,¹⁵⁰ such as an assessment of the pressures faced by a particular type of official; the importance of professional judgment to the exercise of that official's duties; and the threat to public welfare posed by efforts to harass, retaliate, or intimidate the official in the vigorous

147. See Justine A. Dunlap, *Judging Nicholson: An Assessment of Nicholson v. Scoppetta*, 82 DENV. U. L. REV. 671, 677–78 (2005) ("Courts have determined that removal itself is harmful and justified only after a balancing of the harms that will occur absent removal—as have legislatures, through statutes and legislative history, and agencies, through written policies. Yet removal—often on an *ex parte* emergency basis—is the rule in practice. The perennial battle between what is right and what actually happens—the law on the books versus the law as it looks—is often fought in child protection proceedings.").

148. As at least one circuit has acknowledged, state-employed child welfare workers did not exist in 1871 when § 1983 was enacted. See *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 493 (3d Cir. 1997). The Third Circuit had the benefit of Justices Thomas and Scalia's dissent from an opinion denying certiorari in *Hoffman v. Harris*, in which the two Justices criticized lower courts for having overlooked the necessary historical inquiry. 511 U.S. 1060, 1062 (1994) (Thomas, J. joined by Scalia, J., dissenting).

149. See 424 U.S. 409, 421 (1976) ("[Each grant of immunity] was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. . . . [Our result] must be determined in the same manner."). The Court has continued to insist that its immunity cases reflect an attempt to discern congressional intent, rather than to make policy, insisting that its appropriate role is "to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

150. See Alan Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 271 n.50 (1995) (reviewing scholarly work that characterizes the Court's immunity jurisprudence as "unabashedly policy-based").

discharge of her duties.¹⁵¹ *Butz v. Economou* restates this as an assessment of whether a certain class of official performs a “special function” that might require “full exemption from liability.”¹⁵²

The federal courts have embraced this prong of the immunity analysis, speaking largely in chorus about the need to facilitate social workers’ independent judgment by eliminating the threat of retaliatory lawsuits from resentful parents. The Third Circuit, for example, has reasoned,

Like a prosecutor, a child welfare worker must exercise independent judgment in deciding whether or not to bring a child dependency proceeding, and such judgment would likely be compromised if the worker faced the threat of personal liability for every mistake in judgment. Certainly, we want our child welfare workers to exercise care in deciding to interfere in parent-child relationships. But we do not want them to be so overly cautious, out of fear of personal liability, that they fail in situations in which children are in danger.¹⁵³

Other circuits have expressed virtually identical concerns.¹⁵⁴

The federal courts’ concern that the threat of personal liability will unduly influence social worker decisions about tense and possibly dangerous situations has yielded discussions of the policy considerations surrounding absolute immunity that are remarkably consistent with each other, and are also consistent with the messages of *Imbler* and *Butz*.¹⁵⁵

151. 424 U.S. at 423–28.

152. 438 U.S. 478, 508 (1978).

153. *Ernst*, 108 F.3d at 496. The court hypothesized that without absolute immunity, suits against social workers would occur with even greater frequency than suits against prosecutors, as “[p]arents involved in seemingly unjustified dependency proceedings are likely to be even more resentful of state interference in the usually sacrosanct parent-child relationship than are defendants of criminal prosecution.” *Id.* at 496–97.

154. The Fourth Circuit, for example, has asserted,

Like a prosecutor, a social worker must exercise her best judgment and discretion in deciding when to file a Removal Petition. The welfare of the state’s children would be jeopardized if social workers had to weigh their decision in terms of their potential personal liability. In short, the denial of absolute immunity here has the potential to adversely affect the efficient functioning of the state’s child welfare system. Additionally, the chances are high that suits against the social workers would occur with some degree of regularity. Parents, resentful of and humiliated by an attempt to usurp their rights, would likely channel their frustration “into the ascription of improper and malicious actions to the State’s advocate.”

Vosburg v. Dep’t of Soc. Servs., 884 F.2d 133, 137 (4th Cir. 1989) (quoting *Imbler*, 424 U.S. at 425).

155. *See, e.g., Meyers v. Contra Costa Cnty. Dep’t of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987) (“The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker’s independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit.”); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (“[Social workers] are responsible for the prosecution of child neglect and delinquency petitions in the Michigan courts. It is their responsibility, and others in similar positions, to protect the health and well-being of

But like *Imbler* and *Butz*, uniformly absent from these discussions is any attempt to ascertain whether—and, if so, to what extent—social workers are indeed influenced in their decisionmaking by a fear of personal liability.¹⁵⁶ In other words, we might agree that the case for extending absolute immunity to social workers is as strong as the case for prosecutors and agency officials, but wonder how strong that latter case is.

Were the courts to turn to the scholarly literature for assistance, they would find a bewildering disagreement as to the readiness of social workers to intervene in the families they are charged with assisting.¹⁵⁷ This matters immensely for the immunity analysis. If one accepts the view of social workers as interventionist and overzealous, it makes little sense to conclude that social workers systematically fail to act, much less that the failure is caused by a fear of liability. After all, since *DeShaney*, it has been perfectly clear that they will not be held liable for not acting.¹⁵⁸ If, on the other hand, one accepts the view that social workers are too timid and do too little to protect the children in their charge, it makes quite a bit of sense to ask why and to inquire whether the timidity is caused by a fear of liability.¹⁵⁹ In the following Part, I attempt to delve into these questions.

the children of Michigan. They must be able to perform the necessary tasks to achieve this goal without the worry of intimidation and harassment from dissatisfied parents.”); *Mazor v. Shelton*, 637 F. Supp. 330, 334–35 (N.D. Cal. 1986) (“It is essential that social workers perform their duties to minors without fear of intimidation from dissatisfied parents. If courts allow retaliatory suits, social workers would be inclined to act only in cases in which they are absolutely certain that the alleged conduct occurred. But absolute certainty is not always available in situations where the circumstances require an immediate decision to remove a child from a home. Without the benefit of immunity, social workers’ attention would shift from protecting abused or neglected children to avoiding vexatious litigation. This shift could threaten the health and safety of an abused or neglected minor.”).

156. And even for those decisions addressing social worker immunity after *DeShaney*, there have been no acknowledgments that social worker liability runs in only one direction, attaching only to affirmative conduct. The Third Circuit, expressing the concern that a fear of liability might cause social workers to fail to intervene in situations in which children are in danger, provided a “cf” citation to *DeShaney*, with no further elaboration. *Ernst*, 108 F.3d at 496.

157. See *supra* note 16.

158. See *supra* notes 38–40.

159. Some of the researchers who are talking to social workers are chasing down a different grail, exploring the reasons for the crisis of turnover in child welfare agencies. Although the reasons are multifaceted, we know that turnover creates a vicious cycle: Child welfare workers leave in part because of high caseloads, and the agencies often have trouble filling those vacancies, requiring remaining caseworkers to carry the overload. Families that depend on these agencies not only face new caseworkers with whom they not only have no relationship, but who are even more overworked than their predecessors. As one report has summarized:

The costs of turnover in child welfare are great. . . . [T]herapeutic relationships with vulnerable children and families need to be reestablished, workloads are increased as staff cover caseloads until a new worker can be hired and trained, and meanwhile the ASFA time clock continues to tick and the child and family continues [sic] to need vital services to heal as they face the challenge of their lifetime.

III. ASSESSING OVERDETERRENCE AS A BASIS FOR ABSOLUTE IMMUNITY'S POLICY RATIONALE

One might be underwhelmed by the strength of the prosecutor analogy and yet be moved by the assumption outlined in the preceding Part: the notion that absolute immunity for social workers is sound policy. As the preceding discussion makes clear, federal courts have rested their immunity decisions on the intuition that social workers will be less likely to intervene on behalf of endangered children if they have to weigh their professional decisions in terms of personal liability. This notion is essential for our present purpose of evaluating the possibility that absolute immunity can correct *DeShaney's* perverse inequity of incentives.

But is it true? One possible response is that it need not be any truer for social workers than for legislators, judges, and prosecutors. We might note that the Supreme Court, in the nearly sixty years since first recognizing absolute immunity as a defense to certain § 1983 actions, has never required any sort of evidence to support the notion that these officials would be more timid in the discharge of their duties were they not protected by absolute immunity.¹⁶⁰ The Court has simply assumed it to be self-evident.¹⁶¹ The scholarly commentary on official liability has been considerably more cautious, but much of it has accepted at least “[t]he possibility that excessive liability might chill decisive government action.”¹⁶²

AM. PUB. HUMAN SERVS. ASS'N, REPORT FROM THE 2004 CHILD WELFARE WORKFORCE SURVEY: STATE AGENCY FINDINGS 14 (2005).

