

REEXAMINING SOCIAL WORKER IMMUNITY IN THE CHILD WELFARE CONTEXT

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I. INTRODUCTION

In the midst of the Black Lives Matter movement, many have called for police reform, citing the law enforcement system's inherent racism and frequent brutality.¹ The doctrine of qualified immunity for police officers has received special attention,² as it prevents victims of police brutality from recovering against perpetrators in court.³ Other government officials are also entitled to immunity,⁴ including child protective services ("CPS") social workers.

The child welfare system, or "family regulation system," as Dorothy Roberts refers to it, has been compared to the law enforcement system.⁵ Like law enforcement, CPS disproportionately targets and burdens people of color and low-income families.⁶ It also can cause immediate and long-term harm to the children and families it serves.⁷ But can the social workers who work on behalf of CPS be compared to police officers?

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¹ See Evan Semones, *'Enough is Enough': Thousands Descend on D.C. for Largest George Floyd Protest Yet*, POLITICO (June 6, 2020, 5:06 PM), <https://www.politico.com/news/2020/06/06/george-floyd-blm-protest-washington-304635>; Farah Stockman & John Eligon, *Cities Ask if It's Time to Defund Police and 'Reimagine' Public Safety*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/05/us/defund-police-floyd-protests.html>.

² See, e.g., WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS (2020); Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html>.

³ See *infra* Section III.A for more on qualified immunity.

⁴ See NOVAK, *supra* note 2, at 2.

⁵ See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.

⁶ See *infra* Part II.

⁷ See Marsha Garrison & Cynthia Godsoe, *Reforming Child Protection Law: A Public Health Approach*, 21 J.L. & POL'Y 1, 1 (2012).

CPS caseworkers, like police, are forced to make difficult, quick decisions.⁸ Like police, they respond to calls—some of which are intentionally false, some of which are misguided.⁹ Like police, most social workers are white,¹⁰ presenting a problem because children of color are disproportionately represented in the child welfare system.¹¹ Social workers and police may be no more biased than the rest of the U.S. population, but their implicit and explicit biases have a detrimental effect on the people they are supposed to serve.¹² Lastly, as mentioned, CPS social workers also may be entitled to qualified immunity as government officials when they violate someone's constitutional rights.¹³

Yet CPS social workers face unique challenges. As discussed later in this Comment,¹⁴ social workers are overworked, underpaid, and subject to the stress of working for a bureaucratic system. In addition, the system gives them overwhelmingly broad discretion over serious decisions affecting families, and they are prone to compassion fatigue and burnout.¹⁵ Given the similarities and differences between the CPS and law enforcement systems and between police and social workers, this Comment examines social worker qualified and absolute immunity.¹⁶

⁸ See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[P]olice officers are often forced to make split-second judgments . . .”).

⁹ See CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at 16 (2019) [hereinafter CHILD MALTREATMENT], <https://www.acf.hhs.gov/cb/report/child-maltreatment-2019>; see also *infra* Part 0 for a discussion of misguided reports influenced by bias and assumptions.

¹⁰ See Stephanie Smith Ledesma, *The Vanishing of the African American Family: “Reasonable Efforts” and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 51 (2014) (“[M]any of ‘the professionals in the [CPS] system are by and large well-educated, middle class, and predominately white.”); SHELLEY HYLAND & ELIZABETH DAVIS, U.S. DEP'T JUST., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 6 (2019) (reporting that 71.5 percent of full-time local police officers are white); see also *Child, Family, and School Social Workers*, DATA USA, <https://datausa.io/profile/soc/child-family-and-school-social-workers> (reporting that 57.9 percent of child, family, and school social workers are white (non-Hispanic)) (last visited Jan. 17, 2021).

¹¹ See *infra* Part II.

¹² See Vivek Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, IMPRINT (June 21, 2020, 11:00 PM), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616>; see also Rebecca Jean Featherston et al., *Interventions to Mitigate Bias in Social Work Decision-Making: A Systematic Review*, RSCH. SOC. WORK PRAC. 741, 742 (2019).

¹³ See Rudolph Alexander, *Social Workers and Immunity from Civil Lawsuits*, 40 Soc. WORK 648 (1995). For an overview of immunity, see *infra* Section III.A.

¹⁴ See *infra* Section III.C.

¹⁵ See *infra* Section III.C.

¹⁶ See *infra* Section III.A for a discussion and explanation of immunity.

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The child welfare system is a group of services, largely the responsibility of the states, designed to help keep children safe from harm in the home.¹⁷ When the state, through CPS, investigates a family under suspicion of abuse or neglect, it must respect the family's constitutional rights.¹⁸ Specifically, it must ensure that it does not infringe on a parent's Fourteenth Amendment liberty interest in the care and custody of a child or the Fourth Amendment protection from illegal searches and seizures.¹⁹ A social worker who investigates a family without a warrant may violate the child's Fourth Amendment right against illegal searches and seizures.²⁰ A social worker who removes a child without justification violates the parent's Fourteenth Amendment right to familial association.²¹ Although federal law—through § 1983²²—allows individuals to sue state actors for violations of their constitutional rights, courts have granted social workers qualified immunity when the constitutional right is not “clearly established.”²³ When social workers perform acts “intimately associated with the judicial . . . process,”²⁴ such as initiating court proceedings, a court may also grant them absolute or quasi-judicial immunity.²⁵

The idea that CPS and its workers can and do commit acts against families that violate the Constitution runs counter to the intended

¹⁷ See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 1–2 (Feb. 2013) [hereinafter HOW THE CHILD WELFARE SYSTEM WORKS], <https://www.childwelfare.gov/pubPDFs/cpswork.pdf>.

¹⁸ See Teri Dobbins Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 WM. & MARY BILL OF RTS. J. 125, 125–27 (2012).

¹⁹ See U.S. CONST. amends. IV, XIV.

²⁰ See, e.g., *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1089 (3d Cir. 1989); *Calabretta v. Floyd*, 189 F.3d 808, 810 (9th Cir. 1999).

²¹ See, e.g., *Schulkers v. Kammer*, 955 F.3d 520, 539–40 (6th Cir. 2020); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (explaining that “the interest of parents in the care, custody, and control of their children” is a fundamental liberty protected by the Fourteenth Amendment).

²² In relevant part, 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, [or] suit in equity

. . . .

42 U.S.C. § 1983.

²³ See Section III.A for a discussion of qualified immunity and the definition of “clearly established.”

²⁴ *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

²⁵ See, e.g., *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *9 (6th Cir. July 24, 2020); see also *infra* Section III.A.

purpose of CPS; the system is intended to protect children and help families.²⁶ Many people in this country who do not live in fear of CPS knocking on their door may believe that it is accomplishing that goal. The “master narrative,” after all, is that children need saving from “bad parents.”²⁷ Many Americans believe that if CPS has investigated a family, the parent or parents must be either lazy, drug-addicted, or monstrous.²⁸ But this is not the perception of the system for many of its greatly surveilled low-income families and families of color, who distrust it.²⁹ To them, the disproportionality is no mystery.³⁰

Of course, there is undoubtedly an interest in protecting children from the kind of severe abuse that we see in the news.³¹ Those cases are horrific. Yet, at the same time, physical abuse cases constitute only 10.3 percent of maltreatment cases.³² Most cases—61 percent—are neglect cases that can be traced to poverty.³³ What we do not often see on the news are the families who suffer as a result of unwarranted state intervention. This Comment focuses on how the CPS system can affirmatively harm the families it is meant to help. Part II will provide background on some of those harms, including those resulting from

²⁶ See HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 17, at 1.

²⁷ Ledesma, *supra* note 10, at 33 (citing Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2 (2010); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 121 (2013)).

²⁸ See *id.* at 31.

²⁹ Tanya Asim Cooper, *Racial Bias in the American Foster Care System: The National Debate*, 97 MARQ. L. REV. 215, 238 (2013).

³⁰ “For [Black and Native Americans at risk for removal] there is no riddle of overrepresentation of these children in foster care; African Americans ‘get the short end of the stick on every indicia of social well-being: life span, morbidity, incarceration, education, victimization by crime, income, wealth, you name it!’” *Id.* at 239 (footnotes omitted) (citing Child Advocacy Program, *Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts*, Re-Thinking the Policy Options, HARV. L. SCH., (Jan. 28–29, 2011), <https://cap.law.harvard.edu/events-and-conferences/cap-conferences/race-and-child-welfare/conference-videos/>).

³¹ See, e.g., Anemona Hartocollis, *Couple Who Tortured 12 Children in Their California Home Are Sentenced to Life*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/us/turpin-family.html> (describing the charges brought against parents of the twelve Turpin children); Garret Therolf, *How Officials Failed to Save Gabriel Fernandez From Years of Abuse, Torture*, L.A. TIMES (Apr. 8, 2016), <https://www.latimes.com/local/lanow/la-me-ln-gabriel-fernandez-torture-case-20160407-story.html>; THE TRIALS OF GABRIEL FERNANDEZ (Netflix documentary 2020) (describing the murder of Gabriel Fernandez by his mother and her boyfriend); Greg Blass, *Opinion, Abuse, Cruelty, and a System That Failed a Child It Was Supposed to Protect*, RIVERHEAD LOC. (Feb. 9, 2020, 7:05 AM), <https://riverheadlocal.com/2020/02/09/thomas-valva-death-questions-about-failed-syste/>.

³² CHILD MALTREATMENT, *supra* note 9, at 49.

³³ *Id.* See *infra* Section II.B for a brief discussion on the connection between poverty and neglect.

