Restoring Equipoise To Child Welfare

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Since the Supreme Court’s widely criticized decision in DeShaney v. Winnebago County Dept. 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 accounted for 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 presents an unacceptable inequity of incentives 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 it can correct this perilous imbalance.

I. INTRODUCTION: TWO TYPES OF ERROR

Imagine a child protection worker assigned to handle the following case. 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 worker that the injuries could not 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.

1 This example is modeled after a vignette described in Theodore J. Stein and Tina L. Rzepnicki, DECISION MAKING IN CHILD WELFARE SERVICES 69 (1984), which is offered to illustrate the importance of obtaining diagnostic assistance from third parties.

2 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 Larner, Carol Stevenson, and Richard Behrman, THE FUTURE OF CHILDREN 8 (1998).
This is the essence of child protection decision-making -- case after case after case. If it were possible even to envision a social worker whose decision-making 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. 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. If the bruises reflect a pattern of physical assault that the mother will not acknowledge and the 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.

In 2007, an estimated 3.2 million referrals, which included approximately 5.8 million children, were made to state child welfare agencies. Of these referrals, about 38% were screened out, meaning that they received no investigation or assessment. An estimated 794,000 children were found to be victims of maltreatment – about a quarter of those who received an investigation. Of these children, 59.0 percent of victims experienced neglect, 10.8 percent were physically abused, 7.6 percent were sexually abused, 4.2 percent were psychologically maltreated, less than 1 percent were medically neglected, and 13.1 percent were victims of multiple maltreatments, and 4.2 percent of victims experienced “other” types of maltreatment as “abandonment,” “threats of harm to the child,” or “congenital drug addiction.” Nat’l Clearinghouse on Child Abuse & Neglect Info., U.S. Dep’t of Health & Human Servs., Child Maltreatment 2007, available at http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf. (Hereinafter Child Maltreatment 2007). There is also evidence that a “substantial amount” of child abuse goes undetected by 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, 1 RUTGERS J.L. & PUB. POL’Y 177, 217-18 (2007).


Type I error is used to describe a false positive, whereas Type II error refers to a false negative. See, e.g., Robert J. Lukens, The Impact of Mandatory Reporting Requirements on the Child Welfare System, 5 RUTGERS J.L. & PUB. POL’Y 177, 210-211 (2007).

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 can be mitigated with assistance from the state in some form other than removing the child. Experts can (and do) disagree about what would be most beneficial to the child were this to be the 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.
Although it is plain that both false positives and false negatives can pose significant risk of harm to the child’s well-being, 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; 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. 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. 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 child welfare system is not working well enough for us to be sanguine about this inequity of incentives. By its very nature it serves society’s most vulnerable and dependent

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7 See supra Section IV.
11 States reported 1530 child maltreatment fatalities in 2006; in 2007 an estimated 1760 children died from abuse or neglect, over 75% of whom were under four years old. Shockingly, almost 14% of these victims were from families who were already known to CPS agencies: 12% 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. Child Maltreatment 2007. 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, 8 V A J. SOC. POL’Y & L. 165, 192 (2000). Because maltreatment tends to be under-reported on death certificates, the real toll is likely much higher than official reports suggest. See Marsha Garrison, Reforming Child Protection: A Public Health Perspective, 12 V A J. SOC. POL’Y & L. 590, 601 (2006)
members, and it is overburdened, underfunded, and utterly ill-equipped to predict, much less prevent, the harm that it is designed to address.\textsuperscript{12} 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 decision-makers by punishing only those 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,”\textsuperscript{13} and some very persuasive attempts have been made to transcend it\textsuperscript{14} – 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.\textsuperscript{15}


\textsuperscript{13}Clare Huntington, Rights Myopia in Child Welfare, 53 UCLA L. Rev. 637, 639-640 (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.” 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.”

\textsuperscript{14}See id. at 652-55 (canvassing alternatives to the preservationist-protectionist dualism) and at 672-699 (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. 1486 (2007).

argue here that this dispute is one of choice-of-error: no family preservationist would insist that children remain in the home of parents who starve, beat, and rape them, \(^\text{16}\) 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. \(^\text{17}\) What is being

\(^\text{16}\) Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 Geo.L.J. 1745, 1775 (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.”); Roberts, Supra note __ at 225 (“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.”).

\(^\text{17}\) 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.*, Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 Harv.L.Rev. 1716 (2000). 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.

fought over, essentially, is whether it is better to engage in removal that turns out to be
unnecessary or 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, but instead assert that
it does not make sense to subject only one type of social worker error to after-the-fact legal
scrutiny. After *DeShaney*, social workers do not have to answer for type II error as a matter of
substantive constitutional law. 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 it 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

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18 Type I error is used to describe a false positive, whereas Type II error refers to a false negative. *See, e.g.*, Robert J. Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System*, 5 *Rutgers J.L. & Pub. Pol’y* 177, 210-211 (2007).

19 For an exposition of the view that social workers should be more concerned about avoiding type II errors, see John R. Howard, *Rearranging DeShaney*, 16 *T.M. Cooley Law 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 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.
should be entitled when their conduct is challenged in federal court, a question that has received surprisingly little attention from scholars. 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. 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. At the very least, public officials may invoke the 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. While qualified immunity is the norm for executive officers, the Supreme Court has identified a subset of officials whose “special functions require a full exemption from liability.” I propose that social workers be included in the narrow group of officials who are entitled to absolute immunity for certain categories of conduct.

In Part II, I map out the constitutional framework, tracing DeShaney’s distorting effect on the landscape of child welfare decision-making. I argue that the particular vulnerability of


21 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: “[a]ny 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 States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…” 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 (1971).


25 As I will explain in detail in the next sections, some circuits have extended absolute immunity to social workers for conduct that can be analogized to the functions of a prosecutor. In these 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.
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 III, 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 IV, 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’s not fatal to my proposal. In Part V, 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 VI, I sketch out the parameters of my proposal, and finally, in Part VII, I conclude my reluctant defense of absolute immunity.

II. 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.” The origin of this principle is DeShaney v. Winnebago County Dept. of Social Services, in which the Supreme Court considered whether a child’s right to due process was violated by the Department’s repeated failure – in the face of overwhelming evidence – to protect him from his father’s violence. Joshua DeShaney was three years old when his stepmother first complained to the police that his father was hitting him. Randy DeShaney denied the allegations, and the Department took no further action until it was notified a year later that Joshua had been admitted to the hospital with multiple bruises and abrasions. 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. Although the DSS caseworker was informed a month later by emergency room personnel that Joshua had again sustained suspicious injuries, she concluded

26 See Bennet v. Philadelphia, 499 F.3d 281 (3d. Cir. 2007).
28 Id. at 192.
29 Id.
30 Id.
that there was no basis for action. Over the next six months, she did make monthly visits to the DeShaney home, during which she observed suspicious injuries on Joshua’s head and “dutifully recorded” her suspicions that “someone in the DeShaney household was physically abusing Joshua.” 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. 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. 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.