This is not entirely unrelated to the inquiry explored here. While the immunity discussion centers on the extent to which fear of liability may influence individual decisions in particular cases, or create defaults for case management decisionmaking, the crisis of social worker turnover suggests a secondary problem: To what extent does fear of liability motivate social workers to quit the profession? One study asked child welfare supervisors to indicate whether particular challenges faced by social workers—such as excessive workloads or concerns about physical safety—were “highly problematic,” “somewhat problematic,” or “not problematic” in contributing to the problem of social worker turnover. *Id.* at 37. When asked about vulnerability to legal liability, 16% of supervisors responded that it was “somewhat problematic,” and 9% responded that it was “highly problematic”; 75% responded that it was “not problematic.” *Id.*

160. See Chen, *supra* note 150, at 264 n.14 (“[T]here is no empirical basis for any of the Court’s underlying assumptions [about official immunity].”).

161. *Id.*

162. Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 482 (1997); *id.* at 482 n.131 (“Government officials . . . are excessively risk-averse if faced with potential punishment for their torts.”); see also Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1792 (1991) (“Doctrines imposing personal liability on public officials can easily lead to overdeterrence. Officials may tend to be highly risk-averse with respect to threats of personal liability. There is little likelihood of personal gain from pursuing a course that poses even a small risk of being held unconstitutional, while the cost of being sued—even if the suit is ultimately unsuccessful—may be enormous.”); Myriam E. Gilles, *Breaking the*

Perhaps the assumption is sound for prosecutors and caseworkers alike. Peter Schuck, in his influential work on suing government, acknowledged that empirical evidence was sparse,¹⁶³ but that “the most plausible assumptions about official motivation” suggest “a strategy of personal risk minimization.”¹⁶⁴ Schuck argues that the motivation to minimize the personal costs of particular courses of action is so strong that public actors will, in extreme cases, “be prepared to sacrifice all social benefits in order to reduce even slightly the personal costs that a decision entails.”¹⁶⁵ Interestingly, to illustrate the sort of socially costly decision a public actor will make to reduce her own legal exposure, Schuck gives the example of a social worker who prematurely removes children from troubled families, rather than risk being sued on behalf of an abused child.¹⁶⁶ But this example is one of a number of time capsules from the pre-*DeShaney* era.¹⁶⁷ After *DeShaney*, the decision to do nothing is beyond challenge, but the decision to act remains subject to multiple forms of constitutional scrutiny:¹⁶⁸ Did the social worker act so

Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability, 80 B.U. L. REV. 17, 31 (2000); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 74 (1998) (“[S]treet level’ government officers may be more likely than their private counterparts to be excessively inhibited by the threat of liability.”); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982); Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 240–41 (1984). *But see* Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 71 (1997) (“[P]otential liability is only part of the individual’s calculus at the decisional moment. . . . Individual behavioral variation is inevitable no matter how well the microeconomic model predicts the mode.”).

163. And perhaps intrinsically difficult to obtain reliably—he notes the existence of a phenomena called “the Hawthorne effect,” in which merely calling attention to the risk of liability “might exaggerate its perceived magnitude.” PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 69–70 (1983).

164. *Id.* at 68. Schuck argues,

[O]fficials tend to reject any course of action that would drive their personal costs above some minimum level, what I call a “duty threshold.” . . . The duty threshold . . . is defined by one’s idiosyncratic attitudes toward (and trade-offs among) certain values and interests, some altruistic, some more narrowly self-interested, that economic models of choice cannot readily take into account—feelings of professionalism; moral duty; programmatic mission; fear of criticism, discipline, or reprisals for self-protective behavior; concern for professional reputation; habituation to routine; personal convenience; and the like.

Id. (footnote omitted).

165. *Id.* at 70.

166. *Id.* at 75; *see also* Douglas J. Besharov, *The Need to Narrow the Grounds for State Intervention*, in *PROTECTING CHILDREN*, *supra* note 103, at 47, 83 (stating that “most observers would agree” with Schuck’s characterization).

167. Likewise writing before *DeShaney*, Dean Knudsen argues that judgments of liability against social workers for failing to remove a child from danger will cause CPS workers to protect themselves by removing children unnecessarily. *See* DEAN D. KNUDSEN, *CHILD PROTECTIVE SERVICES: DISCRETION, DECISIONS, DILEMMAS* 158 (1988).

168. *See* Jeffries, *supra* note 162, at 75 (“Persons injured by affirmative misconduct can usually state a cause of action. The causal connection between harm to the plaintiff and the act of an

precipitously as to deprive the family of the liberty interest in family integrity? Was the process so irregular as to constitute a violation of procedural due process?¹⁶⁹ This imbalance means that after *DeShaney*, a strategy of personal risk minimization would entail doing as little as possible: delaying intervention, choosing less intrusive forms of intervention, giving parents the benefit of the doubt, and construing uncertainty against removal.¹⁷⁰ The question is whether this sketch even resembles today's child welfare system.

For some prominent critics of the child welfare system, the answer is yes.¹⁷¹ Elizabeth Bartholet, for example, has characterized the child welfare system as one in which “[w]e try to avoid removing children from their families at all costs and to return children who are removed as quickly as possible.”¹⁷² She asserts that “the state is too reluctant to respond to serious child maltreatment with coercive measures, to remove children from harm’s way, and to terminate parental rights so that children can be moved on to safe, nurturing families.”¹⁷³ Richard Gelles and Ira Schwartz argue that the child welfare system is premised upon an ideological commitment to the notion that children should remain with their biological parents, and that the system prioritizes parents’ rights at

identifiable defendant is typically clear. In contrast, those injured by a failure to act find it difficult to bring suit. The causal connection between the plaintiff’s injury and an officer’s inaction may be indirect and obscure. . . . In consequence, the risk of being sued for erroneous or improper action is vastly greater than is the risk of being sued for erroneous or improper (and perhaps equally costly) inaction. This imbalance increases the incentive to protect oneself by doing less.”)

169. See *supra* notes 58–64.

170. This is what a strategy of personal risk minimization would look like when the risk we are speaking of is the risk of liability. What *DeShaney* left untouched, and what no court could eliminate, is the fear of other risks faced by social workers, such as job discipline or adverse publicity stemming from the death of a child left with, or returned to, his biological parents. Fear of these consequences may continue to influence social worker decisionmaking in favor of intervention and removal. The federal courts have not even acknowledged these countervailing forces operating upon social worker decisionmaking, much less articulated any formula or method for balancing the fear of liability for unwarranted intervention against the fear of adverse publicity for failing to timely intervene. However, some commentators continue to speak of fear of job discipline, fear of liability, and fear of adverse publicity as factors that can be grouped together to produce “unnecessary removals” in a phenomenon that could be described as “defensive social work.” See Chill, *supra* note 16, at 542 (citing Douglas J. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?*, 7 CHILD ABUSE & NEGLECT 4, 421–34 (1983)). Post-*DeShaney*, these fears run in different directions, and their effects on social worker decisionmaking must be disaggregated to be meaningful.

171. Some of these characterizations of the child welfare system obviously cannot serve as evidence that caseworkers fail to intervene as warranted for fear of liability. Indeed, Gelles, Schwartz, and Dwyer all suggest substantive ideological reasons for what they perceive as caseworkers’ timidity. But in describing caseworkers as systematically reluctant to remove children from their homes, their portrayal is at least reconcilable with the federal courts’ concern about overly cautious caseworkers whose hesitation to intervene may place vulnerable children at risk. See Dwyer, *supra* note 16, at 442–67; Gelles & Schwartz, *supra* note 16.

172. See BARTHOLET, *supra* note 16, at 24 (“Family preservation has always been the dominant modus operandi in the child welfare system.”).

173. *Id.* at 235 (describing the views of family preservation critics).

the expense of child protection.¹⁷⁴ James Dwyer asserts that social workers have an “adult-centered orientation” and “view their ‘clients’ as the dysfunctional parents, not the maltreated children.”¹⁷⁵ Dwyer writes:

In discussing policy reforms with local and state-level CPS officials in Virginia, I most often heard objections couched in terms of parents’ rights rather than in terms of child welfare. When I give presentations to CPS social workers and directors and I raise this concern, there are always a couple who approach me afterwards, and, in hushed tones, say something to the effect of “it is so true; CPS is all about helping parents and giving them every last chance, not about doing what is best for the children.”¹⁷⁶

However, the child welfare system has been criticized just as vehemently for intervening too readily and too intrusively, for riding roughshod over the constitutional rights of parents, particularly parents of color, and for disregarding the trauma and stress of family separation.¹⁷⁷ Although the overwhelming majority of children in the child welfare system—about 89%—remain in their homes, rather than being placed in foster care,¹⁷⁸ critics see a system that is eager to remove children from their parents and does so without careful evaluation of the costs and benefits. Theo Liebmann, criticizing what he views as amorphous and overly permissive removal standards, notes that removal from a parent has been shown to present risk of various forms of separation anxiety, depression, and other mental health problems, and asserts that “the decision to remove a child is made in a vacuum utterly devoid of these very real facts.”¹⁷⁹ Paul Chill, focusing his critique on the procedural defects of emergency removals, has also noted the “harsh human impact” of removal and has argued that the number of unnecessary removals is “large and growing.”¹⁸⁰

174. See Gelles & Schwartz, *supra* note 16, at 99–102. They argue that the child welfare system is predicated on seven core beliefs, including the beliefs that parents want to and can change their abusive and neglectful behavior, that change can be achieved if there are sufficient resources, that a safe and lasting family reunification can be achieved with sufficient resources, and that children do best when raised by their biological parents. *Id.*

175. Dwyer, *supra* note 16, at 455.

176. *Id.*

177. Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 772–74 (2001); Huntington, *supra* note 14, at 656–63; see also ROBERTS, *supra* note 17, at 225 (stating that African American children are overrepresented in the child welfare system, which further disadvantages black Americans “as a group”).