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removal from the home, safety plans, and investigations. Part IV discusses cases that highlight these harms. As we will see, both absolute and qualified immunities of social workers also play a role in these cases.

This Comment will examine social worker immunity and its rationales, how and under what circumstances courts have granted it, and how it may hinder progress in the system.³⁴ Given the difficult job CPS social workers have and the complexities of the system, this Comment ultimately argues that reform or elimination of qualified and absolute immunity is necessary but must be accompanied by significant changes to the system. Part II of this Comment will discuss in more detail the impact the child welfare system has on families—particularly those of color and those living in poverty. Part III will discuss the origins of both qualified and absolute immunity and the rationale for social worker immunity. Part IV will introduce and analyze recent cases involving social worker immunity to discuss the current state of the law, offer a look into social workers' jobs, and reveal flaws in the child welfare system. Finally, Part V will discuss pathways to limiting immunity for social workers as well as reforming the child welfare system by diversifying its workforce, affording less discretion to social workers, and narrowing its scope to well-grounded reports of physical or sexual abuse.

II. THE CPS SYSTEM'S DISPARATE IMPACT ON FAMILIES

This Part provides an overview of the effects that the child welfare system has on families in America. First, it will provide an overview of removal from the home, safety plans, investigations, and their associated harms. Then, through statistics and some history, it serves to emphasize the broad and wide-reaching impact the child welfare system has on families while also addressing the reality many individual families face.

³⁴ A variety of sources written by real parents and families affected by the CPS system will appear throughout this Comment. What I hope to accomplish by including these stories is to provide a look at the real lives beyond a court's recitation of events. So often in this system, social workers, courts, and society choose not to believe the stories of children and, especially, of their parents. See Michael Fitzgerald, *Rising Voices for 'Family Power' Seek to Abolish the Child Welfare System*, IMPRINT (July 8, 2020, 11:45 PM), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> ("Family just aren't believed," said Kristie Puckett-Williams, a campaign manager for North Carolina's American Civil Liberties Union and a formerly incarcerated mother who has faced CPS investigations.").

Removal of children from their families is perhaps the most obvious harm associated with CPS.³⁵ The children that CPS separates from their families experience psychological trauma, for instance, in the form of separation and attachment disorders.³⁶ Research suggests that early childhood disruption of the bonding process can result in emotional distress at the time as well as aggression and depression later on.³⁷ Even without scientific labels, the pain a child feels while living away from their parent or parents can be understood on a basic emotional level; their foster parents are not their “real” parents.³⁸ Children of color suffer additional harm when they are removed from their communities.³⁹ They are likely to experience identity issues relating to their cultural belonging, affecting their sense of identity and capacity.⁴⁰

Grounds for removing a child from their home differ by state, but a removal may occur when, for instance, there is imminent danger to the child or risk of injury or death that case workers cannot alleviate by using available resources.⁴¹ As another example, in New York City, social workers may carry out an emergency removal when they “determine[] the child is not safe” at home.⁴² In some jurisdictions, social workers must file a petition in juvenile court in order to remove.⁴³ Nothing in practice, however, stops workers from threatening

³⁵ See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 528 (2019).

³⁶ *Id.*

³⁷ See *id.* (citing Miriam R. Spinner, *Maternal-Infant Bonding*, 24 CANADIAN FAM. PHYSICIAN 1151, 1151 (1978)). Studies have also shown that these children are more likely to experience “low educational attainment, homelessness, unemployment, economic hardship, unplanned pregnancies, mental health disorders, and criminal justice involvement.” Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 255 (2020).

³⁸ See Trivedi, *supra* note 35, at 528 (citing Jason B. Whiting & Robert E. Lee III, *Voices from the System: A Qualitative Study of Foster Children’s Stories*, 52 FAM. REL. 288, 292 (2003)).

³⁹ See Ledesma, *supra* note 10, at 42.

⁴⁰ *Id.*

⁴¹ *Removal of a Child*, N.J. DEP’T CHILD. & FAM. POL’Y MANUAL, https://www.nj.gov/DCF/policy_manuals/_CPP-II-C-2-700_issuance.shtml (also requiring that workers err on the side of removal and listing examples of when removal should be considered) (last visited Mar. 14, 2022).

⁴² *Will ACS Take My Child?*, ADMIN. CHILD SERVS., <https://www1.nyc.gov/site/acs/child-welfare/will-acs-take-my-child.page> (last visited Mar. 14, 2022). *But see* Yasmeen Khan, *Family Separations in Our Midst*, WNYC (Apr. 17, 2019), <https://www.wnyc.org/story/child-removals-emergency-powers/> (revealing ACS caseworkers abuse discretion in deciding what constitutes an emergency).

⁴³ See, e.g., TENN. CODE ANN. § 37-1-166 (2020).

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removal;⁴⁴ and that can be a significant problem when safety plans are involved.⁴⁵

Safety plans, also referred to as protection plans, are “agreements between CPS authorities and parents intended to keep children safe.”⁴⁶ CPS workers may develop plans with the parent and child, as well as other people who can keep the family safe.⁴⁷ Sometimes, safety plans require no change of custody.⁴⁸ Some, however, require that custody of the child be shifted to a relative.⁴⁹ As discussed in cases later in this Comment,⁵⁰ this puts a tremendous burden on parents and extended family members.⁵¹ In cases where removal does not occur, where CPS sets up a safety plan, the risk that a family’s constitutional rights will be violated remains; these plans have the potential to be invasive, overbearing, and coercive.⁵² Often, parents sign them with the belief that CPS will take their children away if they refuse.⁵³ The plan’s requirements can also be excessive, making it difficult for parents to comply and keep a job at the same time.⁵⁴

Even without the threat of removal or a safety plan, a mere accusation of abuse or neglect is enough to terrify a parent.⁵⁵ The

⁴⁴ See Joshua Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 876 (2020).

⁴⁵ See *id.* at 848.

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ See *id.* at 848 n.25.

⁴⁹ See *id.* at 849.

⁵⁰ See *Schulkers v. Kammer*, 955 F.3d 520 (6th Cir. 2020); *infra* Part IV.

⁵¹ See DIANE L. REDLEAF, *THEY TOOK THE KIDS LAST NIGHT* 23 (2018) (explaining that the burden often falls on grandparents, whose lives are disrupted as a result of the safety plan).

⁵² See, e.g., *id.* (discussing the coerciveness of safety plans).

⁵³ *Id.* at 2, 23; see generally Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629 (2012).

⁵⁴ See, e.g., MOVEMENT FOR FAM. POWER, *HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR* 5–7 (2020) [hereinafter *GROUND ZERO*], <https://static1.square-space.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eed939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf>. “Service plans” of this kind are not discussed at length in this Comment, but are relevant to the surveillance and regulation families, discussed in Part II. *Id.* at 5. *GROUND ZERO* tells the story of a woman whose service plan, which she needed to complete to regain custody of her children, included parenting classes, anger management classes, parenting classes for children with special needs, participation in a drug treatment program, submission to surprise visits from CPS, participation in all court proceedings and conferences and more. *Id.* All of this was in response to her truthfully telling a CPS worker that she smoked cannabis once in a while; most of the classes were not needed and did not apply to her. *Id.*

⁵⁵ See REDLEAF, *supra* note 51, at xviii.

ensuing investigation can also be traumatic.⁵⁶ Investigations and interviews occur after a call comes in and the child abuse hotline workers screen it for relevance.⁵⁷ A CPS worker contacts the child (or another person who may have information) within a specified timeframe, which varies by jurisdiction.⁵⁸ The ensuing investigation and interviews serve to provide a determination or disposition about the alleged maltreatment.⁵⁹ Dispositions include: substantiated, where the allegation of maltreatment or risk thereof is supported by law or policy; unsubstantiated, where there is insufficient evidence to conclude that the child was maltreated or at risk; and intentionally false, where the person alleging maltreatment knew the allegation was not true.⁶⁰ Investigations and interviews can be invasive and violate the Fourth Amendment, just as a police officer's investigation might.⁶¹ According to law Professor Teri Dobbins Baxter, interviews are searches, and when the child is temporarily taken into custody for an interview, that is a seizure.⁶² Therefore, a social worker needs a warrant or consent to perform them.⁶³ There is a debate surrounding whether there is a special needs exception for child abuse investigations, which is discussed in Part IV. The cases discussed in Part IV show that social workers may interview children at school without their parents' consent.⁶⁴ Sometimes investigations can be disturbingly invasive, involving the examination of children's bodies,⁶⁵ or otherwise terrifying for children.⁶⁶

⁵⁶ Baxter, *supra* note 18, at 125, 127 (“[R]esearch has shown that investigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole.”) (footnote omitted) (citing Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 415, 418–19, 421 (2005)).

⁵⁷ CHILD MALTREATMENT, *supra* note 9, at 6.

⁵⁸ *Id.* at 10.

⁵⁹ *Id.* at 16–17.

⁶⁰ *Id.*

⁶¹ See Baxter, *supra* note 18, at 125.

⁶² *Id.* at 125–26.

⁶³ See *id.* at 126.

⁶⁴ See *Schulkers v. Kammer*, 955 F.3d 520, 530 (6th Cir. 2020); *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1051 (9th Cir. 2019); *Doe v. Woodard*, 912 F.3d 1278, 1285–86 (10th Cir. 2019).

⁶⁵ See *Doe*, 912 F.3d at 1278; Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 415 (2005).

⁶⁶ See *Schulkers*, 955 F.3d at 530 (telling how the children CPS interviewed at school were afraid of being taken away from their parents).