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.” The Court explained that 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.” Nor does the state trigger such an obligation simply by becoming aware of a child’s plight and “proclaiming by word and by deed its intention to protect him.”

The intervening years have illustrated in acute detail the harshness of DeShaney’s decree. Even where a social worker’s failure to protect a child from almost certain harm can be

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31 Id. at 192-93
32 Id. at 193
33 Id. These injuries included a cut forehead, bloody nose, swollen ear, bruises on both shoulders. See Robert G. Meyer and Christopher M. Weaver, LAW AND MENTAL HEALTH, A CASE-BASED APPROACH. (Guilford Press, 2006)
34 489 U.S. at 193.
35 Id. at 195.
36 Id.
37 Id. at 197.
38 See John R. Howard, Rearguing DeShaney, 18 T.M. COOLEY LAW REVIEW 381, 382 (2001) (“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-Create Danger Doctrine, 13 WM. & MARY BILL OF RTS. J. 1165, 1173 (2005) (noting
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. No extremity yields a different result, whatever might be in evidence regarding the child’s vulnerability, the quanta of certainty that might be ascribed to the social worker, or the horror of the ultimate violence preceding the filing of the constitutional tort action. In the face of very gruesome fact patterns courts remain confident are that they are faithfully adhering to DeShaney’s mandate, applying the law rather than reacting to the emotion engendered by a child’s suffering.

Beginning with DeShaney’s passionate dissenter, a well-developed body of criticism exposes the majority opinion’s many failings. Contrary to the original intent of the drafters of that “DeShaney seems to have sealed the fate of children’s protection claims against child welfare systems.”.

39 See, e.g., S.S. v. McMullen, 225 F.3d 960 (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. 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. The social workers also learned from numerous sources that the child’s father had allowed contact between Griffiths and the child on multiple occasions. 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, and less than three months later she was hospitalized with injuries sustained when Griffiths sodomized her.


41 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.”)

42 Justice Brennan wrote a dissent, in which Justices Marshall and Blackmun joined. 489 U.S. at Justice Blackmun also wrote a separate dissenting opinion.

43 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 Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 103 Harv. L. Rev. 1, 10 (1989) (characterizing the majority’s view of the state as “stilted” and primitive’); Aviam Soifer, Moral Ambition, Formalism, and the “Free World” of DeShaney, 57 Geo. Wash. L. Rev. 1513, 1514 (1989) (arguing that “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.”); Theodore Y. Blumoff, Some Moral Implications of Finding No State Action, 70 Notre Dame L.
the 14th Amendment, who contemplated a federal constitutional right to protection from private violence, the majority insists that the Constitution operates only to constrain -- and never to compel -- government action. As Susan Bandes has argued so forcefully, the majority invests 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." 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, the majority presents a distorted version of the state's relationship with Joshua that obscures the full sequence of the state's choices and the attendant consequences. This elision of the affirmative aspects of the state's involvement with Joshua smooths 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." 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.

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 decision-making. 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

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45 489 U.S. at 195-96.
47 DeShaney, 489 U.S. at 201.
48 See Bandes, supra note 46 at 2288-2290.
49 I've 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: "...the 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." See 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).
50 DeShaney, 489 U.S. at 198.
51 Id. at 198-200.
existence “in the free world.” Painfully absent from the majority opinion is an acknowledgement that a three-year old returned to an abusive home is as dependent on the state as any prison inmate or mental patient in the state’s custody.

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. In fact, although much remains unclear about the precise parameters of parental rights, 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.” When social workers intervene 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.

This is as it should be, 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

52 DeShaney at 201.
53 See also Blumoff, supra note __ at 130, arguing that “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?”
54 See Duchesne v. Sugarman, 566 F.2d 817 (2d. Cir. 1977) – the unjustified refusal to return a child to her parent’s custody.
55 See infra Section IV.
57 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.”
58 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, RIGHTS xiv-xix (2001) (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.” West at xx.
home than to attempt to remove him.” Margo Schlanger has captured this dynamic as well, noting that “police 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.”

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 end of the vulnerability spectrum. They are peculiarly dependent on vigorous, unimpeded decision-making that is unsullied, to the 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, they could face federal liability for an unjustified removal or for an unjustified failure to act. On the threshold of decision their personal liability would be in equipoise, even if the affirmative constitutional duty for social workers were as modest as it is for the administrators of mental health facilities - that the record must show the exercise of professional judgment. 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 section 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 what *DeShaney* provides for their omissions.


61 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. 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.” Bandes, supra note __ at 2332. She posits that in *DeShaney* “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.” Bandes, supra note __ at 2333.

III. 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. The Court purported to be doing the same when it considered whether prosecutors were shielded by the sort of absolute immunity enjoyed by legislators and judges or the more limited immunity applicable to police officers. 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

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63 See fn. ___. This of course rests on the assumption that Congress, without saying so, intended 1983 to be read as having incorporated existed common law immunities.

64 Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (announcing that to determine the liability of a state prosecutor under 1983 it would undertake a “considered inquiry into the immunity historically accorded the relevant official at common law.”).


66 Pierson v. Ray, 386 U.S. 547 (1967). The Supreme Court announced that it had “no difficulty” accepting the proposition the judges were entitled to absolute immunity. 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.” 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.” 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.”

67 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. 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 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) (characterizing Pierson’s qualified immunity discussion as a “policy driven analysis which was largely uninfluenced by any controlling law”).
prosecutors 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, 68 making them essentially irrelevant to a determination of Congressional intent. 69

A. From Congressional Intent to Considerations of Policy

The Court was considerably more transparent in discussing the public policy implications of prosecutorial immunity, 70 expressing its 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.” 71 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.” 72 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, creating “unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.” 73 The Court closed its policy discussion by agreeing with Judge Learned Hand that “it

68 The Court noted that the first American case on the matter was Griffith v. Slinkard, 146 Ind. 117 (1896), but didn’t explain what we were to make of the fact that Griffith was decided 25 years after the enactment of §1983, a discrepancy noted quite pointedly by critics of absolute prosecutorial immunity. See Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 B.Y.U. L. REV. 53, 108 (2005).

69 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. Id. at 108-113. See also Burns v. Reed, 500 U.S. 478, 499 (1991) (Scalia, 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 wasn’t at the time that Congress enacted §1983.

70 See Imbler, 424 U.S. at 425.

71 Id.

72 Id.

73 Id. at 425-26. The Court further reasoned that the possibility of personal liability for prosecutors would
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.”\(^{74}\)

The question then was how to “delineate the boundaries” of the immunity.\(^ {75}\) 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.”\(^ {76}\) 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.\(^ {77}\)

**B. Focus on Function Rather Than Title**

This functional assessment of the official activities upon which a § 1983 plaintiff’s claims are predicated has remained 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 — this conduct was deemed investigative.\(^ {78}\) 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.\(^ {79}\)

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

ultimately inure to the detriment of criminal defendants, because prosecutors might be motivated to withhold “evidence suggestive of innocence or mitigation,” and 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.”

\(^{74}\) *Id.* at 428.