178. PATRICIA L. KOHL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, UNSUCCESSFUL IN-HOME CHILD WELFARE SERVICE PLANS FOLLOWING A MALTREATMENT INVESTIGATION: RACIAL AND ETHNIC DIFFERENCES 5 (2007); see also WALDFOGEL, *supra* note 2, at 208 (“[O]nly a small share of the children reported are subsequently removed from their homes. Indeed, most children reported to CPS receive no intervention beyond an initial screening or investigation . . .”).

179. Theo Liebmann, *What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLIN J. PUB. L. & POL’Y 141, 148 (2007).

180. Chill, *supra* note 16, at 541–42.

At times the preservationist portraits of the child welfare system are virtually unrecognizable from those painted by the protectionists, although they are certainly no less condemnatory. Consider the following statement made by Martin Guggenheim, a prominent preservationist, describing what he views as the attitude towards parents involved in the system:

It is the element of hatred that I wish to mention for a minute. There is a shocking presumption generated by fear, by otherness, by a lot of things—that the parents of children in foster care are bad for their children. They don't love them enough or they don't have the ability enough to raise them well. And I'm here to say that in my 30 years of work in this field, that is the most despicable slander of all, and the most difficult falsity to refute.¹⁸¹

This presents a remarkable contrast to the experiences relayed by Dwyer, who reports that an official attested that her agency would never seek to terminate parental rights without pursuing rehabilitation and reunification,¹⁸² because “we don't give up on parents . . . you never know when someone might change.”¹⁸³ Other researchers have also found that

[o]ne of the unique qualities of the child welfare social worker, derived from professional training, is that he or she often focuses on the strengths of the parents even in severe abuse cases. . . . [A]t each stage of the decision-making process caseworkers tend to favor the least stigmatizing interpretation of available information and the least coercive disposition.¹⁸⁴

How can we reconcile these competing views of the child welfare system? The answer, I think, is that underlying these seemingly conflicting visions is the painful truth that agencies all over the country are too burdened with excessive caseloads and inadequate funding to apply a sensitive filter to reports of child abuse.¹⁸⁵ Some will err on the

181. Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predictive Power of Race*, 6 N.Y. CITY L. REV. 61, 74 (2003).

182. While states are required to pursue reunification in the majority of cases, they are exempted from such efforts in cases involving “aggravated circumstances” such as abandonment, torture, or the killing of another child. See Dwyer, *supra* note 16, at 437–38.

183. *Id.* at 454. For an interesting perspective on a bias towards parents in the criminal justice system, see Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131 (2007) (asserting that in cases of violence against children, parental offenders are systematically treated better by the criminal justice system than are extrafamilial offenders, due to the idealization of the parent-child bond). Collins notes an “identification phenomenon,” quoting frustrated prosecutors who have observed that “juries identify with the accused, believing any parent can make a mistake. . . . Most members of the general public have been stressed themselves by child care responsibilities and feel some sense of sympathy for the abuser, who is seen as having lost control.” *Id.* at 154.

184. LINDSEY, *supra* note 106, at 174 n.77.

185. See, e.g., WALDFOGEL, *supra* note 2, at 26–27. Waldfogel's study of Boston case records suggests both that “the American child protective services system is investigating many families unnecessarily,” and that “the system does not always intervene aggressively enough in very high-risk

side of intervention;¹⁸⁶ some will err on the side of hesitation;¹⁸⁷ all will err,¹⁸⁸ even more frequently than whatever might be the inevitable baseline rate of error inherent in any enterprise that is not only investigative, but also predictive. These predictions will be wrong in both directions, offering ample fodder both for the protectionists to decry failures to intervene and for the preservationists to decry unnecessary interventions that cause harm and do no good. This debate is about the better way to be wrong, whether social workers should err on the side of inaction or err on the side of intervention.

My objective here is not to resolve this debate but to point out that that rejecting absolute immunity in a post-*DeShaney* world is to accept that only erring on the side of intervention is redressable, and that only erring on the side of intervention poses a threat to a social worker's personal liability. This produces a bias for inaction in the legal framework that should make us uncomfortable, even though we do not

cases." *Id.* She observes that the system suffers from both overinclusion (families in the system who should not be there) and underinclusion (families who should be receiving child protective services who are not). *Id.* at 84–85. As she puts it:

In too many high-risk cases, repeated warnings are ignored or misread, and children are left to suffer at the hands of cruel or incompetent parents. And in too many low-risk cases, struggling families receive only a heavy-handed investigation, but no real services to help them become better caregivers for their children.

Id. at 208.

186. For an excellent overview of studies confirming the very low rate of reliability in the selection of children for placement in foster care, which causes children who need placement to be left in their homes while children with lesser placement needs were removed from their families, see LINDSEY, *supra* note 106, at 133–38. One study suggested,

[J]udgments of protective service workers about the severity of child abuse and neglect cases . . . varied as a function of the severity of social and economic problems in the areas served by protective service staff. Specifically, workers in district offices with more severe caseloads judged vignettes provided by the author as less severe. Conversely, workers from offices with less severe caseloads judged the vignettes as more severe.

STEIN & RZEPNICKI, *supra* note 1, at 8 (citing Isabel Wolock, *Community Characteristics and Staff Judgments in Child Abuse and Neglect Cases*, 18 No. 2 SOCIAL WORK RESEARCH & ABSTRACTS 9–15 (1982)).

187. See, e.g., Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 153–54 (2003) (“[The] lack of coherent standards results in massive inconsistencies within agencies and within the system as a whole. . . . Some supervisors were cautious about removals, conducting them only after a careful investigation. Some ordered them on only the slightest allegations and conducted the investigation subsequently, if at all. Each investigative unit developed its own culture, its own definitions, and its own standards for investigation. These inconsistencies are reflected in local and national child protection data. One study compared the data of twenty-eight states and found tremendous variation between the rates of substantiation and the type of maltreatment found.” (footnotes omitted)).

188. At least one scholar has argued that one type of error actually causes the other. See Besharov, *supra* note 166, at 48 (“The system is so overburdened with cases of insubstantial or unproven risk to children that it does not respond forcefully to situations where children are in real danger.”).

know how responsive social workers are to this bias.¹⁸⁹ It is true that we have virtually no empirical evidence confirming that social workers fail to act out of fear of personal liability, but the assumption is at least plausible, and the possibility that even a small handful of endangered children who should be removed from their homes would suffer from a social worker's personal liability calculus is deeply troubling. Until an appropriate empirical study disproves the federal courts' assumption that the possibility of such liability—attenuated as it would be under a qualified immunity regime—would cause hesitation, delay, and inaction in child welfare professionals, we should strive for parity in the legal consequences that attend caseworker decisionmaking.

There is insight to be gleaned from the very persistence of the scholarly dispute over the wisdom and efficacy of state intervention in troubled families. The fact that scholars cannot agree on whether caseworkers should be more or less reluctant to intervene itself supports parity. We can expect that an observer who views the child welfare system as overly intrusive would be resistant to the suggestion that unwarranted and damaging interventions would be insulated from federal review for constitutional error. After all, preservationist scholars have been vocal about the harms that flow from unwarranted intrusions,¹⁹⁰ and some of them have explicitly addressed the constitutional implications of these intrusions.¹⁹¹ But it is quite another matter to propose that making caseworkers personally liable for action but not for omission is an appropriate mechanism with which to reduce these interventions—that federal liability should *by design* cause child welfare workers to hesitate before intervening, where the post-*DeShaney* landscape provides no comparable reason to be fearful about the legal consequences of inaction. Such a proposal could be justified only by a high degree of certainty that child welfare workers systematically over-intervene and rarely, if ever, fail to act where warranted. As discussed above, the literature simply does not support that type of certainty.

189. The National Center of Child Abuse and Neglect ("NCCAN") invited public comment on proposed funding priorities for child maltreatment research for fiscal years 1997–2001. Children's Bureau/National Center on Child Abuse and Neglect Proposed Research Priorities for Fiscal Years 1997–2001, 62 Fed. Reg. 6546-01 (proposed Feb. 12, 1997). In response, the National Association of Social Workers (NASW) proffered as one of its top eight priorities: "[e]xamination of the extent to which child welfare workers' fear of both criminal and civil liability charges—given the increasingly litigious practice environment—inhibit timely and appropriate intervention, and thus, render less than efficacious treatment." NAT'L ASS'N SOC. WORKERS, NASW COMMENTS ON PROPOSED PRIORITIES FOR CHILD ABUSE AND NEGLECT RESEARCH (1997), <http://www.socialworkers.org/archives/advocacy/updates/1997/ltrchild.htm>. It appears that such a study was not funded by NCCAN.