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Removals, safety plans, and investigations all contribute to the difficulties CPS-involved families face. To provide a better picture of who these families are and how they become involved in the system, the remainder of this Part discusses the history, statistics, and issues that help explain the system's disparities.

A. *History and Race*

It is difficult to know where to start when discussing the history of the child welfare system. If one were to focus on the separation of children from their families, then the history would begin with slavery⁶⁷ and continue with the removal of Native American children from their homes in the late 19th century and well into the 20th century.⁶⁸ America has a long history of removing children of color from their families.⁶⁹ The CPS system as we know it (and for the purposes of this Comment), however, began in the 1960s.⁷⁰ In 1962, Henry Kempe and his colleagues published "The Battered-Child Syndrome," which created awareness of child abuse, gave doctors a way to understand it, and provided information on how to report it.⁷¹ Not long after, with society's heightened awareness of physical and sexual abuse, Congress passed the Child Abuse Prevention and Treatment Act of 1974 ("CAPTA").⁷² This law conditioned federal funds on the states setting up systems to investigate reports of child neglect (physical, emotional, and academic) and abuse.⁷³ With this passage, reports to CPS skyrocketed from 10,000 in 1967 to 300,000 by 1975.⁷⁴ Now, the numbers are even higher: in 2019, approximately 4,378,000 referrals were made to CPS.⁷⁵

The disproportionality of the child welfare system is still apparent today. It is so obvious that, as Dorothy Roberts notes, if you observed the system without knowing the CPS system had the purpose of helping children, "you would have to conclude that it is an institution designed

⁶⁷ See LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* 19 (2020) ("[T]he threat that children could be taken from kin and caregivers was one of the 'essential features' of enslavement, as . . . W.E.B. DuBois wrote . . .").

⁶⁸ See *id.* at 50–51, 56.

⁶⁹ See generally *id.* at 67 (detailing America's history of taking children as a way to oppress Black, Native American, and Latinx families); see also Detlaff & Boyd, *supra* note 37, at 258–59.

⁷⁰ Michael S. Wald, *Beyond CPS: Developing an Effective System for Helping Children in "Neglectful" Families*, 41 *CHILD ABUSE & NEGLECT* 49, 53 (2015).

⁷¹ See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 *J. AM. MED. ASS'N* 17 (1962), reprinted in 9 *CHILD ABUSE & NEGLECT* 143 (1985).

⁷² See Wald, *supra* note 70, at 53.

⁷³ See *id.*

⁷⁴ *Id.*

⁷⁵ *CHILD MALTREATMENT*, *supra* note 9, at 7.

to monitor, regulate, and punish poor Black families.”⁷⁶ At every juncture of the CPS system—reporting, investigation, substantiation, and foster care placement and exit—children of color are overrepresented.⁷⁷ In 2020, Black children made up 14 percent of the child population,⁷⁸ yet they made up 23 percent of the foster care population.⁷⁹ Similarly, Native American and Alaska Native children made up 1 percent of the child population⁸⁰ yet constituted 2 percent of the foster care population.⁸¹ Aside from removals, mere investigation numbers show the disparity. 37 percent of all children will experience a CPS investigation before turning eighteen.⁸² That number alone is disquieting. But perhaps more jarring is this fact: 53 percent of Black children experience an investigation by the time they turn eighteen.⁸³

⁷⁶ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6 (2002).

⁷⁷ Cooper, *supra* note 29, at 258.

⁷⁸ CHILD POPULATION BY RACE IN THE UNITED STATES, KIDS COUNT, <https://datacenter.kidscount.org/data/tables/103-child-population-by-race#detailed/1/any/false/574,1729,37,871,870,573,869,36,868,867/68,69,67,12,70,66,71,72/423,424> (last updated Sept. 2021).

⁷⁹ CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *THE AFCARS REPORT 2* (2021) [hereinafter *AFCARS REPORT*], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf>. The same was true of 2019, CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *THE AFCARS REPORT 2* (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>, and 2018, Sankaran, *supra* note 12. This disproportionality has improved, however; in 2009, Black children constituted 30 percent of the foster care population. CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *THE AFCARS REPORT 2* (2009), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport17.pdf>.

⁸⁰ CHILD POPULATION BY RACE IN THE UNITED STATES, *supra* note 78.

⁸¹ *AFCARS REPORT*, *supra* note 79, at 2. It should be noted, however, that this disproportionality has improved since the enactment of the Indian Child Welfare Act (ICWA) in 1978; in the 1970s, 25 percent to 35 percent of all Native children were removed. *About ICWA*, NAT’L INDIAN CHILD WELFARE ASS’N, <https://www.nicwa.org/about-icwa/> (last visited Apr. 23, 2021). Also, compare these numbers to non-Hispanic white children, who make up 50 percent of the child population, CHILD POPULATION BY RACE IN THE UNITED STATES, *supra* note 78, yet constitute 43 percent of the foster care population, *AFCARS REPORT*, *supra* note 79, at 2. Hispanic or Latinx children are 26 percent of the child population, CHILD POPULATION BY RACE IN THE UNITED STATES, *supra* note 78, and 22 percent of the foster care population, *AFCARS REPORT*, *supra* note 79, at 2. Asian children make up 5 percent of the child population, CHILD POPULATION BY RACE IN THE UNITED STATES, *supra* note 78, and 1 percent of the foster care population, *AFCARS REPORT*, *supra* note 79, at 2.

⁸² Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, *AM. J. PUB. HEALTH* 274, 277 (2017).

⁸³ *Id.* Compare that number to 32 percent of Hispanic children, 28.2 percent of white children, 23.4 percent of Native American children, and 10.2 percent of Asian or Pacific Islander children. *Id.*

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B. Poverty

Low-income families and communities are also overrepresented in the child welfare system.⁸⁴ It may be that a causal connection exists between poverty and CPS involvement.⁸⁵ For instance, some research suggests that parents under high chronic stress due to poverty are more vulnerable to alcohol abuse, which may inhibit parenting capacity.⁸⁶ But states frequently define neglect as a failure to provide food, clothing, shelter, medical care, or supervision.⁸⁷ Often what workers consider a failure is simply an *inability* to find adequate housing,⁸⁸ food,⁸⁹ or a babysitter.⁹⁰ Indigent parents, therefore, live in fear of CPS knocking at their doors.⁹¹

There are also a few aspects of poverty that make indigent parents more likely to be surveilled and reported and therefore

⁸⁴ See Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 5 (2017); Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, AM. BAR ASS'N (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/>.

⁸⁵ See Fong, *supra* note 84, at 5.

⁸⁶ See *id.* at 6.

⁸⁷ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (Mar. 2019), <https://www.childwelfare.gov/pubPDFs/define.pdf>.

⁸⁸ See Amy Dworsky, *Families at the Nexus of Housing and Child Welfare*, STATE POL'Y ADVOC. & REFORM CTR. (Nov. 2014), <http://childwelfaresparc.org/wp-content/uploads/2014/12/Families-at-the-Nexus-of-Housing-and-Child-Welfare.pdf> (explaining the relationship between housing and child welfare system involvement).

⁸⁹ See Sharkkara Harrison, *The Do's and Don'ts of Parenting While Poor*, RISE (Nov. 6, 2017), <https://www.risemagazine.org/2017/11/the-dos-and-donts-of-parenting-while-poor/> (advising parents to “try to have food in your home at all times.”).

⁹⁰ Elizabeth Brico, *Poverty Isn't Neglect, But the State Took My Children Anyway*, TALK POVERTY (Nov. 16, 2018), <https://talkpoverty.org/2018/11/16/poverty-neglect-state-took-children/> (written by a parent who had her children removed for neglect due to poverty).

⁹¹ See *id.*; Katherine Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform>; Emma S. Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html?_r=0.

See Harrison, *supra* note 89, for an article on the steps poor parents need to take in order to avoid a CPS investigation. It is also worth noting that the COVID-19 pandemic has sent 2.5 million children below the poverty line since May 2020. Jason DeParle, *8 Million Have Slipped Into Poverty Since May as Federal Aid Has Dried Up*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/us/politics/federal-aid-poverty-levels.html?smtyp=cur&smid=tw-nytimes>. Thus, the problem has been exacerbated.

overrepresented.⁹² Bias has a role.⁹³ Mandatory reporters, like doctors,⁹⁴ may be more inclined to report perceived maltreatment based on social class.⁹⁵ Additionally, low-income families often use public programs, causing them to come into contact with public officials (who also may be mandatory reporters)⁹⁶ more often; this consequently increases their visibility and the chances that someone will report them to CPS.⁹⁷

C. Mandatory and Anonymous Reporting

Inside and outside the context of poverty, mandated reporting has been subject to some controversy.⁹⁸ The laws surrounding mandatory reporting put the burden on mandated reporters like teachers, daycare workers, and doctors⁹⁹ to report suspected abuse and neglect.¹⁰⁰ In addition to the sense of guilt that likely accompanies a failure to act in the face of suspected neglect or abuse, forty-nine states, Washington, D.C., American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands impose some kind of penalty on mandatory reporters who knowingly or willfully fail to report suspected child maltreatment.¹⁰¹ Moreover, at least some of these reporters likely feel they are helping the family by calling CPS.¹⁰²

⁹² See Fong, *supra* note 84, at 6 (“[W]elfare sanctions or employment changes predict . . . investigation, but not additional child welfare involvement, suggesting that economic factors may shape the . . . report more so than the underlying behavior.”).