\(^{75}\) *Id.*

\(^{76}\) *Id.* at 430.

\(^{77}\) *Id.*

\(^{78}\) Burns.

\(^{79}\) Burns, 500 U.S. at 490-91, 492-96.
administrative proceeding in which the Department of Agriculture sought to revoke or suspend a company’s registration as a commodity futures commission merchant. 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.

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.” 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 fear of harassment or retaliation that would undermine their independence.

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 means of controlling unconstitutional conduct.” The Court cited “the 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.” 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.” Jurors are screened for bias, and witnesses are subject to cross-examination and penalties for perjury. In the Court's view “these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process,” thus reducing the need for individual suits to correct constitutional error.

81 Id. at 482-83.
82 Id. at 508.
83 Id. at 508-511.
84 Id. at 512.
85 Id.
86 Id.
87 Id.
88 Id.
The Court held that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process to produce the same immunities: the role of federal hearing examiners and administrative law judges is “functionally comparable” to that of a judge, and the “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.” 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.

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, this framework yields two 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.”

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

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89 Id. at 513-15.

90 Id. at 514, 515-16, 517.

91 The Supreme Court has denied certiorari on the issue, with two justices dissenting from the denial. See Hoffman v. Harris, 511 U.S. 1060 (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 to 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.’” The majority of the circuits have concluded that a social worker who initiates judicial proceedings to obtain custody of an endangered child engages in conduct that is functionally analogous to that of a prosecutor. See Ernst, 108 F.3d at 495 (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 Vosburg v. Dep’t. Of Social Services, 884 F.2d 133 (4th Cir. 1989); Rippy v. Hattaway, 270 F.3d 416 (6th Cir. 2001); Millspaugh v. County Dept. of Public Welfare of Wabash County, 937 F.2d 1172, 1176 (7th Cir. 1991); Abdouch v. Burger, 426 F.3d 982 (9th Cir. 2005); Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008).
workers are entrusted with the authority to exercise independent judgment in determining when to initiate dependency proceedings and act as advocates for the state in a capacity intimately associated with the judicial process. At this level of generality the analogy holds, but a closer look at child protection proceedings reveals cleavages.

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

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92 Meyers v. Contra Costa County Dep’t of Social Services, 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,” and other circuits have followed suit without scrutinizing the analogy in its particulars. See, e.g., Ernst, 108 F.3d at 496 (quoting Meyers); Vosburg, 884 F.2d at 137 (also quoting Meyers).

93 Ernst, 108 F.3d at 496.

94 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 Dept. of Social Services, 911 F.2d 863 (2d Cir. 1990), for example, Connie and Richard van Emrik brought suit against two child protective case-workers responsible for the temporary removal of their seven month old daughter. According to the court it was “undisputed” that the caseworkers would “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.” 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 criminal proceedings.” See Sutton v. Tompkins County, 2007 WL 2815639 (N.D.N.Y Sep. 25, 2007). The First Circuit has similarly applied qualified immunity to complaints against social workers without having addressed whether social workers might be entitled to absolute immunity for conduct that could be characterized as prosecutorial. See Carter v. Lindgren, 502 F.3d 26 (1st Cir. 2007); Kauch v. Dept. for Children, Youth, and Their Families, 321 F.3d 1 (1st Cir. 2003); Hatch v. Dept. for Children, 274 F.3d 12 (1st Cir. 2001)


96 Id. Some states extend the reporting obligation to clergy. See, e.g. ALA. CODE § 26-14-3.

97 CPS receives roughly an equal number of reports from mandated and nonmandated reporters. Mandated reporters are, on average, “better” reporters in the sense that they are more likely to report cases that CPS
case worker to investigate the allegations. The case 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.”

When the investigation substantiates the report of abuse, social workers typically have two distinct types of authority. Where the child is thought to be in imminent risk of danger, a social worker may conduct an emergency removal. Emergency removals have been criticized subsequently determines to be genuine cases of abuse or neglect. Jane Waldfogel, The Future of Child Protection 107,112 (1998).

Evaluating the extent to which it is appropriate for child protection agencies to conduct these investigations, one researcher has noted that “[c]hild protection agencies do not have the investigative technology, training, and resources that are available to the police. They do not have crime laboratories, fingerprint 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 (Oxford University Press 1994). On the other hand, they have “interviewing and assessment skills that are useful in determining whether abuse has occurred.” Id.

ALASKA STAT. 47.17.030; CONN. GEN. STAT. 17a-101g. Some jurisdictions permit their hotline workers to screen out cases that seem inappropriate for investigation. Waldfogel, supra note ___ at 5, 114. See also Lukens, supra note ___, 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.”).


“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.” 33 VT. STAT. ANN. § 4912(10) (1991).

As noted by Chill, supra note ___, this determination generally must be supported by probable cause or the equivalent. See, e.g., FLA. STAT. CH. 39.401(b) (2002) (probable cause); cf. CONN. GEN. STAT. § 17a-101g (2003) (probable cause); 325 ILL. COMP. STAT. 5/5 (2003) (reasonable belief); DEL. CODE. ANN. tit. 16 § 907(a) (2003) (reasonable suspicion); cf. ARIZ. REV. STAT. ANN. § 8-821(B) (2003) (clear necessity).

See, e.g., CAL. WEL. & INST. CODE §306 (authorizing a social worker to take warrantless temporary
as terrifying and traumatic for children and in many cases unjustified by imminent danger.\textsuperscript{104} In theory emergency removals must be followed by a hearing within a specified period of time,\textsuperscript{105} but this requirement has been flouted.\textsuperscript{106}

Alternatively, social workers may initiate dependency proceedings to transfer custody of the child – legal, physical, or both – from the parent or guardian to the department.\textsuperscript{107} These
custody of a minor where she “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”); \textit{CONN. GEN. STAT.} § 17a-101g; \textit{VA. CODE ANN.} § 16.1-251 (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 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; emergency removal order can be obtained after the child is taken into emergency custody); \textit{VA. CODE ANN.} 63.2-1517 (authorizing a physician, law enforcement official, or child protective services worker to take a child into custody for up to 72 hours where a court order is not immediately obtainable); Mont. Code 41-3-301.


\textsuperscript{105}See \textit{Tex. Fam. Code} § 262.201(b); \textit{Colo. Rev. Stat. Ann.} 19-3-403(3.5)

\textsuperscript{106}See \textit{Pamela B. v. Ment}, 709 A.2d 1089, 1097, fn. 11 (S.C. Conn. 1998) (citing “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.”)

\textsuperscript{107}\textit{CAL. WEL. & INST. CODE} § 325. In some states this authority is not vested exclusively in social workers; in Connecticut, for example, a petition may be filed by “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.” \textit{CONN. GEN. STAT.} 46b-129. In Pennsylvania a petition alleging that a child is dependent may be brought by “any person.” \textit{42 Pa.C.S.} 6334. 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 district attorney is given the authority to decide whether to file a
dependency proceedings vary not only from state to state but also from case to case; they typically begin with a preliminary hearing at which the parent is advised of the allegations, their right to counsel, and given the opportunity to stipulate to a temporary transfer of custody to

petition to have the child adjudicated in need of care. See Austin v. Borel, 830 F.2d 1356, 1357 (5th Cir. 1987).