190. See, e.g., Liebmann, *supra* note 179, at 169–71.

191. See *id.* at 154–62; see also Guggenheim, *supra* note 16, at 1742–43.

Instead, the most convincing portrayals indicate a system rife with both over- and underinclusion.¹⁹²

The horror stories abound, illuminating both types of failure in excruciating detail.¹⁹³ That is why it is no answer to object to absolute immunity on the grounds that child welfare workers have ruined the lives of too many families with aggressive, unwarranted intrusions. These unnecessary interventions do not explain away the all-too-numerous failures to intervene in other cases, where a child's health or safety is demonstrably at risk. Because these failures are also numerous, instances of overintervention cannot be invoked as though they conclusively demonstrate that absolute immunity for caseworkers is unnecessary or unwise, as too many caseworkers are already doing too much. In other words, one can accept, as I do, that too many interventions are precipitous and damaging, and yet remain unsatisfied that retaining caseworker liability only for affirmative error is a good way to reduce these unnecessary interventions.

It is closer to the mark to conclude despairingly that the system fails so haphazardly—or perhaps predictably—in both directions, and is subject to so many inputs, that it is perhaps simply unresponsive to federal immunity doctrines. But in evaluating this possibility as well, we return to the same question: Is it sound to use this uncertainty about the actual effect of official liability as a basis to discard our concerns about *DeShaney's* skewed incentives? I would argue, to the contrary, that we should be unwilling to accept these skewed incentives unless and until we can conclusively determine that they have no effect on social worker decisionmaking.

In fact, parity in the legal consequences that attend child welfare decisionmaking may even be a prerequisite to getting accurate empirical data about social worker responsiveness to the incentives created by liability rules. Imagine that a social worker participating in an empirical study is presented with a fact pattern about a child that appears to be at risk of harm; the social worker is then asked to state whether or not it would be appropriate to remove the child from the home in such circumstances. The study is designed so that this response, perhaps in

192. See LINDSEY, *supra* note 106, at 133–36; WALDFOGEL, *supra* note 2, at 84–85; Besharov, *supra* note 166, at 48; see also Besharov, *supra* note 12, at 199–200 (“Social agencies fail to protect children who need help the most—the victims of physical brutality—by not removing them from their abusive parents. At the same time, they overreact to cases of social deprivation in poor families.”).

193. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 212–16 (E.D.N.Y. 2002) (describing the plight of children unjustifiably separated from their loving but battered mothers and placed into the homes of foster parents who then batter them); BARTHOLET, *supra* note 16, at 107 (describing the testimony of the administrator of a home for abused children, revealing multiple instances of children sent home to their parents in spite of having received third degree burns, skull fractures, and in the case of one infant of fifteen months, venereal warts).

combination with responses to other vignettes or interview questions, is intended to serve as a sort of baseline against which to measure the effects of liability concerns on optimal child welfare decisionmaking. But if the social worker is aware that removing the child may expose her to personal liability, while leaving the child in the home presents no such threat, that recognition may skew her response at some level, making it impossible to develop the necessary baseline.

Unfortunately, after *DeShaney*, the only way to equalize the incentives on either side of a removal decision is to equalize down to nothing, eliminating the prospect of compensation for those individuals harmed by affirmative social worker conduct. In the next Part, I consider whether this loss is reason enough to reject absolute immunity as a means of correcting *DeShaney*'s skewed incentives.

IV. THE COMPETING CONCERNS OF COMPENSATION

If we do not reliably know that absolute immunity will be an effective incentive for social workers to act decisively, the argument goes, then let it not stand in the way of compensation for parents (and children)¹⁹⁴ who suffered unconstitutional infringements of their family integrity. Putting aside the fact that, on average, social workers get paid less than nurses, public school teachers, police officers, and firefighters,¹⁹⁵ a potentially serious objection to absolute immunity for caseworkers is that, regardless of *DeShaney*'s elimination of relief for Type II error, federal courts should continue to provide compensation for families harmed by Type I error. Absolute immunity, after all, insulates deliberate, even malicious violations of constitutional rights¹⁹⁶ not only from liability, but from the scrutiny of the adversarial process. Even without absolute immunity, social workers would still be entitled to claim the defense of qualified immunity, protecting them from reasonable mistakes about what the law requires¹⁹⁷ and providing insulation from personal liability unless they violated a federal right that was clearly established at the time of the challenged conduct.¹⁹⁸ The Supreme Court

194. The extent to which children's rights intersect with their parents' rights has been the source of much judicial and scholarly comment. Some courts have held that a child's right to family integrity is concomitant with that of a parent. *See, e.g., Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 & n.46 (5th Cir. 2000). Scholars have noted that a parent's liberty interest in the care, custody, and management of her child also functions to protect a child's interest in remaining with her biological parent. *See Huntington, supra* note 14, at 644 n.29. The Vermont Supreme Court has articulated the right in a way that captures this intuition: "the freedom of children and parents to relate to one another in the context of the family, free of governmental interference . . ." *In re N.H.*, 373 A.2d 851, 856 (Vt. 1977).

195. *See AM. PUB. HUMAN SERVS. ASS'N, supra* note 159, at 19–20.

196. *See Johns, supra* note 73, at 55.

197. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

198. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987); *Harlow v. Fitzgerald*, 457 U.S.

has expansively described qualified immunity as providing “ample protection to all but the plainly incompetent or those who knowingly violate the law.”¹⁹⁹

We have to ask: Why is qualified immunity not the better balance between the need to protect social worker decisionmaking and the goal of compensating individuals harmed by unjustified intrusions on their family’s privacy? In this context, the fairest inquiry is not to compare the harsh results of absolute immunity with the results of qualified immunity, by which the latter seems to be the more moderate and balanced approach, but to compare qualified immunity with *DeShaney*’s absolute ban on liability for social workers whose transgression is a failure to act. In this very specific context, how could qualified immunity, with its intractable indeterminacy, be enough to counteract the very clear application of *DeShaney*’s rule?²⁰⁰

A. QUALIFIED IMMUNITY IS INDETERMINATE

That qualified immunity is indeterminate has been amply demonstrated by a number of legal scholars.²⁰¹ But for present purposes, there is perhaps no better illustration than that which appears in a periodical published for social workers. In an article explaining the difference between absolute and qualified immunity, and indicating in which jurisdictions each immunity defense may be used, the journal *Social Work* cautions its readers,

[S]ocial workers . . . should be aware that their actions will be scrutinized before the courts will rule that they have qualified immunity. . . . [S]ocial workers must present more than just mere testimony that they thought the actions taken were right or that their professional training required the actions taken. They must convince a judge that their conduct did not violate clearly established rights that a reasonable person would have known.²⁰²

800, 818 (1982). The Supreme Court has described qualified immunity as a “fair warning” standard. See *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As articulated by one lower court, “[public] [o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.” *Maciarrello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

199. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

200. That *DeShaney*’s rule is clear in application, at least in relation to other doctrines we might identify, is borne out by an examination of the cases in which it has been held to govern. See *supra* note 41.

201. See, e.g., *Chen*, *supra* note 150, at 263 (“[T]he Supreme Court has crafted this qualified immunity standard into a broad set of general guidelines that require lower courts to analyze immunity claims on a case-by-case basis.”).

202. Rudolph Alexander, Jr., *Social Workers and Immunity from Civil Lawsuits*, 40 *SOCIAL WORK* 648, 653 (1995). The National Association of Social Workers, the organization that publishes the journal, describes the journal as follows:

Social Work is the premiere journal of the social work profession. Widely read by practitioners, faculty, and students, it is the official journal of NASW and is provided to all

This is, all told, a pretty accurate description of qualified immunity.²⁰³ Qualified immunity is highly fact-dependent, requiring the introduction of often voluminous amounts of evidence²⁰⁴ and correspondingly lengthy pretrial and discovery proceedings.²⁰⁵ Not only does the specter of prolonged scrutiny loom large, but social workers are correctly advised that their actions will not withstand scrutiny merely on the basis of good faith or professional judgment.²⁰⁶ Consequently, this brief description of qualified immunity, targeted towards social workers seeking to understand a conceptually difficult form of protection from liability, is not particularly reassuring.

The rejoinder, of course, is that we do not want qualified immunity to be overly reassuring; indeed, one of the goals of official liability, even in its qualified form, is to deter unconstitutional conduct.²⁰⁷ But this is

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203. The language of this excerpt suggests that the social worker defendant has the burden of establishing an entitlement to qualified immunity. It is quite right that qualified immunity is an affirmative defense and thus, the defendant has the burden of raising it; however, the circuits disagree as to which party has the ultimate burden of proof. The majority of circuits hold that once the defendant has raised the qualified immunity defense, the burden then shifts to the plaintiff to demonstrate that the defendant violated a constitutional right that was clearly established at the time of the alleged conduct. See MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 151 (2d ed. 2008). The Second Circuit, however, requires the defendant to bear the burden of both pleading and proving an entitlement to qualified immunity. See *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997).

204. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) (“[R]easonableness analyses inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context. The fact-intensive nature of these inquiries is exacerbated by the predominance of multifactored balancing tests in substantive constitutional law.”). Chen posits that the doctrine has become “not only internally inconsistent, but also extraordinarily difficult and costly to administer.” *Id.* at 230–31.

205. In *Mitchell v. Forsyth*, for example, pretrial proceedings and discovery lasted five and a half years. 472 U.S. 511, 515 (1985).

206. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982). Qualified immunity previously included both a subjective and an objective component; the Court abandoned the subjective good faith inquiry, because it made the doctrine too difficult to adjudicate at early stages of litigation. See *id.* While professional judgment is an element of some substantive constitutional inquiries, it is not a predicate for qualified immunity. *Id.*

207. Chen, *supra* note 150, at 263 (“Damages serve the complementary objectives of compensating the constitutional tort victim and of deterring not only the specific defendants but also other public officials from committing similar constitutional infractions in the future.”); James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 400 (2003) (“Theoretically, constitutional tort actions should deter constitutional violations by raising their cost. If government officials commit constitutional torts, they will be subject to suits and forced to pay damage awards. By making conduct that violates the Constitution more costly, damage awards should

what makes qualified immunity a poor counterweight against *DeShaney*'s markedly skewed incentives.²⁰⁸ *DeShaney* completely eliminates liability for all failures to intervene; it functions as a one-sided absolute immunity, providing total insulation for inaction. Qualified immunity, on the other hand, at least theoretically retains enough of a threat to deter some subset of removals.

B. COMPENSATION FOR PARENTS BRINGING SUIT UNDER A QUALIFIED IMMUNITY REGIME IS NONETHELESS EXTREMELY DIFFICULT TO ACHIEVE

We might begrudgingly accept this uneven state of affairs—an absolute ban on omission-liability paired with a qualified defense to act-liability—in the name of providing some compensation to those harmed by affirmative conduct from overzealous caseworkers. Qualified

increase the incentive of government officials to avoid such conduct. As a result, fewer individuals should be subject to constitutional rights deprivations.”); see also Thomas E. O’Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 767 (2004) (asserting that damage suits against government officials deter unlawful conduct). But see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) (arguing that the deterrence effects of constitutional tort actions are limited).

208. This same sort of indeterminacy is what makes insurance and indemnification policies inadequate responses to the incentive problem. Although these arrangements vary widely from state to state, they typically contain exclusions for actions committed in bad faith, variously phrased as “actual fraud, corruption, or malice”; “willful or wanton acts or omissions”; “willful misconduct”; “malice or criminal intent”; “malicious or fraudulent acts”; “gross negligence, fraud or malice” and so on. See SCHUCK, *supra* note 163, at 87 (internal quotation marks omitted). As Schuck argues:

These exclusions, of course, are a source of great uncertainty for officials who face litigation, as they create potentially large lacunae in indemnification schemes. If denial of indemnification could be surgically limited to truly *malicious* officials held liable under § 1983 (or under state law), wrongdoing could be deterred with little or no cost to vigorous decisionmaking. But where bad faith is not restricted to actual malice but can be based upon other factors about which officials may bear the burden of proof under a decidedly amorphous judicial standard, the threat to vigorous decisionmaking may be great.

Id.; see also Gilles, *supra* note 162, at 30–31 (“[I]ndemnification provisions are themselves wrought with uncertainty and difficulties. . . . [I]ndemnification statutes invariably afford the municipality the unilateral option of disclaiming coverage in broad categories of cases.”). For a rather counterintuitive take on the incomplete nature of indemnification, see K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 850 (7th Cir. 1990). Judge Posner begins by arguing that the familiar justification for official immunity becomes strained when a “governmental entity indemnifies its employees for damages and other expenses that they incur in defending against suits that complain about their performance of official duties.” *Id.* He recognizes that “[t]he indemnity is not always complete, and some governmental entities provide no indemnity, the federal government being a prominent example.” *Id.* Judge Posner then suggests:

[I]f the public employer itself, by refusing to indemnify its employees for torts committed in the course of public employment—or the legislature, by refusing to authorize indemnity, out of concern with the public fisc—manifests indifference to the disincentive effects of tort liability, it may be questioned whether the courts should worry about those effects and seek to offset them.

Id.

immunity, however, is becoming an increasingly difficult hurdle for plaintiffs to overcome. The Court has made it clear that it views qualified immunity not merely as immunity from damages, but as an immunity from suit,²⁰⁹ and the Justices have continually reworked and adjusted the doctrine to satisfy that objective. An important example is the availability of interlocutory appeal from denials of qualified immunity,²¹⁰ a procedural innovation that keeps § 1983 plaintiffs away from juries.²¹¹

Added to this are decisions that occupy the nether region between procedural and substantive; recall that for a plaintiff to overcome qualified immunity, the constitutional right she is asserting must have been clearly established at the time of the alleged violation.²¹² In elaborating on this requirement, the Supreme Court has cautioned that the right in question must have been established in a fairly particularized sense:

[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.²¹³

While the Court rejected a circuit court's requirement that the facts of existing precedent be "materially similar,"²¹⁴ it has demanded close factual correspondence between the preexisting law invoked by a plaintiff and the facts of her own case.²¹⁵

Thus, the first challenge for a parent who seeks damages against a social worker is the same as that of any § 1983 plaintiff: She might be the first to show up in court with her particular type of constitutional challenge.²¹⁶ In fact, even if other plaintiffs have previously asserted such a claim, she may not be able to point to clearly established law; if courts

209. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

210. *Id.* at 527; see also *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996); *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (recognizing *Mitchell* as establishing that interlocutory appeal is appropriate where the question to be decided is legal, not factual).

211. See Mark R. Brown, *The Rise and Fall of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 194-96 (2008); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 21-22 (1997); Allen H. Denson, Comment, *Neither Clear nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 762 (2008).

212. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

213. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citation omitted).

214. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

215. See *id.* at 739-41.

216. See, e.g., *Kiser v. Garrett*, 67 F.3d 1166, 1174 (5th Cir. 1995) (reasoning that where plaintiff's father asserted that his due process rights were violated by the social workers' failure to disclose exculpatory evidence, even if that right existed, it was not clearly established at the time of the state court custody proceedings).

faced with that constitutional claim have previously declined to elucidate the contours of a right,²¹⁷ it may well remain insufficiently established for her to overcome qualified immunity. At best, she may obtain a ruling vindicating her assertion that her constitutional rights were violated,²¹⁸ but she will not receive damages from the individual official who caused the constitutional deprivation.²¹⁹

Parents seeking damages for claims arising from child protection proceedings face an even steeper climb, arising out of the particular constitutional right they seek to vindicate. Unless they can successfully assert that their child was seized in violation of the Fourth Amendment's reasonableness requirement,²²⁰ or that the removal of their child was not accompanied by constitutionally adequate procedural safeguards,²²¹ parents will, by and large, rely on substantive due process, arguing that the state's intervention violated their fundamental liberty interest in the care and custody of their children.²²² The Supreme Court first identified such a right more than eighty years ago, along with the corresponding acknowledgment that states nonetheless retain a great deal of authority under their police power to regulate the physical, mental, and moral

217. To address concerns that the law would never develop if courts could repeatedly refuse to state whether a certain type of conduct was unconstitutional, the Supreme Court suggested and then required that lower courts first decide whether the plaintiff had suffered a constitutional violation while assessing a defendant's entitlement to qualified immunity. See Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53, 53–54 (2008). Only if the defendant's conduct was determined to be unconstitutional would the court then proceed to inquire whether that was clearly established at the time of the challenged conduct. *Id.* The "order-of-decisionmaking" rule was widely criticized, see *id.* at 54, and the Court recently abandoned it in *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

218. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("The strip search of Savana Redding was . . . [unconstitutional], but petitioners . . . are nevertheless protected from liability through qualified immunity.").

219. Only under very limited circumstances might she obtain damages from the entity that employs the officer. States enjoy sovereign immunity from suits brought pursuant to § 1983. While qualified immunity protects only individual officials and not entities, there is no respondeat superior liability under § 1983; an agency or municipality thus can only be liable for damages if the constitutional violation occurred pursuant to official policy or custom. See Aviel, *supra* note 52, at 222–24.

220. The Third and Ninth Circuits have held that a social worker must satisfy the warrant and probable cause requirements to conduct a strip search of a child. See *Calabretta v. Floyd*, 189 F.3d 808, 817–18 (9th Cir. 1999); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989); see also *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407–08 (5th Cir. 2002) (stating that a social worker needs a warrant, the parent must give permission, or there must exist exigent circumstances to subject a child to a visual body cavity search); *Tenenbaum v. Williams*, 193 F.3d 581, 604–05 (2d Cir. 1999) (stating that social workers must obtain judicial approval to have physician perform gynecological exam on child without parental permission).

221. See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2d Cir. 1977); cf. *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) (noting that a procedural due process issue was raised by an agency's policy of removing a suspected parent from the family home, without any procedural safeguards, while child abuse investigations were pending).