⁹³ See *id.*

⁹⁴ See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (Apr. 2019) [hereinafter MANDATORY REPORTERS], <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

⁹⁵ See Fong, *supra* note 84, at 6.

⁹⁶ MANDATORY REPORTERS, *supra* note 94, at 2.

⁹⁷ See Ledesma, *supra* note 10, at 47; Fong, *supra* note 84, at 6; see also CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 6 (Nov. 2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf.

⁹⁸ See Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 10 (2005); Kathryn S. Krase, *Differences in Racially Disproportionate Reporting of Child Maltreatment Across Report Sources*, 7 J. PUB. CHILD WELFARE 351 (2013).

⁹⁹ See MANDATORY REPORTERS, *supra* note 94, at 2.

¹⁰⁰ See Harrison, *supra* note 89.

¹⁰¹ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 2 (Feb. 2019) [hereinafter PENALTIES], <https://www.childwelfare.gov/pubPDFs/report.pdf>. In most states, the failure is a misdemeanor, but in Florida it is a felony. *Id.*

¹⁰² See Melton, *supra* note 98, at 12 (telling the story of a well-meaning neighbor who calls CPS on a mother who struggles to feed and provide supervision of her children).

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Most states allow reporters to remain anonymous if they choose.¹⁰³ This means that the reporter does not have to disclose their identity to the hotline.¹⁰⁴ This also presents problems. Though anonymous reports are rare,¹⁰⁵ they are not regulated and are susceptible to abuse.¹⁰⁶ For instance, some perpetrators of domestic violence anonymously make false reports to CPS to assert power and control over their victims.¹⁰⁷ This discredits the victims' ability to parent and subjects them to further trauma through CPS investigations.¹⁰⁸ The fact that the reports are anonymous means CPS does not track them, and therefore neither CPS nor anyone else can stop abusers from repeatedly making false reports.¹⁰⁹ Moreover, there are no penalties for false reporting if the caller is anonymous.¹¹⁰

But even where calls are not anonymous, false reporting does occur.¹¹¹ Though it is a rare occurrence,¹¹² anyone from disgruntled neighbors, friends, family members, or exes may make a false report in retaliation.¹¹³

D. Drug Use

Drug use and CPS's assumptions about it (for instance, the assumption that drug use causes bad parenting) also affect reporting and CPS involvement. As already mentioned, sometimes substance abuse can lead to neglect.¹¹⁴ But in many jurisdictions, CPS and courts conflate evidence of drug use with a risk of harm—even where there is

¹⁰³ See MANDATORY REPORTERS, *supra* note 94, at 4.

¹⁰⁴ CHILD MALTREATMENT, *supra* note 9, at 115.

¹⁰⁵ Only 6.5 percent of reports were from anonymous sources in 2019. *Id.* at 9.

¹⁰⁶ See Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 52 (2014).

¹⁰⁷ See Keyna Franklin, Melissa Landrau, & Sara Werner, *False and Malicious Reports: Why NY Should End Anonymous Reporting*, RISE (Sept. 1, 2020), <https://www.risemagazine.org/2020/09/false-and-malicious-reports-why-ny-should-end-anonymous-reporting/>.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See Cecka, *supra* note 106, at 52. Even if the reports are not anonymous; only twenty-nine states and Puerto Rico have penalties for false reporting. PENALTIES, *supra* note 101, at 3.

¹¹¹ See CHILD MALTREATMENT, *supra* note 9, at 30.

¹¹² See *id.*

¹¹³ See, e.g., Kathryn S. Krase, *Social Workers as Mandated Reporters: What Happens If I'm Wrong? The Immunity Provision, Part IV*, THE NEW SOC. WORKER (Winter 2014), <https://www.socialworker.com/feature-articles/practice/social-workers-as-mandated-reporters-what-happens-if-im-wrong/>; see also Fong, *supra* note 84, at 6.

¹¹⁴ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., PARENTAL SUBSTANCE USE AS CHILD ABUSE (July 2019), <https://www.childwelfare.gov/pubPDFs/parentalsubstanceuse.pdf>.

no evidence of actual harm.¹¹⁵ This is despite there being no conclusive study that establishes a link between drug use and maltreatment.¹¹⁶ This is also a point of disparity; low-income, Black, Native American, and Latinx families use drugs at a rate similar to their wealthier white counterparts,¹¹⁷ but CPS is more likely to target the former, and people are more likely to report them.¹¹⁸

E. Surveillance

Surveillance of certain poor communities of color is another malady of the CPS system.¹¹⁹ In New York City, for instance, the number of children in foster care has decreased, but investigations concentrated in certain communities have increased.¹²⁰ As already discussed, investigations are themselves traumatic. When investigations lead to court-ordered supervision, we see surveillance on an individual level.¹²¹ As Rise Magazine reports, 10,000 families in New York City had to report to the court on family matters in 2017.¹²² One parent detailed how difficult it was to comply with instructions, which required her to take off work multiple times; it eventually resulted in her losing her job.¹²³ Similarly, having their names on the child abuse registry if abuse was “indicated”¹²⁴ may affect parents’ ability to obtain employment.¹²⁵

F. Bias and the Discretion of Social Workers

The foregoing information suggests an explanation for the over four million calls CPS gets every year and how low-income, Black, and Native American families are disproportionately involved in the

¹¹⁵ See Jasmine Harris, *Child Abuse and Cannabis Use: How a Prima Facie Standard Mischaracterizes Parental Cannabis Consumption as Child Neglect*, 41 CARDOZO L. REV. 2761, 2762–63 (2020); see also *Schulkers v. Kammer*, 955 F.3d 520 (6th Cir. 2020); *infra* Part IV.

¹¹⁶ Harris, *supra* note 115, at 2765 (explaining that researchers are unable to determine conclusively that marijuana use is a direct cause of child maltreatment).

¹¹⁷ GROUND ZERO, *supra* note 54, at 15.

¹¹⁸ REDLEAF, *supra* note 51, at xix (explaining that one study found that prenatal drug use was reported at a rate eleven times higher for Black women than for white women, though actual use was the same).

¹¹⁹ See *Surveillance Isn't Safety—How Over-Reporting and CPS Monitoring Stress Families and Weaken Communities*, RISE (Sept. 17, 2019) [hereinafter *Surveillance Isn't Safety*], <https://www.risemagazine.org/2019/09/surveillance-isnt-safety/>.

¹²⁰ *Id.*

¹²¹ See *Surveillance Isn't Safety*, *supra* note 119.

¹²² *Id.*

¹²³ *Id.*; see also GROUND ZERO, *supra* note 54, at 5–7.

¹²⁴ A disposition of “indicated” abuse or neglect is when maltreatment is suspected, but cannot be substantiated. CHILD MALTREATMENT, *supra* note 9, at 16.

¹²⁵ See REDLEAF, *supra* note 51, at 38, 40–42.

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system.¹²⁶ Of those referrals, over 45 percent are screened out for irrelevance or lack of information.¹²⁷ Most of the remaining reports are investigated by a caseworker.¹²⁸ This is another juncture where biases play a role—specifically, the biases of CPS workers.

Social workers have broad discretion and must use their judgment to determine when children are at risk of harm and the appropriate response.¹²⁹ Often, they do so with little factual information in an overwhelmed state, creating “strained decision-making conditions.”¹³⁰ Unfortunately, this presents the opportunity for them to make inferences based on their pre-existing ideas of the families they are investigating.¹³¹ For instance, social workers—most of whom are middle class and white¹³²—may tend to compare families to a “norm” that is middle class and white.¹³³ Thus, stereotypes such as Black mothers as “unfit,” Black fathers as “uninvolved,”¹³⁴ and low-income families as neglectful¹³⁵ are allowed to influence their decision-making.¹³⁶ While there are several resources designed to mitigate implicit bias in the child welfare system,¹³⁷ scholars suggest that increased testing for implicit bias is needed to address the problem.¹³⁸

¹²⁶ See CHILD MALTREATMENT, *supra* note 9, at 7. See also Joyce McMillan & Jessica Prince, *Opinion: The Press is Stoking Fears of a Phantom Child-Abuse Crisis*, CITY LIMITS (June 29, 2020), <https://citylimits.org/2020/06/29/opinion-the-press-is-stoking-fears-of-a-phantom-child-abuse-crisis/>, for the assertion that the drop in child neglect and abuse reporting during the COVID-19 lockdown was not due to the fact that the abuse was “hidden,” but that most calls pre-lockdown were unmerited.

¹²⁷ CHILD MALTREATMENT, *supra* note 9, at 12.

¹²⁸ *Id.* at 16.

¹²⁹ See Cooper, *supra* note 29, at 252; Sankaran, *supra* note 12.

¹³⁰ See Kathleen Simon, Note, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 361–62 (2018) (explaining how CPS workers are overworked, under trained, and lacking information).

¹³¹ See *id.* at 362.

¹³² See Ledesma, *supra* note 10, at 51.

¹³³ See *id.* at 52.

¹³⁴ Simon, *supra* note 130, at 353.

¹³⁵ See Ledesma, *supra* note 10, at 32.

¹³⁶ See *id.* at 51–52. For a study on social worker implicit bias, see, for example, Sheila D. Ards et al., *Racialized Perceptions and Child Neglect*, 34 CHILD & YOUTH SERVS. REV. 1480 (2012).

¹³⁷ See, e.g., Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, AM. BAR ASS’N (Dec. 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january--december-2019/race-and-poverty-bias-in-the-child-welfare-system--strategies-f/; *Implicit Bias 101: Exploring Implicit Bias in Child Protection*, KIRWAN INST., <https://kirwaninstitute.osu.edu/implicit-bias-101> (last visited Jan. 13, 2020).