108 In Lassiter v. Dep’t of Soc. Serv. of Durham, 452 U.S. 18 (1981), the Supreme Court considered whether an indigent parent facing the termination of parental rights is entitled to counsel under the Due Process Clause. Using the balancing test developed in Matthews v. Eldridge, 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. 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.

the department. A guardian ad litem is appointed for the child.109

Where a parent chooses to contest the transfer, the court may take evidence before issuing an order adjudicating the child neglected or dependent.110 Such a determination will typically be accompanied by what is initially a temporary transfer of custody to the department; 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. In some cases physical custody of the child may be transferred to the agency, resulting in a kinship, foster care, or institutional placement. 111

State agencies must make “reasonable efforts” to prevent the placement of a child in foster care and to reunify the child with her family should removal be necessary.112 States are exempted from undertaking such efforts in cases involving “aggravated circumstances” such as torture or

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111 As a matter of social work practice, “[t]hree 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 38 (2d ed. 2003).

112 42 U.S.C. § 671(a)(15)(A) and (B). These requirements are imposed as a condition of receiving federal funds.
the killing of another child. Dependency cases must receive periodic review, at least once every six months. They conclude when the child is either returned to her family or freed for adoption following the termination of parental rights.

So the question, then, for the immunity analysis, is the extent to which this chronology 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 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. 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 a 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.”

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,” and that for better or for worse, child welfare proceedings are characterized by pervasively informal, extra-judicial interactions, decisions, and agreements. To obtain the perceived benefit of being seen as cooperative, parents will often consent to

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115 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, 202 (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.”)
116 See supra pp.__
119 See Emily Buss, Parents’ Rights and Parents Wronged, 57 Ohio St. L.J. 431 (1996) (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”)
“voluntary” arrangements without the benefit of counsel or judicial oversight.\textsuperscript{120}

Amy Sinden, who has represented parents in civil child abuse and neglect proceedings, notes that “social work norms and discourse predominate in this setting.”\textsuperscript{121} 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.”\textsuperscript{122} 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 abuse and neglect proceedings, confirms that this power isn’t 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.”\textsuperscript{123}

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,\textsuperscript{124} 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

\textsuperscript{120}See id. See also Nicholson v. Williams, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002), a federal civil rights suit brought against the New York Administration of Child Services by women whose children had been removed from their care solely based on domestic violence against the mother. The director of the agency 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.” 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.”

\textsuperscript{121}Sinden, supra note ___, at 353.

\textsuperscript{122}Id. at 354.

\textsuperscript{123}Emily Buss, Parents’ Rights and Parents Wronged, 57 OHIO ST. L.J. 431, 434 (1996). See also Dorothy Roberts, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 66 (2002) (“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.”).

for a six month sentence\textsuperscript{125} would have the right to the effective assistance of counsel.\textsuperscript{126} Before accepting the guilty plea the court would have to provide specific advisements to the defendant\textsuperscript{127} and ascertain that the plea was knowing and voluntary.\textsuperscript{128} 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 in itself has no bearing on the immunity analysis, because these out-of-court arrangements by their very terms wouldn’t be considered “intimately associated” with the judicial process; as discussed previously, social workers therefore wouldn’t receive absolute immunity for that conduct.\textsuperscript{129} But in the child welfare system the discourse of cooperation retains its force even after legal proceedings have been formally initiated.\textsuperscript{130} It remains a critical aspect of a social worker’s assessment of a parent’s fitness,\textsuperscript{131} and judges often defer to social workers once these cases get to court.\textsuperscript{132}

What makes this dynamic even more difficult to analogize to a criminal prosecution is that it is the social worker and her agency that are entrusted with providing the family with the services they need to be reunited. If the basis for the dependency petition is that the parent is incapacitated by addiction or having anger management issues, it is the agency’s role to provide the parent with drug treatment or parenting classes. It is the parent, however, who is up against


\textsuperscript{128}Johnson v. Zerbst, 304 U.S. 458 (1938).

\textsuperscript{129}See supra pp___.

\textsuperscript{130}See, e.g., Ernst, 108 F.3d at 489 (for a five year period after the filing of a dependency petition, caseworkers “found Ernst to be uncooperative, antagonizing, and unwilling to acknowledge her parenting problems...as 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.”)

\textsuperscript{131}See Roberts, supra note ___, 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. Any disagreement with the agency’s proposed plan is reported as evidence of unwillingness to reform.”).

\textsuperscript{132}Sinden, supra note ___, at 353.
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,” children languishing for years in foster care without being reunited with their families or freed for adoption.\textsuperscript{133} 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 22 consecutive months will be freed for adoption, and their biological parent’s rights terminated.\textsuperscript{134} In contrast, throughout a criminal proceeding it is the prosecutor who is running against the clock to comply with speedy trial rights.\textsuperscript{135}

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 can’t get their act together 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.\textsuperscript{136} 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 exercise independent discretion in making these decisions, they are enmeshed in a relationship with these parents that is in some ways fundamentally different than the 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


\textsuperscript{134} 42 USCS § 675(5)(E).

\textsuperscript{135} And possibly statutes of limitation. For an overview of a criminal defendant’s constitutional and statutory rights to a speedy trial, see Twenty-fifth Annual Review of Criminal Procedure, 84 GEO.L.J. 887, 1022 (1996).

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 labor to effectuate Congressional intent with regards to categories of public official that didn’t exist at the time 1983 was enacted is a truly tenuous fiction. What Imbler so unmistakably communicates, in spite of the Court’s protestations to the contrary, is that absolute immunity is predicated on policy considerations; 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, the threat to public welfare posed by efforts to harass, retaliate, or intimidate the official in the vigorous discharge of her duties, and so on. Butz restates this as an assessment of whether a certain class of official performs a “special function” that might require “full exemption from liability.”

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 that “[l]ike 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

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137 See Justine 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”).

138 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 and Youth Services of Chester County, 108 F.3d 486, 493 (3d Cir. 1997). The Third Circuit had the benefit of Justices Thomas and Scalia’s dissent from cert denial in Hoffman, in which the two Justices criticized lower courts for having overlooked the necessary historical inquiry.

139 The Court has continued to insist that its immunity cases reflect an attempt to discern CONgressional intent rather than make policy, insisting that its appropriate role is “not to make a freewheeling policy choice, but rather to discern Congress’ likely intent in enacting § 1983.” Malley v. Briggs, 475 U.S. 335, 342 (1986).


141 Butz.
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.”

Other circuits have expressed virtually identical concerns. The federal courts’ concern that 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 that are also consistent with the messages of Imbler and Butz. But like Imbler and Butz, uniformly absent from these discussions is any attempt to ascertain whether – and if so to

142Ernst, 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 “parents 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.”