222. See, e.g., *Abdouch v. Burger*, 426 F.3d 982, 987–88 (8th Cir. 2005).

well-being of their citizens.²²³ But it continually revisited the fraught relationship between a parent's liberty interest and the State's *parens patriae* authority in contexts that did little to illustrate the contours of the constitutional right, resolving disputes over parents' asserted prerogative to have their children learn a foreign language before the age of fourteen,²²⁴ attend private school,²²⁵ accompany a parent engaged in religious proselytizing,²²⁶ or withdraw from school after eighth grade to participate in the Amish community.²²⁷ In deciding these rather fact-specific cases, the Court continually reiterated the abstract principle that parents enjoy a fundamental right that is limited by the state's *parens patriae* obligation, but provided no analytical framework for how these interests should be balanced against each other when they were shown to be in conflict.

Although later cases gave rise to more workable principles with broader application, such as the notion that a state cannot terminate parental rights absent a showing of parental unfitness,²²⁸ these precedents still could be seen as falling short of providing the sort of "close factual correspondence" that would allow damages to be awarded to parents, who, for example, had their children returned to them following a prolonged and assertedly unjustified separation. If the Constitution forbids the state from terminating parental rights absent a showing of parental unfitness, what does it say to the State about the suspension of these rights when a child is temporarily placed in State custody over the objection of her parents? What sort of showing does that require? Does the State's demonstrative burden increase along with the length of separation?

Rather than attempting to venture some answers and await correction or confirmation from the Supreme Court, in a process that would eventually build a "clearly established" law of constitutional obligations in the child welfare context, many of the lower courts have concluded that the competing interests that need to be balanced against each other vitiate not only the existence but also the *possibility* of clear principles in this area.²²⁹ These opinions have suggested that the right to

223. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

224. *Id.* at 397.

225. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

226. *Prince v. Massachusetts*, 321 U.S. 158, 159-60 (1944).

227. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

228. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (reinforcing the idea, under the rubric of procedural due process and equal protection, that a parent's liberty interest is limited by the state's interest in child welfare, and suggesting that the State may not interpose itself simply because it has a different idea of what is best for the child, but rather must justify its intervention by a showing of harm).

229. *See Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1023 (7th Cir. 2000) (citing *Tenenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999); *Kiser v. Garrett*, 67 F.3d 1166, 1169-74 (5th Cir. 1995); *Doe*

family integrity is *inherently* nebulous, such that any alleged constitutional violation stemming from a child's removal "will rarely—if ever—be clearly established."²³⁰ In gearing up for such a conclusion, a court begins by noting that a parent's liberty interest in the care and custody of her children is limited by the state's "potentially conflicting, compelling interest in the safety and welfare of the children."²³¹ The court then observes that it must "weigh the interests of the state and child against those of the parents to determine whether a constitutional violation has occurred."²³² The disabling conclusion for the parent is the notion that "[t]he need to continually subject the assertion of this abstract substantive due process right to a balancing test . . . makes the qualified immunity defense difficult to overcome."²³³

It is rather remarkable to witness federal courts repeatedly suggesting that as a matter of law, a constitutional right is beyond workable articulation—that not only was it not clearly established at the time of the alleged violation, but it never will be. This deserves its own entry in the "right without remedy" pantheon.²³⁴ At least one court has made explicit the logical conclusion: If the courts cannot articulate what the Constitution requires in these circumstances, then it will, as a matter of course, be "difficult, if not impossible, for officials" to know what they must do to comply.²³⁵ The underlying premise, that not only will the law never be clear enough to justify damages, but that violations of this very theoretical right are inevitable, is troubling. In short, in the unanswered questions left by the Supreme Court's parental rights jurisprudence, lower courts have found a license to declare the right intrinsically unknowable and therefore unredressable through damages actions.²³⁶

Thus, qualified immunity looks capacious next to absolute immunity, especially from the social worker's perspective, but it offers very slim prospects for recovery in the child welfare context, producing exactly that dynamic Schuck described twenty years ago: "[T]he subjectively perceived risks of litigation loom far greater than the

v. Louisiana, 2 F.3d 1412, 1417–18 (5th Cir. 1993); Frazier v. Bailey, 957 F.2d 920, 929–31 (1st Cir. 1992); Hodorowski v. Ray, 844 F.2d 1210, 1216–17 (5th Cir. 1988)).

230. *Brokaw*, 235 F.3d at 1023.

231. *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005) (citing *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995)).

232. *Id.*

233. *Id.* (quoting *Manzano*, 60 F.3d at 510) (internal quotation marks omitted).

234. See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 3–4 (2002) (reviewing doctrines that drive a wedge between a violation of rights and a remedy for the violation).

235. *Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992).

236. The Second Circuit has made an effort to articulate constitutional standards in this context. See *Wilkinson v. Russell*, 182 F.3d 89, 103 (2d Cir. 1999) (relying on an objective reasonableness standard).

objective probability of liability alone would suggest.²³⁷ The indeterminacy of qualified immunity makes it burdensome to litigate and leaves open the possibility, however remote, of damages. For this reason, qualified immunity fails to assuage whatever fear of liability might be motivating social workers to inaction, while at the same time failing to provide compensation to the vast majority of families wronged. This is the worst of possible worlds, generating the overdeterrence that has worried courts and scholars about constitutional tort liability,²³⁸ without the compensation that is supposedly its primary objective.²³⁹ Against this very low bar, absolute immunity starts to look a little better, for all of its troubling aspects.

C. WHILE ABSOLUTE IMMUNITY WOULD ELIMINATE COMPENSATION FOR A SUBSET OF PLAINTIFFS WHO COULD OVERCOME QUALIFIED IMMUNITY, *DESHANEY* REQUIRES THIS PAINFUL CHOICE

To this point, I have argued that our concern that absolute immunity eliminates compensation for victims of constitutional torts is more powerful in the abstract than when evaluated against the actual prospects of recovery under a qualified immunity scheme. But there are families who would be able to recover damages for violations of their constitutional rights under a qualified immunity scheme.²⁴⁰ Even if we were to focus on this narrow swath of families for whom absolute immunity eliminates recovery that would otherwise be available, absolute immunity remains the necessary but painful choice.

To see why, it is useful to break down the various categories of individuals who have rights against the State when it comes to social worker intrusion into the family. There are abused children and their parents, and there are non-abused children and their parents.²⁴¹ The constitutional rights that might form the basis of a § 1983 claim against a social worker, limited as they are to negative liberties against state interference, are not of equal value or force to these different categories of rights-holders.²⁴² Children in abusive homes benefit very little from

237. SCHUCK, *supra* note 163, at 80–81.

238. *See supra* note 162.

239. *See Felder v. Casey*, 487 U.S. 131, 139 (1988).

240. *See, e.g., Currier v. Doran*, 242 F.3d 905, 923–24 (10th Cir. 2001) (holding that one of the defendants could be liable because the relevant law was clearly established).

241. The reader will quickly see that for this Part, I do not engage two enormously difficult questions: (1) where the line is drawn, and (2) how the social worker is supposed to know which families are on which side of the line. I simply assume that families fall into one category or the other, so as to illustrate that (1) constitutional rights operate differently on either side of the line, and (2) what happens on one side of the line may affect what happens on the other side of the line in harmful and unintended ways.

242. “Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they

their negative liberties.²⁴³ A brutalized four-year-old's right to be left alone is a meager right indeed. It is worse than meager; it is meaningless, even cruel.²⁴⁴

Negative liberties are worth more to their parents, of course; indeed, an important body of scholarship criticizes our scheme of negative liberties on the grounds that such a regime insulates private hierarchies and empowers the strong to subordinate the weak within these private spheres.²⁴⁵ On the other hand, most abusive parents are desperately poor and themselves would benefit from affirmative state assistance rather than from the presumption of privacy that negative liberties provide.²⁴⁶

In any event, putting aside the somewhat difficult question of whether abusive parents benefit or suffer from the insulating effect of negative liberties,²⁴⁷ as a doctrinal matter, abusive parents forfeit their negative liberties against state intervention upon harming their child. As discussed above, the liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children, particularly where the children need to be protected from their own

protect." *Carey v. Phipus*, 435 U.S. 247, 254 (1978).

243. The Supreme Court has instructed that "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

244. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 74–75 (1991) ("By exalting autonomy to the degree we do, we systematically slight the very young, the severely ill or disabled, the frail elderly, as well as those who care for them—and impair their own ability to be free and independent in so doing. . . . The exceptional solitariness of the American rights-bearer is but one aspect of the hyperindividualism that pervades our American right dialect.").

245. See West, *RIGHTS*, *supra* note 62, at xv; see also Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 421 (2005) ("Enabled and then protected by liberalism's doctrine of parental autonomy, adults sometimes cause great harm to their children."); Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 569 (1992) ("Attempts to accommodate family autonomy and privacy interests have significantly compromised the protection of our children . . ."); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497, 511 ("As women and children know best, family privacy can be oppressive as well as protective.").