¹³⁸ See, e.g., Marian S. Harris, *Racial Bias as an Explanatory Factor for Racial Disproportionality and Disparities in Child Welfare*, in 11 RACIAL DISPROPORTIONALITY AND

Fighting this bias takes place at an individual level as well as a systemic level, which is discussed briefly at the end of this Comment. There are times, however, when a social worker's conduct goes beyond a good faith ignorance of culture and poverty and enters a realm of carelessness and disregard for families.¹³⁹ That is the point where deterrable and preventable unconstitutional conduct may occur. This conduct is deterrable because holding social workers liable for intentional conduct may help protect the rights of families. It is preventable because some aspects of the system are undoubtedly to blame.

III. THE RATIONALE FOR SOCIAL WORKER IMMUNITY

Social workers are entitled to qualified immunity as government officials. Because they also sometimes perform certain functions associated with the judicial process, like initiating proceedings, they may also be entitled to absolute immunity. This Part offers a brief overview of each form of immunity, how they came to apply to social workers, and why or why not such immunity is inappropriate.

A. *A Brief Overview of Immunity*

Qualified immunity is a judicially created doctrine that protects government officials from civil liability when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.¹⁴⁰ In deciding whether an official is entitled to qualified immunity, a court must use a two-prong test: it must decide whether the plaintiff has alleged a violation of a constitutional right and whether that right was clearly established at the time of the defendant's conduct.¹⁴¹ The court uses its discretion in deciding which of these two prongs to evaluate first.¹⁴² In deciding whether the right was clearly established, the "law" should not be defined "at a high level of generality."¹⁴³ There must be a "fair warning"

DISPARITIES IN THE CHILD WELFARE SYSTEM 141, 154 (Alan J. Dettlaff ed., 2021) (calling for increased testing and moderating of implicit bias using tests such as the Implicit Association Test ("IAT"), Affect Misattribution Procedure ("AMP"), and Implicit Relational Assessment procedure ("IRAP")).

¹³⁹ See *infra* Part IV.

¹⁴⁰ See NOVAK, *supra* note 2, at 1; see also Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803 (2018) (explaining that the Supreme Court "created qualified immunity" in *Pierson v. Ray*, 386 U.S. 547 (1967)); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁴¹ *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

¹⁴² *Id.* at 236.

¹⁴³ *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

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that the alleged conduct was unconstitutional.¹⁴⁴ A right is not clearly established just because it would be in another jurisdiction. It must be binding on the court considering the issue, or there must be a consensus of cases of persuasive authority.¹⁴⁵

What is the rationale behind giving officials such broad immunity? Originally, when the Supreme Court applied qualified immunity to a § 1983 claim in *Pierson v. Ray* in 1967, the purpose was to protect officials acting in good faith from liability.¹⁴⁶ In *Harlow v. Fitzgerald*, the Court said qualified immunity prevents costs “to society as a whole” like the expenses of litigation, “diversion of official energy,” the “deterrence of able citizens from acceptance of public office,” and the danger that the “fear of being sued will ‘dampen the ardor of . . . [public officials], in the unflinching discharge of their duties.’”¹⁴⁷ More recently, the Supreme Court has framed the last rationale as serving to give officials “breathing room” to make judgments.¹⁴⁸

Absolute or judicial immunity stems from English common law.¹⁴⁹ It is absolute, meaning that even if judges act maliciously or corruptly, they are not liable unless there is a “clear absence of all jurisdiction.”¹⁵⁰ As with qualified immunity, in *Pierson v. Ray*, the Court held that absolute immunity is an available defense in § 1983 suits.¹⁵¹ Importantly, when a court applies absolute immunity, it does not do so automatically just because the defendant is a judge; rather, the court looks at the defendant’s acts. Absolute immunity applies only to judicial acts—not administrative, legislative, or executive functions that a judge may perform.¹⁵²

¹⁴⁴ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

¹⁴⁵ *See Wilson v. Layne*, 526 U.S. 603, 617 (1999).

¹⁴⁶ *See generally* *Pierson v. Ray*, 386 U.S. 547 (1967); *see* Schwartz, *supra* note 140, at 1803 & n.38.

¹⁴⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

¹⁴⁸ *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

¹⁴⁹ *See* Brittney Kern, Comment, *Giving New Meaning to “Justice for All”: Crafting an Exception to Absolute Judicial Immunity*, 2014 MICH. STATE L. REV. 149, 154 (2014) (citing *Floyd & Barker*, (1607) 77 Eng. Rep. 1305, 1305; 5 Co. Rep. 23, 23); *see also* *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (“Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . .”). Absolute immunity also extends to legislators, prosecutors, and witnesses. Kern, *supra*, at 153.

¹⁵⁰ *Bradley v. Fisher*, 80 U.S. 335, 351 (1871).

¹⁵¹ *Pierson*, 386 U.S. at 554 (“The legislative record [for § 1983] gives no clear indication that Congress meant to abolish . . . common-law immunities.”).

¹⁵² *See Forrester v. White*, 484 U.S. 219, 227 (1988).

It is this functional approach that allowed the expansion of absolute immunity to other officials performing judicial acts.¹⁵³ In *Imbler v. Pachtman*, the Supreme Court applied this quasi-judicial immunity to prosecutors sued under § 1983.¹⁵⁴ The Court held that initiating a prosecution and presenting the State's case were acts "intimately associated" with the judicial process and, therefore, those prosecutorial activities were covered by absolute immunity.¹⁵⁵ The rationale for both judicial and quasi-judicial absolute immunity is the same,¹⁵⁶ and it is similar to the rationale for qualified immunity. The Court in *Imbler* recognized a need for keeping prosecutors from the distraction of litigation and encouraging the exercise of independent judgment.¹⁵⁷ Less than absolute immunity, it said, "would disserve the broader public interest" by preventing "vigorous" performance of prosecutors' duties.¹⁵⁸ It also considered that because prosecutors act under significant time constraints and sometimes with little information, prosecutors inevitably make decisions that might violate the Constitution.¹⁵⁹ It recognized that, like judges, prosecutors had other ways to deter misconduct, like professional discipline or criminal liability.¹⁶⁰

While the Supreme Court has never addressed social worker absolute immunity,¹⁶¹ several lower courts have applied it.¹⁶² Some of these courts have likened the discretion that social workers have to initiate child protection proceedings to prosecutorial discretion to initiate proceedings.¹⁶³ Actions like this are "intimately associated with the judicial process."¹⁶⁴

¹⁵³ See Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 S.M.U. L. REV. 265, 274 (2006); *Butz v. Economou*, 438 U.S. 478, 514 (1978).

¹⁵⁴ *Imbler v. Pachtman*, 424 U.S. 409, 438 (1976).

¹⁵⁵ *Id.* at 430–31.

¹⁵⁶ See *id.* at 422–23.

¹⁵⁷ See *id.* at 423.

¹⁵⁸ *Id.* at 427.

¹⁵⁹ See *id.* at 425.

¹⁶⁰ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

¹⁶¹ See Johns, *supra* note 153, at 288.

¹⁶² See, e.g., *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *1–2 (6th Cir. July 24, 2020); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1103 (9th Cir. 2010); *Hughes v. Long*, 242 F.3d 121, 125–26 (3d Cir. 2001); *Millsbaugh v. Cnty. Dep't of Pub. Welfare* 937 F.2d 1172, 1172 (7th Cir. 1991).

¹⁶³ See Johns, *supra* note 153, at 286–87.

¹⁶⁴ *Turner*, 2020 U.S. App. LEXIS 23446, at *9 (citing *Pittman v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 640 F.3d 716, 725 (6th Cir. 2011)).

B. *Common Criticisms of Immunity*

Some scholars have criticized qualified immunity as not having a basis in law.¹⁶⁵ Nothing in § 1983—neither the original version¹⁶⁶ nor the statute as it is now—indicates that officials are entitled to immunity.¹⁶⁷ Nor is there a basis in the common law.¹⁶⁸ At the time Congress passed the original version of the statute in 1871, officials who committed illegal acts were liable without regard to subjective intent.¹⁶⁹ In fact, in *Myers v. Anderson*, the Court rejected the argument that an official could assert a good faith defense to a § 1983 claim.¹⁷⁰ When the Court decided *Pierson v. Ray*,¹⁷¹ however, it allowed for that defense under § 1983, contradicting its own precedent and common law.¹⁷²

Perhaps more importantly, qualified immunity “hamper[s] the development of constitutional law.”¹⁷³ The Supreme Court set a narrow definition of “clearly established,” and that definition has become even narrower over time.¹⁷⁴ In order to have a clearly established right, there must be binding precedent or a consensus of persuasive authority that involves an official “acting under similar circumstances.”¹⁷⁵ While the Court said that there does not need to be a prior case “directly on point,”¹⁷⁶ it has reversed denials of qualified immunity where there was failure “to identify a case where an officer acting under similar circumstances” violated the Constitution.¹⁷⁷ Also hindering the development of constitutional doctrine is the Supreme Court’s grant of

¹⁶⁵ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018); Schwartz, *supra* note 140, at 1801 (noting that there is no basis for qualified immunity in common law); see also Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), <https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure>.

¹⁶⁶ See An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

¹⁶⁷ See 42 U.S.C.S. § 1983 (West 2021); Baude, *supra* note 165, at 49–50.

¹⁶⁸ See Schwartz, *supra* note 140, at 1801.

¹⁶⁹ *Id.*

¹⁷⁰ See Baude, *supra* note 165, at 57–58; *Myers v. Anderson*, 238 U.S. 368, 378–79 (1915).