143Id. at 496-97. The Fourth Circuit, for example, has asserted that “[l]ike 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, 884 F.2d at 137.

144See, e.g., Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (child welfare 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 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.”); Meyers, 812 F.2d at 1157 (“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”); Mazor v. Shelton, 637 F. Supp. 330, 335 (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.”).
what extent – social workers are indeed influenced in their decision-making by a fear of personal liability.  

(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 is.)

Were the courts to turn to the scholarly literature for assistance they would find the bewildering disagreement, noted in the introduction, as to the readiness of social workers to intervene in the families they are charged with assisting.  This matters immensely for the immunity analysis. If one accepts the view of social workers as interventionist and over-zealous 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 won’t be held liable for not acting. 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.

145 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” to DeShaney, with no further elaboration. Ernst, 108 F.3d 486, 496.

146 See supra note ____.

147 See infra pp____.

148 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 do 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. So families that depend on these agencies not only face new caseworkers with whom they have no relationship, but who are even more overworked than their predecessors. As one report has summarized: “[t]he costs of turnover in child welfare are great... therapeutic 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 to need vital services to heal as they face the challenge of their lifetime.” REPORT FROM THE 2004 CHILD WELFARE WORKFORCE SURVEY, STATE AGENCY FINDINGS, FEBRUARY 2005. Available at http://www.aphsa.org/Home/Doc/Workforce%20Report%202005.pdf

This is not entirely unrelated to the inquiry I’m exploring 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 decision-making, 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
following section, I attempt to delve into these questions.

IV. 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 section: the notion that absolute immunity for social workers is sound policy. As the preceding section 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. And this notion is essential for our present purposes – 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. They have simply assumed it to be self evident.\textsuperscript{149} The scholarly commentary on official liability has been considerably more cautious, but much of it has accepted at least “the possibility that excessive liability might chill decisive government action.”\textsuperscript{150}

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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 but that “the most plausible assumptions about official motivation” suggest “a strategy of personal risk minimization.” 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.” 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. But this example is one of a number of time capsules from the pre-DeShaney era. After DeShaney, the decision to do nothing is beyond challenge but the decision to act remains

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_Consitutional Torts_, 18 GA. L. REV. 201, 240-41 (1984); Richard Fallon and Daniel Meltzer, _New Law, Non-Retroactivity, and Constitutional Remedies_, 104 HARV. L.REV. 1733, 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.”); 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).


152And 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.” Schuck, _supra_ note ___ at 69-70.

153_Id._ at 68. Schuck argues that “officials tend to reject any course of action that would drive their personal costs above some minimum level, what I call a ‘duty threshold’...defined by one’s idiosyncratic attitudes towards (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.”

154_Id._

155_Id._. _See also_ Douglas J. Besharov, _The Need to Narrow the Grounds for State Intervention_, in _Protecting Children From Abuse and Neglect: Policy and Practice_ 83 (Douglas J. Besharov ed., 1988), suggesting that “most observers would agree” with Schuck’s characterization.

156 _See_ Dean Knudsen, _Child Protective Services_, 158 (1988) Likewise writing before DeShaney, 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.
subject to multiple forms of constitutional scrutiny:157 did the social worker act so 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?158 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.159 So the question is whether this sketch even resembles today’s child welfare system, a question prior to that of the role that fear of liability plays. For some prominent critics of the child welfare system, the answer is yes.160

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157 See Jeffries, *supra* note ___ at 74. “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 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.”

158 See *supra* notes ___ and infra notes ____.

159 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 the 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 decision-making in favor of intervention and removal. The federal courts have not even acknowledged these countervailing forces operating upon social worker decision-making, much less have they articulated any formula or method for balancing fear of liability for unwarranted intervention against the fear of adverse publicity for failing to timely intervene. On the other hand, 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, e.g.*, Paul Chill, *The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 542 (2004) (citing Douglas 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 decision-making must be dis-aggregated to be meaningful.

160 Some of these characterizations of the child welfare system obviously can’t serve as evidence that caseworkers fail to intervene as warranted because they fear 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.
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.” 161 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.” 162 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 the expense of child protection. 163 James Dwyer asserts that social workers have an “adult-centered orientation” and “view their ‘clients’ as the dysfunctional parents, not the maltreated children.” 164 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 child welfare. When I give presentations to CPS social workers and directors and 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 children.” 165

The problem is that 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. 166 Although the overwhelming majority of children in the child welfare system –

162Id. at 235.
163Richard Gelles & Ira Schwartz, Children and the Child Welfare System, 2 U. PA. J. CONST. L. 95, 97, 103 (1999). 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.
165Id.
166Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection
about 89% – remain in their homes rather than being placed in foster care, these 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 Liebman, 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.”

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.”

At times the preservationist portraits of the child welfare system are virtually unrecognizable from those painted by the protectionists, although 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.

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167 Patricia Kohl, Unsuccessful In-Home Child Welfare Service Plans Following a Maltreatment Investigation: Racial and Ethnic Disparities, Casey-CSSP Alliance; Washington University; The Annie E. Casey Foundation (2007), available at http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={1D8ECB7D-56DB-44A3-B68C-1A8A52A52C77}. See also Waldfogel, supra note ___ at 208 (“Only 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.”


This presents a remarkable contrast to the experiences relayed by James Dwyer, who reports that an official attested that her agency would never seek to terminate parental rights without pursuing rehabilitation and reunification because “we don’t give up on parents...you never know when someone might change.” Other researchers have also found that “one 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...at each stage of the decision-making process caseworkers tend to favor the least stigmatizing interpretation of available information and the least coercive disposition.”

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. Some will err on the side of

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171While 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 supra note ____.

172James Dwyer, The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents, 93 MINN. L. REV. 407, 455 (2008). 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 152.

173Lindsey, supra note ____ at 174.

174As I’ll attempt to demonstrate later in the paper, the existence of these diametrically opposing views is important to assessing the wisdom of absolute immunity.

175See, e.g., Jane Waldfogel, THE FUTURE OF CHILD PROTECTION 26-27 (1998). 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 cases.” She observes that the system suffers from both overinclusion – families in the system who shouldn’t be there – and underinclusion – some families who should be receiving child protective services aren’t. Id. at 84-85. As she puts it, “[i]n 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.
intervention;\textsuperscript{176} some will err on the side of hesitation;\textsuperscript{177} all will err,\textsuperscript{178} even more than whatever we might accept as the inevitable, baseline rate of error that cannot be avoided in any enterprise that is not only investigative, but in an essential way, 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 but to point out that that rejecting absolute immunity in a post-DeShaney world is to accept that only the latter is redressable; that only the latter 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 don’t know how responsive social workers are to this bias.\textsuperscript{179} It is true that we have

\textsuperscript{176}For an excellent overview of studies confirming the very low rate of reliability in the selection of children for placement in foster care, causing children who need placement to be left in their homes while children with lesser needs for placement were removed from their families, see Lindsey, supra note ___ at 133-138. One study suggested that social worker assessments of the severity of 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 cases judged vignettes provided by the author as less severe. Conversely, workers from offices with less severe caseloads judged the vignettes as more severe.” Stein and Rzepnicki, supra note 1 at 8, citing Isabel Wolock, Community Characteristics and Staff Judgments in Child Abuse and Neglect Cases, SOCIAL WORK RESEARCH AND ABSTRACTS, Vol. 18, No.2 (Summer 1982), pp. 9-15.