246. See Garrison, *supra* note 17, at 1790–91 ("[C]hildren served by the child welfare system . . . typically live in extreme poverty, in inadequate housing, with inadequate social and community supports. Most parents show massive disability in their functioning, and many are mentally ill, alcoholic, or addicted to drugs. Frequently, they or their children have chronic physical illnesses. They are seldom employed and poorly educated. Multiple stresses and severe deprivation overwhelm these families, with the result that many parents become unable to cope with their children." (footnotes omitted)).

247. See James G. Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053, 1071–72 (1999) ("[P]arents do not benefit from being able to abuse their children. . . . [W]here parents' impulses toward abusive conduct are destroying their relationship with their children, the parents themselves would benefit from intervention that can help them get on a different track, a track that leads to a mutually rewarding relationship with their offspring. It is therefore a mistake, I think, to view state intervention in abuse situations as always 'for' the child and 'against' the parent. Parents share with children an interest in receiving appropriate state intervention.").

parents.²⁴⁸ While a parent's liberty interest in the care of her children does not "evaporate" simply because she has not been a "model parent,"²⁴⁹ no court would hold that a truly abusive parent whose child is removed from her custody has suffered an unconstitutional intrusion on the right to family integrity. However unsure we might be about the parameters of the right, we know that it simply does not include the right to abuse one's children without state intervention. In short, it is not for these families that we need to maintain compensatory damages; the State's intervention does not give rise to a constitutional cause of action in these scenarios.

On the other hand, children in non-abusive homes do benefit enormously from their negative liberties, as do their parents. Negative liberties keep the state from separating these families without cause. As some family preservationists have reminded us so passionately, an unwarranted intrusion is not merely a violation of the parents' rights against the state, it is a serious threat to the child's well-being and a predicate for potentially devastating harms.²⁵⁰ Negative liberties block the meddlesome State from intruding on family integrity, a right that is truly precious in those families for whom there is insufficient cause to intervene. Absolute immunity would prevent these children and their parents from seeking damages for their wrongful separation, and that is a cost that cannot be taken lightly, however unlikely it might be that these families could surmount the defense of qualified immunity and actually receive a judgment entitling them to compensation from the offending social worker.

The problem, as illustrated by the vignette at the very beginning of this Article, is that it is not always easy to tell which families fall into which category; in fact, it can be extraordinarily difficult. And if immunity doctrines work in the way the courts and many scholars have assumed,²⁵¹ then the availability of damages for non-abused children who were wrongfully removed will chill social worker conduct with regards to abused children who *should be removed*. The latter group suffers from the fact that after *DeShaney*, social workers face no federal liability for failing to act. Since liability attaches only to affirmative conduct, social workers might reflect unduly on the damages available to non-abused children, erroneously removed from their homes, before making a decision to remove an abused child.

248. See *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005).

249. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

250. See, e.g., MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 192-96 (2005) ("Children do not thrive in foster care. The state is a poor substitute for one's family.").

251. See *supra* note 162.

The question then becomes whether abused children have a greater claim to protective removal than non-abused children and their parents have to compensatory damages. I argue that the unfortunate answer is yes, and this is the essence of my contention: Absolute immunity shields the abused child's claim to protective removal from what might otherwise be the effect of *DeShaney's* regrettable calculus. If this sounds like the sort of "freewheeling policy choice"²⁵² that the Supreme Court has professed to eschew in its immunity jurisprudence, well, perhaps it is.²⁵³ But in *DeShaney's* long shadow, what a painfully unremarkable, unambitious policy choice it turns out to be: simply, that a social worker should face equal incentives on both sides of a removal decision.

V. DELINEATING THE PARAMETERS

Once the choice for absolute immunity is made, it is critical to circumscribe its parameters. As discussed in preceding Parts, *Butz v. Economou*, the one case in which the Supreme Court has explicitly extended absolute immunity to officials based on function rather than job title, has done little to illuminate for the lower courts any viable method for assessing whether a particular type of public official engages in conduct that is functionally analogous to that of a prosecutor.²⁵⁴ But it does provide some guidance as to the aspects of a social worker's role for which absolute immunity might be appropriate. The Court placed a great deal of emphasis on the procedural safeguards in administrative adjudications that enhance reliable decisionmaking and protect constitutional rights in the first instance, reducing the need for private damages actions after the fact as a means of "controlling unconstitutional conduct."²⁵⁵ These safeguards—opportunities to present evidence, adversarial testing, adjudication by a neutral decisionmaker, and appellate review—are essential predicates to an absolute immunity scheme that maintains a minimal commitment to constitutional rights.²⁵⁶ If there is any sort of limiting principle to be found in the Court's pronouncement that absolute immunity covers only that conduct "intimately associated" with judicial proceedings, it inheres in the

252. *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

253. See *Chen*, *supra* note 150, at 271 n.50 (reviewing scholarly work that characterizes the Court's immunity jurisprudence as "unabashedly policy-based").

254. See *supra* Part II.B.

255. See *Butz v. Economou*, 438 U.S. 478, 512 (1978).

256. See Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1279-95 (1975). Judge Friendly proposed the following as elements of a fair hearing: an unbiased tribunal; notice of the proposed action and the grounds asserted for it; an opportunity to present reasons why the proposed action should not be taken; the right to call witnesses; the right to know the evidence against one; a decision based only on the evidence presented; an opportunity for representation by counsel; the making of a record and a statement of reasons; public attendance; and judicial review. See *id.*

presence of these safeguards, which both describe, as a doctrinal matter, when absolute immunity attaches, and justify, as a normative matter, absolute immunity's affront to the principle that every violation of a legal right must have a remedy.²⁵⁷

In the child welfare context, then, absolute immunity would attach upon a social worker's formal initiation of dependency proceedings, in accordance with the procedures specified by state law. The immunity should include presenting evidence to support the petition, making recommendations to the court, and executing orders obtained as a result of the filing of the petition—including, most notably, a court's order to remove a child from her parent's home. The investigative conduct that precedes a social worker's decision to initiate judicial proceedings should remain outside the scope of absolute immunity. These investigations present the threat of serious invasions of privacy,²⁵⁸ are largely unsupervised by the courts, and do not trigger a right to counsel.²⁵⁹ For the same reasons, absolute immunity should not attach to warrantless emergency removals, or to those authorized following an *ex parte* hearing.²⁶⁰ As these emergency removals have been criticized as

257. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)). The rights-remedies gap in constitutional law is so pervasive, and has been so well documented, that Justice Marshall's famous pronouncement can hardly be invoked without a bit of irony. See, e.g., John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 (1999) (“Ever since John Marshall insisted that for every violation of a right, there must be a remedy, American constitutionalists have decried the right-remedy gap in constitutional law.”). That said, some doctrines offend this principle more nakedly than others, absolute immunity being chief among them.

258. Coleman, *supra* note 245, at 436–41.

259. Buss, *supra* note 116, at 433–34. (“Investigations of abuse and neglect reports are routinely done by case workers with little or no specialized training in how to approach the families, how to conduct an effective and appropriate investigation, and how to assess the information uncovered. These investigations are inherently coercive because parents know that whether or not they can keep their children hangs in the balance. Cooperation is therefore at a premium. In this context, it is not surprising that parents who under most circumstances would never consent to a strip search of their children by a stranger, would give their consent to an abuse investigator, for fear that failure to agree would translate into an admission that they had something to hide. Parents are forced to respond to these coercive investigations without the assistance of lawyers or the supervision of judges.”).

260. This stays true to the Supreme Court's own parsing of the difference between a police officer applying for a warrant and a prosecutor seeking an indictment. See *Malley v. Briggs*, 475 U.S. 335, 342–43 (1986); see also *Kalina v. Fletcher*, 522 U.S. 118, 128 (1997). After the Court announced in *Imbler v. Pachtman* that prosecutors have absolute immunity for functions intimately associated with the judicial process, 424 U.S. 409, 431 (1976), a police officer who had been sued for obtaining a search warrant that was allegedly unsupported by probable cause argued that this was conduct intimately associated with the judicial process and thus, covered by absolute immunity under *Imbler's* rationale. See *Malley*, 475 U.S. at 341–42. The Supreme Court rejected the analogy on the grounds that applying for a search warrant is too far removed from the actual criminal prosecution to be covered by prosecutorial immunity:

We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the

particularly prone to error, traumatic for children, and difficult to reverse in subsequent stages of the child protection process, we might be interested in encouraging social workers to forego these emergency removals in the majority of cases.²⁶¹ Similarly, we might welcome incentives for social workers to reduce reliance on informal “voluntary” arrangements that operate in coercive ways and remain outside the scope of judicial scrutiny and its attendant safeguards.²⁶²

A shrewd observer might note that a social worker would thus have an incentive to hurry to the courthouse, cutting short an investigation for which she is protected only by qualified immunity and rushing to file a petition that brings her the full protection of absolute immunity.²⁶³ But this contains its own check: At least in theory, a petition that is unsupported by sufficient evidence will be vulnerable to serious challenge by a parent’s attorney, or the child’s guardian ad litem, and subject to dismissal by the dependency court judge. That is why it matters that absolute immunity would insulate only the forms of social worker conduct that are judicially supervised and reflect indicia of the adversarial process.²⁶⁴

Also exempted from absolute immunity should be any and all failures by the State to protect the welfare of children in the State’s foster care system.²⁶⁵ Both the Fourth and the Seventh Circuits provide examples of this approach, extending absolute immunity to social workers for the decision to initiate child dependency proceedings²⁶⁶ but applying qualified immunity to claims against social workers arising from harms suffered by children while in foster care.²⁶⁷ While the Fourth

judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner’s analogy, while it has some force, does not take account of the fact that the prosecutor’s act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Id. at 342–43.