¹⁷¹ See *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

¹⁷² See Schwartz, *supra* note 140, at 1802 (citing Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO STATE J. CRIM. L. 463, 504 (2010)).

¹⁷³ Schwartz, *supra* note 140, at 1800.

¹⁷⁴ See *id.* at 1814.

¹⁷⁵ See *id.* at 1815–16 (quoting *White v. Pauly* 137 S. Ct. 548, 552 (2017)).

¹⁷⁶ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted).

¹⁷⁷ *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017).

discretion in deciding which prong to consider first.¹⁷⁸ If a court decides to analyze whether a right is clearly established first, and finds it was not, it does not have to decide if the officer violated a constitutional right.¹⁷⁹ Thus, even if another plaintiff brings a factually similar case, the right is still not “clearly established” because the conduct in the previous case was not found to be unconstitutional.¹⁸⁰ As law Professor Joanna C. Schwartz has articulated, the combination of a narrow definition of a clearly established law and the discretion of courts to choose which prong to evaluate first creates a “vicious cycle.”¹⁸¹

In this sense, as Justice Sotomayor dissented in *Mullenix v. Luna*, qualified immunity “renders the protections of the Fourth Amendment hollow.”¹⁸² It ultimately signals to officials that they can act first and think later about whether their conduct was constitutional—without any consequences.¹⁸³ But, of course, there are consequences for the victims denied justice. Additionally, qualified immunity may discourage people from bringing suits in the first place.¹⁸⁴

As for absolute quasi-judicial immunity, the fact that prosecutors can avoid liability even when their actions lead to wrongful convictions has been said to add to the “criminal legal machine” that facilitates mass incarceration.¹⁸⁵ While the Supreme Court cited professional discipline and criminal liability as proper deterrents against prosecutorial misconduct, these measures are rarely used against prosecutors.¹⁸⁶

The Supreme Court itself has not addressed absolute immunity as it applies to social workers, but in dissent to a denial of certiorari, Justice Thomas briefly discussed it.¹⁸⁷ Justice Thomas expressed doubt as to whether social workers’ activities were similar to that of prosecutors,

¹⁷⁸ See Schwartz, *supra* note 140, at 1815 (citing *Pearson v. Callahan*, 555 U.S. 223, 223–24 (2009)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1815–16; see, e.g., *Schulkers v. Kammer*, 955 F.3d 520, 535–36 (6th Cir. 2020) (recognizing that the court did not need to consider whether a constitutional right was violated because it first determined that the law was not clearly established, but deciding to address the question anyway to “promote[] the development of constitutional precedent”) (internal quotation marks and citation omitted).

¹⁸¹ Schwartz, *supra* note 140, at 1815.

¹⁸² *Mullenix v. Luna*, 577 U.S. 7, 20–21, 26 (2015) (Sotomayor, J., dissenting).

¹⁸³ See *id.* As Justice Sotomayor wrote, the decision “sanction[ed] a ‘shoot first, think later’ approach to policing . . .” *Id.* at 26.

¹⁸⁴ Schwartz, *supra* note 140, at 1818.

¹⁸⁵ See Kate Levine & Joanna Schwartz, *Hold Prosecutors Accountable, Too*, BOS. REV. (June 18, 2020), <http://bostonreview.net/law-justice/kate-levine-joanna-schwartz-hold-prosecutors-accountable-too>.

¹⁸⁶ See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 70–71 (2005).

¹⁸⁷ *Hoffman v. Harris*, 114 S. Ct. 1631, 1632–33 (1994) (Thomas, J., dissenting).

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while also pointing out that social worker absolute immunity could not stand on its own because it has no basis in common law; the immunity, and indeed social workers, did not exist in 1871 at the time that § 1983 was first enacted.¹⁸⁸

C. *Social Workers and Immunity*

Whether or not qualified and quasi-judicial immunity fulfill their intended goals, their rationales might also apply to social workers. Social workers must make difficult decisions.¹⁸⁹ Perhaps giving them some “breathing room” in that decision-making is in their best interest. Likewise, they might do their jobs best when not distracted by litigation or the threat thereof. Perhaps the threat of liability would “dampen [their] ardor” in performing their duties.¹⁹⁰ Additionally, like prosecutors, they often act under time constraints¹⁹¹ and with limited information,¹⁹² which inevitably makes it likely they will, at times, violate the Constitution.

As Justice Thomas indicated, there might be other policy reasons to justify immunity for social workers besides a functional analogy to judges or prosecutors or historical justification.¹⁹³ The following discussion addresses some of those reasons.

First of all, a social worker’s job is very difficult and is hindered by a lack of resources, including training.¹⁹⁴ Most importantly, social

¹⁸⁸ See *id.* (citing *Burns v. Reed*, 500 U.S. 478, 489 (1991) (Scalia, J., concurring in judgment and dissenting in part); see also *Johns*, *supra* note 153, at 285.

¹⁸⁹ See JAMES PAYNE, PUB. CONSULTING GRP. HUM. SERVS., BEYOND QUICK FIXES: WHAT WILL IT REALLY TAKE TO IMPROVE CHILD WELFARE IN AMERICA? PAPER TWO: CASEWORKERS ARE FIRST RESPONDERS. THEY DESERVE THE SAME PROFESSIONALIZATION AS OTHER ESSENTIAL PERSONNEL 2 (June 10, 2014), https://www.publicconsultinggroup.com/media/1352/caseworkers_are_first_responders_whitepaper.pdf.

¹⁹⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

¹⁹¹ See *A Day in the Life of a CPS Social Worker: It’s a Mess*, THE DOE (Sept. 2020), <https://www.thedoe.com/narratives/day-in-life-cps-social-worker> (“I regularly clocked 15-plus hour days . . .”); Austin Griffiths et al., “*The Stress Is Indescribable*”: *Self-Reported Health Implications From Child Welfare Supervisors*, 38 CLINICAL SUPERVISORS 183, 190 (2019) (detailing unhealthy eating habits due to skipping lunches and working past dinners).

¹⁹² See Gupta-Kagan, *supra* note 44, at 877 (explaining how workers work off of “imperfect information”).

¹⁹³ *Hoffman v. Harris*, 114 S. Ct. 1631, 1633 (1994).

¹⁹⁴ See Claire Burke, *Newly Qualified Social Workers Have No Time for Training*, *Study Finds*, GUARDIAN (Dec. 11, 2012, 3:30 PM) <https://www.theguardian.com/social-care-network/2012/dec/11/newly-qualified-social-workers-no-time-training>; *Families in Crisis: DSS Training Issues Put Children in Danger*, ABC 13 NEWS (June 13, 2018), <https://wlos.com/news/local/dss-families-in-crisis-training-issues>.

workers are overburdened with caseloads often exceeding the recommended number.¹⁹⁵

Even if the caseloads were within the recommended range, it would not likely make the job much easier. In many ways, social workers function as first responders. On a daily basis, they must make potentially life or death decisions, either over the phone or on a visit to a family.¹⁹⁶ Additionally, they witness the trauma that children and families experience and have to review and relive it repeatedly.¹⁹⁷ With this pressure and exposure to trauma, along with the stress of the system's environment itself,¹⁹⁸ social workers sometimes experience mental health consequences like compassion fatigue,¹⁹⁹ secondary traumatic stress,²⁰⁰ and burnout.²⁰¹ Given the long hours, one could hardly find that the money makes it worth it.²⁰²

Among the difficult decisions previously mentioned lies perhaps the most difficult of all: the decision of whether to remove a child. Thus, it is worthwhile to address this aspect of the social worker's job in particular. Removals can be traumatic for both children and families, yet sometimes children's safety is so seriously at risk that they must be removed from the home. When social workers face such a difficult decision, does the possibility of immunity have an effect on it?

¹⁹⁵ PAYNE, *supra* note 189, at 2.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 3.

¹⁹⁸ See *Stress and the Child Welfare Workforce: Recognizing Signs of Secondary Traumatic Stress*, QUALITY IMPROVEMENT CTR. WORKFORCE DEV. (July 2, 2018), <https://www.qic-wd.org/blog/stress-and-child-welfare-workforce-recognizing-signs-secondary-traumatic-stress> (listing "[b]ureaucratic rules, paperwork, work overload, role confusion, high demands with low resources, high levels of office politics, unfair practices, and other forms of negative organizational culture and climate" as sources of stress).

¹⁹⁹ See David Turgoose & Lucy Maddox, *Predictors of Compassion Fatigue in Mental Health Professionals: A Narrative Review*, 23 *TRAUMATOLOGY* 172, 172 (2017) ("Compassion fatigue [is] the empathic strain and general exhaustion . . . from dealing with people in distress It is characterized by physical and emotional exhaustion and . . . reduction in the ability to feel empathy and compassion for others.").

²⁰⁰ See *Stress and the Child Welfare Workforce: Recognizing Signs of Secondary Traumatic Stress*, *supra* note 198; Brian E. Bride, *Prevalence of Secondary Traumatic Stress Among Social Workers*, 53 *SOC. WORK* 63, 63 (2007) ("[Secondary traumatic stress] is the stress resulting from helping or wanting to help a traumatized or suffering person.").

²⁰¹ See Dnika J. Travis et al., *'I'm So Stressed!': A Longitudinal Model of Stress, Burnout and Engagement among Social Workers in Child Welfare Settings*, 46 *BRIT. J. SOC. WORK* 1076, 1076 (2016) (defining burnout as emotional exhaustion and depersonalization).