\textsuperscript{177}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, 154 (2003) (arguing that the “lack of coherent standards results in massive inconsistencies within agencies and across 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.”).

\textsuperscript{178}At least one scholar has argued that one type of error actually causes the other. Besharov, supra note ___ 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.”).

\textsuperscript{179}The National Center of Child Abuse and Neglect invited public comment on proposed funding priorities for child maltreatment research for fiscal years 1997-2001. (February 12, 1997 Federal Register.) In response, the National Association of Social Workers proffered as one of its top eight priorities: “Examination 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.”
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 decision-making.

The persistence of the scholarly dispute over the wisdom and efficacy of state intervention in troubled families, however, the fact that scholars can’t 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, and some of them have explicitly addressed the constitutional implications of these intrusions. 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 only be justified 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 doesn’t support that type of certainty. Instead, the most convincing portrayals indicate a system rife with both over- and under-inclusion.

The horror stories abound, illuminating both types of failure in excruciating detail.183

Available at: https://www.socialworkers.org/archives/advocacy/updates/1997/ltrchild.htm. It appears that such a study was not funded by NCCAN.


182 See Waldfogel, *supra* note ___ at 84-85; Lindsey, *supra* note ___ at 133-36; Besharov, *supra* note ____ at 48. See also Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 Va. J. Soc. Pol’y & L. 165, 199-200 (2000) (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.”).

183 See, e.g. Nicholson v. Williams, 203 F.Supp. 2d 153 (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
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 numerous also, instances of over-intervention can’t be invoked as though they conclusively demonstrate that absolute immunity for caseworkers is unnecessary or unwise because too many caseworkers are already doing too much. In other words, one can accept, as I do, that all 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: 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.

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 section I consider whether this loss is reason enough to construe our empirical uncertainty about social-worker decision-making against absolute immunity.

V. THE COMPETING CONCERNS OF COMPENSATION

If we don’t 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) who suffered unconstitutional infringements of their family integrity.

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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 to that of a parent. See Wooley v. City of Baton Rouge, 211 F.3d 913, 923 fn. 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, Rights Myopia in Child Welfare, 53 UCLA L. Rev. 637, 644 fn. 29 (2006). The Vermont Supreme Court has articulated the right in a way that captures this intuition:
Putting aside the fact that on average social workers get paid less than nurses, public school teachers, police officers, and firefighters, 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 rights 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 requires, and providing insulation from personal liability unless they violated a federal right that was clearly established at the time of the challenged conduct. The Supreme Court has expansively described qualified immunity as providing “ample protection to all but the plainly incompetent or those who knowingly violate the law.”

So we have to ask: why isn’t qualified immunity the better balance between the need to protect social worker decision-making 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 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?

A. Qualified Immunity is Indeterminate

“the freedom of children and parents to relate to one another in the context of the family, free of governmental interference.” See In re N,H. 135 Vt. 230, 236 (1977).


190 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 is held to govern. See supra note ____.
That qualified immunity is indeterminate has been amply demonstrated by a number of legal scholars. 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 which jurisdictions provide which type of protection against liability, the journal *Social Work* cautions its readers that they should be aware that their actions will be scrutinized before the courts will rule that they have qualified immunity...social 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.

This is, all told, a pretty accurate description of qualified immunity. Qualified immunity is highly fact-dependent, requiring the introduction of often voluminous amounts of evidence.

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192 *Social Work*, Vol. 40, No. 5 (1995). The National Association of Social Workers, the organization that publishes the journal, describes it 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 members as a membership benefit. Social Work is dedicated to improving practice and advancing knowledge in social work and social welfare. Its articles yield new insights into established practices, evaluate new techniques and research, examine current social problems, and bring serious critical analysis to bear on problems in the profession. Major emphasis is placed on social policy and the solutions to serious human problems.” [http://www.naswpress.org/publications/journals/sw.html](http://www.naswpress.org/publications/journals/sw.html).

193 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 Federal Judicial Center, 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, e.g., Hicks v. Feeney, 850 F.2d 152, 159 (2d Cir. 1988).

194 Alan Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) ( “...reasonableness 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
and correspondingly lengthy pretrial and discovery proceedings. Not only does the specter of prolonged scrutiny loom large, but social workers are correctly advised that they won’t withstand the scrutiny merely on the basis of good faith or professional judgment. The upshot is that this brief description of qualified immunity, targeted towards social workers seeking to understand this conceptually difficult form of protection from liability, isn’t particularly reassuring.

The rejoinder, of course, is that we don’t 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. But this is what makes qualified immunity a poor counterweight against DeShaney’s markedly skewed incentives. DeShaney completely eliminates liability

become “not only internally inconsistent, but extraordinarily difficult and costly to administer.”

195 In Mitchell v. Forsyth, these proceedings lasted five and a half years. See Chen, supra note ___ at 239.

196 See Harlow v. Fitzgerald, 457 U.S. 800. 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. While professional judgment is an element of some substantive constitutional inquiries, it is not a predicate for qualified immunity.

197 See James Park, The Constitutional Tort Action as Individual Remedy, 38 HARV. C.R.-C.L. L. REV. 393 (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 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 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 (2004) (asserting that damage suits against government officials deter unlawful conduct); Alan Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 IOWA L. REV. 261, 263 (1995) (“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”). But see Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345 (2000)(arguing that the deterrence effects of constitutional tort actions are limited).

198 This same sort of indeterminance is what makes insurance and indemnification 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 ___ at 87. As Schuck argues:
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 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, and the justices have continually reworked and adjusted the doctrine to satisfy that objective. An important example is the availability of interlocutory

Id. See also Myriam E. Gilles, Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability, 80 B.U.L. Rev. 17, 30-31 (2000) (noting that indemnification provisions are “wrought with uncertainty and difficulties... indemnification 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. v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990). 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.” He recognizes that “[t]he indemnity is not always complete, and some governmental entities provide no indemnity, the federal government being a prominent example.” Posner then suggests that if the employer, “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.”

appeal from denials of qualified immunity, a procedural innovation that keeps §1983 plaintiffs away from juries.

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. In elaborating on this requirement, the Supreme Court has cautioned that the right in question must have been established in a “fairly particularized sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must have been apparent.” While the Court rejected a circuit court’s requirement that the facts of existing precedent be “materially similar,” it has demanded “close factual correspondence” between the pre-existing law invoked by a plaintiff and the facts of her own case.

So the first hurdle for a parent who seeks damages against a social worker is the same as for any §1983 plaintiff: she might be the first to show up in court with her particular type of constitutional challenge. 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 faced with that constitutional claim have previously declined to elucidate the contours of right, it may well remain

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202 *Saucier*, 53 U.S. at 305.