261. See Chill, *supra* note 16, at 541.

262. See Katherine C. Pearson, *Cooperate or We’ll Take Your Child: The Parents’ Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 836 (1998).

263. Thanks are due to Alan Chen for this observation.

264. What’s trickier is what happens when social workers present fabricated evidence. The Ninth Circuit has recently narrowed the scope of social worker immunity to eliminate this type of conduct from absolute protection. See *Beltran v. Santa Clara Cnty.*, 514 F.3d 906, 908 (9th Cir. 2008) (en banc).

265. The problem of children being abused and neglected while in foster care is grave, growing, and well documented. See, e.g., Huntington, *supra* note 14, at 662.

266. See *Millsbaugh v. Cnty. Dep’t of Pub. Welfare*, 937 F.2d 1172, 1176 (7th Cir. 1991); *Vosburg v. Dep’t of Soc. Servs.*, 884 F.2d 133, 137–38 (4th Cir. 1989).

267. See *White ex rel. White v. Chambliss*, 112 F.3d 731 736–37 (4th Cir. 1997); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990).

Circuit has done so without explaining this distinction, the Seventh Circuit has provided some insight, noting that state courts rarely, if ever, delineate the particular foster care home or institution into which a child should be placed.²⁶⁸ The inspection and licensing of foster homes, the initial placement of a child in a particular home, the transfer of a child from one foster home to another, and all too often, to many more, all take place outside the purview of judicially supervised, adversarial proceedings with the safeguards extolled in *Butz*.²⁶⁹ A social worker's management of a child's foster care placements is administrative conduct that is too far removed from the judicial process to be covered by absolute immunity.²⁷⁰

This proposed framework has two serious shortcomings. First, it rests on assumptions that are only as strong as judicial review itself. Absolute immunity is a judicially created doctrine and reflects a deep trust in the adversary process conducted under judicial supervision; it requires an abiding faith in the procedural safeguards that attend judicial proceedings. It has been amply demonstrated that this faith is not always justified; dependency court, in particular, has been described as a "grossly overburdened and underfunded system that resides at the bottom of the judicial hierarchy."²⁷¹ A Third Circuit case, for example, reveals that five years of judicial supervision by the Chester County Court of Common Pleas were insufficient to alert the court to the fact that social workers recommended against family reunification out of personal animosity, rather than on the basis of professional concerns for the well-being of the child.²⁷² Judges, like social workers, err grievously in the other direction as well, granting inexplicably unfounded requests to discharge dependency petitions that are supported by overwhelming evidence.²⁷³ The trust placed in judicial review is obviously and inescapably aspirational, but it is an aspiration of almost unparalleled importance in our constitutional system. It is the essence of due process; it is consistent with our constitutional values and traditions that absolute immunity for social workers, as well as other officials, be limited to proceedings that are conducted under judicial review.

The more serious shortcoming, in my view, is that this parsing of the various stages of a social worker's professional involvement with a child

268. *K.H.*, 914 F.2d at 868 (Coffey, J., concurring in part and dissenting in part).

269. *Cf. Butz v. Economou*, 438 U.S. 478, 512 (1978).

270. *See supra* Part II.

271. Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 *DENV. U. L. REV.* 1, 50 (2001).

272. *See Ernst v. Child & Youth Servs.*, 108 F.3d 486, 489–90, 504 (3d Cir. 1997).

273. *See S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (affirming dismissal even though plaintiff alleged defendants knew that her father allowed her to have contact with a known pedophile).

comes at some cost to clarity, as has been embarrassingly evident with prosecutorial immunity.²⁷⁴ The more complicated a regime, the more uncertainty it produces with respect to the types of conduct that engender each level of protection, and the less likely it is to achieve its objectives. If child welfare workers do not understand which of their functions are absolutely protected and which might require them to “convince a judge that their conduct did not violate clearly established rights that a reasonable person would have known,”²⁷⁵ the absolute immunity they receive for some of their conduct will serve only as a barrier to relief, rather than as an instrument for vigorous decisionmaking.²⁷⁶

As awkward as prosecutorial immunity has become, however, the Court retains it because it is so committed to the position that prosecutors require freedom from liability to exercise fully their independent judgment about who and when to prosecute and how to present a case in court.²⁷⁷ And the Court retains the functional analysis, in spite of the confusion it has generated, to avoid overbreadth—to allow damages suits to proceed against prosecutors for conduct that does not directly implicate these concerns.²⁷⁸ This same tension is in play for social workers who are making a decision about whether to initiate child dependency proceedings, with the added dynamic that, unlike prosecutors, who represent the public at large, social workers are tasked with protecting specific identified children, known to the State to be vulnerable, at risk of harm, and in need of care.

For all its complexity, the absolute immunity doctrine allows courts to resolve most claims that fall within its scope on the pleadings.²⁷⁹ To the extent that qualified immunity lacks the modicum of clarity provided by

274. Prosecutorial conduct covered by absolute immunity includes initiating criminal proceedings, knowingly introducing false testimony, and suppressing exculpatory evidence. *See supra* Part II.A. Actions taken by prosecutors that have not been categorized under the prosecutorial mantle, and which are subject to a qualified rather than absolute immunity defense, include shopping for an expert witness who would give the desired opinion regarding some forensic evidence, giving a press conference announcing that there was evidence tying the defendant to the murder, and fabricating evidence as part of the pre-prosecution investigation. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993). Perhaps the hallmark of absurdity is *Burns v. Reed*, in which the Supreme Court determined that a prosecutor was entitled only to qualified immunity after advising a police officer that a suspect could be hypnotized but was entitled to absolute immunity for introducing into evidence at trial the confession produced by the selfsame hypnosis. 500 U.S. 478, 492, 496 (1991).

275. *See supra* note 202.

276. *See* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 45 (1992) (“Call it the ‘audience principle.’ It holds that the complexity of a rule should be tailored to the sophistication and cost-bearing capacities of those who will have to interpret and implement it.” (citing Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 5 (1974))).

277. *See supra* Part II.A.

278. *See Kalina v. Fletcher*, 522 U.S. 118, 126 (1997).

279. *See Chen, supra* note 204, at 234–35.

absolute immunity, without the corresponding prospect of actual recovery for parent victims of unconstitutional conduct, it is worse.²⁸⁰

CONCLUSION

In arguing that social workers should be entitled to absolute immunity for their decisions to seek custody of an endangered child, I have no intention of obscuring absolute immunity's shortcomings. Indeed, as I have discussed at length, absolute immunity for social workers, as articulated by the courts that have chosen it, is predicated on a weak and unexamined analogy to prosecutors. The policy arguments in its favor are premised on sixty years of unsubstantiated judicial and scholarly intuition about what motivates and inhibits public officials in the discharge of their duties. These intuitions may or may not reflect the truth about prosecutors in the first place and, whether true or untrue with regards to prosecutors, may be entirely different for child welfare workers. What we do know is that prosecutorial immunity has been more difficult to adjudicate and administer than it initially promised to be. And although qualified immunity presents nearly insurmountable hurdles for most parents seeking constitutional damages against social workers, there will be some cases in which the difference between qualified and absolute immunity will be outcome-determinative.²⁸¹ For these plaintiffs, absolute immunity eliminates not only damages relief, but also an opportunity to be heard about the constitutional violations they suffered.

My argument is simply that we should prefer these defects to a system that gives social workers reason to view intervention as a riskier endeavor than standing by and doing nothing.²⁸² To make peace with a system in which social workers can be held liable for removing a child from a potentially dangerous home but not for leaving him there, one would have to be willing to assert that social workers are completely impervious to the differential incentives created by such a lopsided liability scheme. I am willing to acknowledge this possibility. But in the absence of empirical evidence to support it, it is a bold and dangerous proposition. The cost of it being wrong—even for just one abused child whose overworked, underpaid caseworker is unreasonably afraid of being sued—is very high. In contrast, conferring absolute immunity on social workers in the limited way that I have proposed fits comfortably within current immunity jurisprudence and eliminates recovery for only that very narrow group of plaintiffs who would be able to surmount both the hurdle of qualified immunity and *DeShaney's* substantive limitations.

280. See *supra* Part IV.B.

281. See *supra* Part IV.C.

282. See *supra* Part I.

The essential point is this: Until we have reliable empirical data that tells us whether social worker decisionmaking is influenced by a fear of liability, we have to assume either that it is or that it is not. In my view, the vulnerability of the children who depend on this system makes the latter assumption unacceptable. We should strive to equalize the incentives on either side of a removal decision unless and until we know that such parity is unnecessary. Absolute immunity, for all its flaws, can restore that equipoise.