²⁰² The annual pay for social workers has a wide range. Annual pay by state ranges from \$37,190 in Mississippi to \$71,590 in Washington, D.C., with the average being \$49,448. Maura Deering, *Social Work Salaries and Hiring Outlook*, *SOC. WORK GUIDE* (Oct. 12, 2020), <https://www.socialworkguide.org/salaries/>.

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In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that social workers could not be held liable under § 1983 for leaving a child with abusive parents in the event the child got hurt.²⁰³ The petitioners in that case were Joshua DeShaney, a child whose father had abused and permanently injured him after CPS had failed to remove him from the home, and his mother.²⁰⁴ CPS social workers knew that the father abused Joshua and ignored many warning signs that Joshua was at risk for serious injury.²⁰⁵ The petitioners sued CPS under § 1983 for violating the child's Fourteenth Amendment substantive due process rights.²⁰⁶ Specifically, the petitioners contended that by failing to protect Joshua, CPS deprived him of his "liberty interest in 'free[dom] from . . . unjustified intrusions on personal security.'"²⁰⁷ The Court rejected the argument that CPS owed him an affirmative duty under the Constitution to protect against private actors' invasion.²⁰⁸ It held that the State is only responsible for safety and well-being when it takes a person into custody against that person's will.²⁰⁹ Thus, CPS could not be held liable for failing to remove a child.²¹⁰

Law Professor Rebecca Aviel has argued that the Court's holding in *DeShaney* has made immunity for social workers necessary.²¹¹ She claims that without absolute immunity, social workers have more of an incentive to leave a child in an abusive household than to risk liability for wrongful removal.²¹² But this is not necessarily true. Even the Court in *DeShaney* articulated that CPS might have acquired a duty to protect Joshua under state tort law, so petitioners might sue under that cause of action.²¹³ Moreover, when a caseworker fails to remove a child, the media and the public take notice of it; there is an element of shame.²¹⁴

²⁰³ See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989).

²⁰⁴ See *id.* at 191–93.

²⁰⁵ See *id.* at 192–93.

²⁰⁶ *Id.* at 194–95.

²⁰⁷ *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)) (alteration in original).

²⁰⁸ See *id.* at 195.

²⁰⁹ See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

²¹⁰ See *id.* at 201.

²¹¹ Rebecca Aviel, *Restoring Equipoise to Child Welfare*, 62 HASTINGS L.J. 401, 408 (2010).

²¹² See *id.* at 406–08, 435.

²¹³ *DeShaney*, 489 U.S. at 201–02.

²¹⁴ See, e.g., Andrea Ball & Eric Dexheimer, *Dozens of CPS Caseworkers Caught Lying, Falsifying Documents*, AUSTIN AM.-STATESMAN (Jan. 13, 2015), <https://projects.statesman.com/news/cps-missed-signs/wrongdoing.html>; Faith Abubey & Lindsey Basye, *800+ Georgia DFCS Workers Disciplined for Violations*, 11 ALIVE (Aug. 22, 2019, 4:40 PM), <https://www.11alive.com/article/news/investigations/the-reveal/800-georgia-dfcs-workers-disciplined-for-violations/85-37ce7f6d-7c99-4a22-94db-fd711e53e794>;

But we do not so often see cases of wrongful removals or coercive safety plans in the news. As Diane Redleaf, a family defense attorney and author, writes, “[n]o one wants to take a chance on being on the wrong side of a child abuse story.”²¹⁵ Moreover, the horrific abuses we do see in the news, while awful and heartbreaking, are rare.²¹⁶ Law Professor Doriane Lambelet Coleman acknowledges cases of horrific abuse but notes that, like those children who suffer from extreme abuse at the hands of their caregivers, children who are the subjects of intrusive examinations and victims of separation also have “names, faces, and stories that ought not be hidden from view.”²¹⁷

Perhaps social worker immunity does make sense, given the doctrine’s intended goals. But Part IV discusses how this doctrine plays out in practice to support the conclusion that immunity doctrine must be reformed in tandem with CPS reforms.

IV. SOCIAL WORKER IMMUNITY IN THE COURTS

Immunity for social workers was discussed by a number of legal writers in the 1990s and 2000s.²¹⁸ This is still a relevant and used defense today, and the following cases will show this. In each of these cases, defendant social workers asserted qualified immunity, absolute immunity, or both. Additionally, these cases will provide a look into social worker activities, the impact on families, the flaws in the system, and how immunity hinders progress.

Richard Winton, *An 8-year-old Boy’s Death Has Social Workers Wondering, ‘Could I Face Criminal Charges?’* L.A. TIMES (Feb. 13, 2017), <https://www.latimes.com/local/lanow/la-me-ln-gabriel-fernandez-social-workers-20170213-story.html> (describing the criminal charges brought against social workers who failed to remove Gabriel Fernandez before his mother and her boyfriend murdered him).

²¹⁵ REDLEAF, *supra* note 51, at 61.

²¹⁶ As mentioned briefly in Part I, physical abuse cases make up only 10.3 percent of maltreatment cases. CHILD MALTREATMENT, *supra* note 9, at 49. Compare that percentage to the percentage of neglect cases: 61 percent. *Id.* Also, discussed in Part II, recall that what is often considered “neglect” is simply poverty.

²¹⁷ Coleman, *supra* note 65, at 446.

²¹⁸ See, e.g., Alexander, *supra* note 13, at 651; Johns, *supra* note 153, at 266; Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL’Y REV. 267, 280 (2004); 42 U.S.C. § 1983—*Absolute Immunity—Sixth Circuit Holds That Social Worker Is Not Absolutely Immune From § 1983 Suit*, 114 HARV. L. REV. 1647, 1647 (2001); Susan Lynn Abbott, Note, *Liability of the State and its Employees for the Negligent Investigation of Child Abuse Reports*, 10 ALA. L. REV. 401, 428 (1993); Eric P. Gifford, Comment, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 TEX. TECH L. REV. 1013, 1013 (1995).

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A. Qualified Immunity

1. Doe v. Woodward

Four-year-old I.B. was attending a Head Start Program when someone anonymously reported to CPS that there were possible signs of abuse on her body.²¹⁹ These signs were “bumps on her face, a nickel-sized bruise on her neck, a small red mark on her back, two small cuts on her stomach, and bruised knees.”²²⁰ CPS had investigated I.B. and her mother around six times before, all based on what the complaint said were false reports of abuse.²²¹ This time, a CPS social worker went to I.B.’s preschool without her mother’s consent, took her to the nurse’s office, removed her clothes, and began taking pictures of her body.²²² The worker photographed I.B.’s buttocks, stomach, and back—over I.B.’s objections.²²³ Her mother did not hear of the incident until after CPS determined that the allegations were unsubstantiated, when I.B. told her that she did not like it when the worker “takes all my clothes off.”²²⁴ When the mother confronted the social worker about the investigation, the social worker denied it.²²⁵ Two months later, however, she admitted to taking the photographs.²²⁶

The Does, I.B. and her mother, sued under § 1983, claiming that the inspection and photographs violated their Fourth and Fourteenth Amendment rights.²²⁷ The lower court dismissed both claims; it determined the Does failed to state a claim under the Fourteenth Amendment and that the social worker was entitled to qualified immunity on the Fourth Amendment claims.²²⁸ The following will address the claim dismissed on the grounds of qualified immunity.

The court limited its analysis to the second prong of qualified immunity²²⁹—which asks whether the right was clearly established—using the discretion the Supreme Court granted in *Pearson v.*

²¹⁹ Doe v. Woodard, 912 F.3d 1278, 1285 (10th Cir. 2019); Brief of Appellant at 4, Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019) (No. 18-1066).

²²⁰ Doe, 912 F.3d at 1285.

²²¹ Id. at 1285 n.3 (quoting Amended Complaint ¶ 15, Doe v. Woodard, No. 15-01165, 2015 U.S. Dist. LEXIS 123616 (Sept. 16, 2015)).

²²² Id.

²²³ Id. at 1285–86; Brief of Appellant at 4, Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019) (No. 18-1066).

²²⁴ Doe, 912 F.3d at 1286 (internal citation omitted).

²²⁵ Id.

²²⁶ Id.

²²⁷ Id.

²²⁸ Id. at 1288.

²²⁹ Id. at 1293.

Callahan.²³⁰ This discretion allowed the court to assess whether the right was clearly established without addressing the constitutionality of the conduct.²³¹

The particular issue here, which is not uncommon in CPS immunity suits,²³² was the in-school interview without parental consent or a warrant.²³³ Where a search and seizure takes place without a warrant, it is *per se* unreasonable.²³⁴ The Supreme Court, however, has recognized certain exceptions to the rule that a warrantless search is *per se* unreasonable: consent of the person being searched, if they have the capacity to consent, or consent by a person authorized to consent on their behalf; exigent circumstances; or special needs.²³⁵ Here, the question was whether it was clearly established that the special needs exception did not apply to in-school searches pursuant to child abuse investigations.²³⁶ The Supreme Court recognized the special needs exception in *New Jersey v. T.L.O.*, where it found school officials did not need a warrant before searching a student's purse for drugs because it would put an undue burden on schools.²³⁷ The exception applies if "special needs[] beyond the normal need for law enforcement" make the requirements for a warrant and probable cause impracticable.²³⁸ If the special needs exception did apply, the court would hold the social worker to a lower standard of reasonableness: the search would need to be justified at its inception and reasonable in its scope given the circumstances.²³⁹

The Does attempted to use four cases to show that the law was clearly established.²⁴⁰ In *Franz v. Lytle*, a police officer investigating child abuse who examined a child's private areas without a warrant was

²³⁰ See 555 U.S. 223, 236 (2009); see also *supra* Section III.A.