204 Hope v. Pelzer, 536 U.S. 730, 739.

205 Id.

206 See, e.g., Kiser v. Garrett, 67 F.3d at 1166. The plaintiff father asserted that his due process rights were violated by the social workers’ failure to disclose exculpatory evidence. The court dealt with this in a single sentence, reasoning that “even if such a right exists, it was not clearly established at the time of the state court custody proceedings.”

207 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 when assessing a defendant’s entitlement to
insufficiently established for her to overcome qualified immunity. At best she may obtain a ruling vindicating her assertion that her constitutional rights were violated, but she will not receive damages from the individual official who caused the constitutional deprivation.

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, or that the removal of their children was not accompanied by constitutionally adequate procedural safeguards, parents will by and large be relying on substantive due process, arguing that the state’s intervention violated their fundamental liberty interest in the care and custody of their children. 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 well-being of their citizens. But it continually re-

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, 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. The “order-of-decisionmaking” rule was widely criticized, see id., and the Court recently abandoned it in Pearson v. Callahan, 129 S. Ct. 808 (2009).


209 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 suit. 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 Rebecca Aviel, Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility, 10 LEWIS & CLARK L.REV. 201, 222-24 (2006).

210 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. Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1092 (1989); Calabretta v. Floyd, 189 F.3d 808, 817-18 (9th Cir. 1999). See also Tenenbaum v. Williams, 193 F.3d 581, 604-05 (2d Cir. 1999) (social workers must obtain judicial approval to have physician perform gynecological exam on child without parent permission). Roe v. Tex. Dep’t of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002).

211 See, e.g., Duchesne v. Sugarman, 566 F.2d 817 (2d. Cir. 1977); cf. Croft v. Westmoreland County Children and Youth Services, 103 F.3d 1123 (1997).


visited the fraught relationship between a parent’s liberty interest and the state’s parens patria 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,\textsuperscript{214} attend private school,\textsuperscript{215} accompany a parent engaged in religious proselytizing,\textsuperscript{216} or withdraw from school after eighth grade to participate in the Amish community.\textsuperscript{217} 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 patria 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,\textsuperscript{218} 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 that occurs when a child is temporarily placed in CPS 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 the possibility of clear principles in this area.\textsuperscript{219} These opinions have suggested that the right to family integrity is inherently nebulous, such that any alleged constitutional

\textsuperscript{214}Id.


\textsuperscript{216}Prince v. Massachusetts, 321 U.S. 158 (1944).

\textsuperscript{217}Wisconsin v. Yoder, 406 U.S. 205 (1972).

\textsuperscript{218}Quilloin v. Walcott, 434 U.S. 246 (1978); see also Santosky v. Kramer, 455 U.S. 745 (1982). Although a procedural due process case, it reinforces the idea that a parent’s liberty interest is limited by the state’s interest in child welfare; it also suggests 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.

\textsuperscript{219}See Brokaw v. Mercer County, 235 F.3d 1000, 1023 (7th Cir. 2000) (citing Kiser v. Garrett, 67 F.3d 1166, 1169-74 (5th Cir.1995); Hodorowski v. Ray, 844 F.2d 1210, 1216-17 (5th Cir.1988); Tenenbaum v. Williams, 193 F.3d 581, 595-96 (2d Cir.1999); Doe v. State of Louisiana, 2 F.3d 1412, 1416-21 (5th Cir.1993)).
violation stemming from a child’s removal “will rarely – if ever – be clearly established.”

A court gearing up for such a conclusion 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, competing interest in the safety and welfare of the children.” 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.”

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.”

This is rather remarkable – a federal court saying 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.

At least one court has made explicit the logical conclusion – if the courts can’t 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.

What is so troubling about this is the premise that not only will the law never be clear enough to justify damages, but that violations of this very theoretical right are inevitable. 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.

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 Peter Schuck described 20 years ago: “the subjectively perceived risks of litigation loom far greater that the objective probability of liability alone would suggest.” Qualified immunity, because its indeterminance makes it burdensome to litigate and leaves open, however remotely, the possibility of damages, thus fails to assuage whatever fear of liability might be motivating social workers to inaction, and yet provides compensation to very few families wronged. This is the worst of possible worlds, generating the

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220 Id.
221 Abdouch v. Burger, 426 F.3d 982, 987 (8th Cir. 2005).
222 Id.
223 Id.
226 The Second Circuit has made an effort to articulate constitutional standards in this context. See Wilkinson v. Russell, 182 F.3d 89 (2d Cir. 1998).
227 Schuck, supra note ___ at 80-81.
over-deterrence that has worried courts and scholars about constitutional tort liability, without the compensation that is supposedly its primary objective. 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 Some Subset of Plaintiffs Who Could Overcome Qualified Immunity, *DeShaney* Requires This Painful Choice

To this point I’ve 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. Even if we were to focus on this narrow swath of families for whom absolute immunity eliminates recovery that would otherwise be available, I want to explain why I think this painful choice is necessary.

First, we need to break down the various categories of individuals who have rights against the state when it comes to social worker intrusion into the family. We have abused children and their parents, and we have non-abused children and their parents. 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. Children in abusive homes benefit very little from their negative liberties.

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228 See *supra* notes __ and __.


230 See, e.g., *Currier v. Doran*, 242 F.3d 905 (10 Cir. 2001).

231 The reader will quickly see that for this section 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.

232 “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 protect.” *Carey v. Piphus*, 435 U.S. 247, 253 (1977).

is worse than meager, it is meaningless, cruel even.\textsuperscript{234}

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. \textsuperscript{235} On the other hand, most abusive parents are desperately poor and themselves would benefit from affirmative state assistance rather than the presumption of privacy that negative liberties provide. \textsuperscript{236}

In any event, putting aside the somewhat difficult question of whether abusive parents benefit or suffer from the insulating effect of negative liberties, \textsuperscript{237} as a doctrinal matter abusive

\textsuperscript{234} See, e.g., Mary Ann Glendon, \textit{Rights Talk: The Impe


\textsuperscript{236} See Duncan, \textit{supra} note __ at 257; Marsha Garrison, \textit{Child Welfare Decisionmaking: In Search of the Least Drastic Alternative}, 75 GEO.L.J. 1745, 1790 (1987) (noting that the children involved in 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.”).

\textsuperscript{237} See James G. Dwyer, \textit{Children’s Interests in a Family Context – A Cautionary Note}, 39 SANTA CLARA L. REV. 1053, 1071 (suggesting that parents do not benefit from being able to abuse their children; rather, ‘where 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 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 parents.\textsuperscript{238} While a parent’s liberty interest in the care of her children doesn’t evaporate simply because she has not been a model parent,\textsuperscript{239} no court would hold that an 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 doesn’t 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.\textsuperscript{240} 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’s a cost that can’t 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,\textsuperscript{241} 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.

So 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

\textsuperscript{238}See Abdouch, 426 F.3d at 986.


\textsuperscript{240}See, e.g., Martin Guggenheim, WHAT’S WRONG WITH CHILDREN’S RIGHTS 192-96 (2005).

\textsuperscript{241}See supra note ___
DeShaney’s regrettable calculus. If this sounds like the sort of “free-wheeling policy choice” that the Supreme Court has professed to eschew in its immunity jurisprudence, well, perhaps it is. 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.

VI. Delineating the Parameters

So how might we draw the parameters of this absolute immunity? As discussed in preceding sections, 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. 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 adjudication that enhance reliable decision-making 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.” These safeguards – opportunities to present evidence, adversarial testing, adjudication by a neutral decision-maker, appellate review – are essential predicates to an absolute immunity scheme that maintains a minimal commitment to constitutional rights. 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 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 legal right must have a remedy.

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243 See supra Part III (A).

244 Butz, 438 U.S. at 512.

245 See Henry 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; to know the evidence against one; and to have decision based only on the evidence presented; representation by counsel; the making of a record and a statement of reasons; public attendance; and judicial review.

246 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), quoting Blackstone’s premise that “[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,
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, are largely unsupervised by the courts, and don’t trigger a right to counsel. For the same reasons, absolute immunity should not attach to warrantless emergency removals, or those authorized following an ex parte hearing. As these emergency removals whenever that right is invaded.” 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 Jeffries, The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 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 chief among them.


248 Buss, 57 Ohio St. L.J. 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.”

249 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 (1986), and Kalina v. Fletcher, 516 U.S. 118 (1997). After the Court announced in Imbler that prosecutors have absolute immunity for functions intimately associated with the judicial process, 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 v. Briggs, 475 U.S. 335 (1986). 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 judicial phase of
have been criticized as 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.\textsuperscript{250} 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.\textsuperscript{251}

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 only protected by qualified immunity and rushing to file a petition which brings her the full protection of absolute immunity.\textsuperscript{252} 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’s why it matters that absolute immunity would only insulate the forms of social worker conduct that are judicially supervised and reflect indicia of adversarial process.\textsuperscript{253}

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.\textsuperscript{254} Both the Fourth Circuit and

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.

475 U.S. at 343.


\textsuperscript{251}Katherine C. Pearson, Cooperate or We’ll Take Your Child: The Parents’ Fictional Voluntary Separation Decision and a Proposal for Change, 65 Tennessee Law Review (1998). On the other hand, the financial savings these arrangements provide for agencies may be too powerful a counterweight even for absolute immunity.

\textsuperscript{252}Thanks are due to Alan Chen for this observation.

\textsuperscript{253}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 County, 514 F.3d 906, 907 (9th Cir. 2008) (en banc).

the Seventh Circuit provide examples of this approach, extending absolute immunity to social workers for the decision to initiate child dependency proceedings, but applying qualified immunity to claims against social workers arising from harms suffered by children while in foster care. While the Fourth Circuit has done so without explanation of this distinction, the Seventh Circuit has provided some insight, noting that state courts rarely, if ever, delineate the particular foster care home or institution in which a child should be placed. 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 . 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.  

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 it 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.” A Third Circuit case, for example, reveals that five years of judicial supervision by the Chester County Court of Common Pleas were insufficient to produce for the court the realization that social workers were making recommendations against reunification that were motivated by personal animosity rather than professional considerations regarding the child’s well-being. 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. 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

255 See Millspaugh v. County Dep’t. Of Public Welfare, 937 F.2d 1172 (7th Cir. 1991); Vosburg v. Department of Social Services, 884 F.2d 133, 137-38 (4th Cir. 1989).

256 See K.H. v. Morgan, 914 F.2d 846, 854 (7th Cir. 1990); White by White v. Chambliss, 112 F.3d 731 (4th Cir. 1997).

257 K.H., 914 F.2d at 868.

258 438 U.S. at 512.

259 See infra Section III.


261 See Ernst, 108 F.3d at 489-90, 504.

262 See SS v. McMullen, 225 F.3d 960 (8th Cir. 2000).
consistent with our constitutional values and traditions that absolute immunity for social workers – and 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 comes at some cost to clarity, as has been embarrassingly evident with prosecutorial immunity.\textsuperscript{263} The more complicated a regime, the more uncertainty it produces about what types of conduct engender which levels of protection, the less likely it is to achieve its objectives. If child welfare workers don’t 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,”\textsuperscript{264} 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 decision-making.\textsuperscript{265}

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 that case in court.\textsuperscript{266} And it 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 doesn’t directly implicate these concerns.\textsuperscript{267} I see this same tension 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.

\begin{itemize}
\item \textsuperscript{263}Prosecutorial conduct covered by absolute immunity includes initiating criminal proceedings, knowingly introducing false testimony; and suppressing exculpatory evidence. \textit{See supra} Section II. Actions taken by prosecutors that have not been categorized under the prosecutorial mantle, and therefore 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. \textit{See Buckley v. Fitzsimmons}, 509 U.S. 259 (1993). Perhaps the hallmark absurdity is \textit{Burns v. Reed}, 500 U.S. 478 (1991), in which the Supreme Court determined that a prosecutor was entitled only to qualified immunity for advising a police officer that a suspect could be hypnotized, but entitled to absolute immunity for introducing into evidence at trial the confession produced by the selfsame hypnosis.
\item \textsuperscript{264}\textit{See supra} note ___.
\item \textsuperscript{265}\textit{See Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures}, 42 DUKE L. J. 1, 45 (1992) (crediting Boris Bittker with 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.”).
\item \textsuperscript{266}\textit{See supra} Section III.
\item \textsuperscript{267}\textit{See Kalina v. Fletcher}, 516 U.S. 118 (1997).
\end{itemize}
For all its disappointing complexity, absolute immunity doctrine nonetheless does allow courts to resolve most claims that fall within its scope on the pleadings.\textsuperscript{268} To the extent qualified immunity lacks the modicum of clarity provided by absolute immunity, without a corresponding prospect of actual recovery for parent victims of unconstitutional conduct, I think it is worse.\textsuperscript{269}

VI. 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, intuitions which may or may not be true 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 its initial promise. And although qualified immunity itself 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.\textsuperscript{270} For these plaintiffs absolute immunity eliminates not only damages relief but 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 more personally risky endeavor than standing by and doing nothing.\textsuperscript{271} 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 lop-sided liability scheme. I am willing to acknowledge this possibility.\textsuperscript{272} But in the absence of empirical evidence to support it, it is a bold and risky 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’ve proposed fits comfortably within current immunity jurisprudence, and eliminates recovery only for that very


\textsuperscript{269}See supra pages ___

\textsuperscript{270}See supra Section VC.

\textsuperscript{271}See DeShaney, 489 U.S. at 201.

\textsuperscript{272}See supra page ___ and note ___.
narrow group of plaintiffs who would be able to surmount both the hurdle of qualified immunity and *DeShaney*’s substantive limitations.

The essential point is this: until we have reliable empirical data that tells us whether social worker decision-making is influenced by a fear of liability, we have to assume either that it is or that it isn’t. 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.