²³¹ See *supra* Section III.B.

²³² See, e.g., *Schulkers v. Kammer*, 955 F.3d 520, 530 (6th Cir. 2020); *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1051 (9th Cir. 2019).

²³³ *Doe v. Woodard*, 912 F.3d 1278, 1290 (10th Cir. 2019). There is currently a circuit split as to whether in-school interviews by CPS concerning abuse constitute "special needs." See *Baxter*, *supra* note 18, at 146. The exception applies "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

²³⁴ *Doe*, 912 F.3d at 1290 (quoting *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

²³⁵ *Id.*

²³⁶ See *id.* at 1291–92.

²³⁷ See 469 U.S. 325, 340 (1985).

²³⁸ *Earls*, 536 U.S. at 829 (internal quotations omitted).

²³⁹ *T.L.O.*, 469 U.S. at 341 (1985) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

²⁴⁰ *Doe v. Woodard*, 912 F.3d 1278, 1294 (10th Cir. 2019).

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found to have violated the Fourth Amendment.²⁴¹ In *Dubbs v. Head Start, Inc.*, a school's genital examinations and blood tests, performed supposedly in order to comply with federal regulations and without parental consent, were found to be unconstitutional under either standard.²⁴² The court in *Dubbs* also asserted that there is no social worker exception to the Fourth Amendment,²⁴³ which would seem to suggest that the special needs exception would not apply. The third case the Does cited was *Roska v. Peterson*, in which the court found the special needs exception did not apply when a social worker entered a home to remove a child.²⁴⁴ Lastly, the Does cited *Ferguson v. City of Charleston*, a Supreme Court case, which they argued held that excessive entanglement with law enforcement renders the special needs exception inapplicable.²⁴⁵

The court distinguished each of these cases, holding that they do not put a reasonable social worker on notice that undressing and photographing a child without parental consent violated the Fourth Amendment.²⁴⁶ *Franz* did not put a reasonable social worker on notice because "a police search is not a social worker search."²⁴⁷ *Dubbs* did not put a reasonable social worker on notice because the examinations were more invasive and not examinations for child abuse.²⁴⁸ *Roska* did not put a reasonable social worker on notice because the social worker in that case did not enter the child's home.²⁴⁹ Lastly, *Ferguson* did not put a reasonable social worker on notice because "*Ferguson* says nothing about social workers searching and photographing a child at school because of suspected child abuse or whether such conduct is unacceptably entangled with law enforcement to qualify for special needs analysis."²⁵⁰

²⁴¹ See *id.* at 1292 (citing *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993)).

²⁴² See *id.* (citing *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1214–15 (10th Cir. 2003)).

²⁴³ See *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003) (citing *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.9 (2001)).

²⁴⁴ See *Doe*, 912 F.3d at 1292 (citing *Roska v. Peterson* 328 F.3d 1230, 1242 (10th Cir. 2003)).

²⁴⁵ See *id.* at 1294; *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (holding that drug tests used in state pregnancy ward were not under the special needs exception because of coordination with law enforcement).

²⁴⁶ See *Doe*, 912 F.3d at 1294.

²⁴⁷ *Id.*

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ *Id.* at 1294–95. *But see* *Roe v. Texas Dep't of Protective & Regul. Servs.*, 299 F.3d 395, 406 (5th Cir. 2002) (holding that the special needs exception did not apply to a social worker examination for child abuse, emphasizing the overlap of social workers with law enforcement); see also *Baxter*, *supra* note 18, at 135–36 (explaining the involvement in child abuse investigations).

The dissent offered one more case, *Safford Unified School District No. 1 v. Redding*, in which the special needs exception did not apply to a school's search of a student's underwear for drugs.²⁵¹ The dissent argued that this Supreme Court case, along with *Dubbs*, put the social workers on notice that searching intimate areas, in general, required a warrant, consent, or exigent circumstances.²⁵² The majority, however, dismissed this argument as defining clearly established law at "a high degree of generality."²⁵³

Doe v. Woodard illustrates several themes of this Comment—in both the court's handling of the case and the facts of the case. First, the court used the Supreme Court's narrow definition of clearly established at the expense of justice for I.B. and her mother.²⁵⁴ Second, this decision is practically useless as future precedent because it only examined the second prong of the qualified immunity analysis—the clearly established prong. Because of the discretion the Supreme Court granted in *Pearson v. Callahan*, the Tenth Circuit did not have to address whether the conduct was unconstitutional.²⁵⁵ This means that if a similar case is presented in this circuit in the future, the plaintiff's Fourth Amendment right to a warrant and probable cause would still not be clearly established. Not only did the court fail to decide if this particular search was unconstitutional, but it also failed to clear the haze surrounding the application of the special needs exception to child abuse investigations in the Tenth Circuit. Therefore, social workers there may feel free to continue on this potentially unconstitutional path with no consequences.

Turning to the facts of the case, we can see that some of the characteristics that place families at risk of excessive and unwarranted state intervention are present here. First, I.B. attends a Head Start program, a federally funded preschool for low-income families.²⁵⁶ As discussed in Part II, this means that mandatory reporters like teachers and social workers are more likely to surveil and report them to CPS.²⁵⁷ Second, the Does are victims of repeated false reports of child abuse. This report, in particular, was anonymous. False reports, while rare, are harmful for people like the Does because although they are false, they

²⁵¹ See *Doe v. Woodard*, 912 F.3d 1278, 1303–04 (10th Cir. 2019) (Briscoe, J., dissenting) (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009)).

²⁵² See *id.* at 1302–03.

²⁵³ *Id.* at 1298 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)).

²⁵⁴ See *id.* at 1289.

²⁵⁵ See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); see also *supra* Section III.A.

²⁵⁶ See *About the Office of Head Start*, OFF. OF HEAD START, <https://www.acf.hhs.gov/ohs/about> (last visited Feb. 3, 2022).

²⁵⁷ See Fong, *supra* note 84, at 6.

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still result in investigations. While the six previous CPS investigations did not result in a § 1983 lawsuit, the absence of such a lawsuit does not indicate those investigations were any less traumatic for I.B. and her mother.

2. Schulkers v. Kammer

Holly Schulkers, ready to give birth to her fifth child, checked into the hospital for labor induction.²⁵⁸ Without notifying her, the hospital performed a urine drug test that resulted in a “presumptive positive” for opiates.²⁵⁹ This set the stage for what probably turned out to be the hardest two months of the Schulkers family’s life. After the birth of her child, the hospital social worker told Holly about the positive test and that her newborn’s umbilical cord would be tested for opiates.²⁶⁰ Holly told the social worker that she had taken some prescription cough medicine and eaten some poppyseed chips soon before but had never used opiates.²⁶¹ Despite this, the social worker did not perform a confirmatory test on Holly.²⁶² Instead, before receiving the results from the umbilical cord test, she charted Holly as having a positive drug screen and a substance use disorder.²⁶³ The social worker then put in a report with Kentucky’s Cabinet for Health and Family Services (“CHFS”).²⁶⁴ The CHFS intake social worker opened a case to investigate the abuse and neglect of the five children that Holly cared for because she thought the children were at “risk of harm.”²⁶⁵ Risk of harm, according to Kentucky’s standards of practice, is present where the caretaker exhibits a pattern of conduct that renders the caretaker “incapable of caring for the immediate and ongoing needs of the child due to incapacity due to alcohol or other drugs.”²⁶⁶

Three social workers took the case: one was a supervisor, one was still in training, and we do not know much about the other.²⁶⁷ The three of them, both in speech and through a “Prevention Plan” (which is the term this jurisdiction uses for “safety plan”),²⁶⁸ made it clear that Holly

²⁵⁸ Schulkers v. Kammer, 955 F.3d 520, 526 (6th Cir. 2020).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 526–27.

²⁶¹ *Id.* at 526.

²⁶² *Id.* at 527.

²⁶³ *Id.*

²⁶⁴ Schulkers v. Kammer, 955 F.3d 520, 527 (6th Cir. 2020).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 528. The third social worker’s last name is not available. *Id.* at 528 n.3.

²⁶⁸ See KY. DEP’T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE ONLINE MANUAL: 7.4 CPS PREVENTION PLANNING, <https://manuals.sp.chfs.ky.gov/chapter7/42/Pages/74cps>

could not be with her children unsupervised until the hospital returned more test results.²⁶⁹ The trainee explained that if she did not follow the safety plan, CHFS would remove all five of the children.²⁷⁰ The safety plan itself said that if the preventative services were not effective, the planned arrangement would be foster care.²⁷¹ In fact, there was no arrangement for foster care, and CHFS stamped this language on every safety plan.²⁷² The day after Holly gave birth, both a second urine test and the umbilical cord test returned negative results.²⁷³ Despite this, after discharge, the Schulkers remained subject to the safety plan requiring supervision of Holly at all times.²⁷⁴ Under the belief that failure to comply with the plan would result in the removal of their children, the Schulkers followed the orders while requesting that they be released.²⁷⁵ Holly's husband even had to take off work in order to supervise her.²⁷⁶

Soon after Holly's discharge, the trainee and another worker went to the four children's schools to interview them without parental consent or knowledge—or a warrant.²⁷⁷ They took the children into a room alone with them and shut the door.²⁷⁸ The children went home "terrified" they would be taken away from their parents.²⁷⁹

For the next two months, the Schulkers were subject to the plan, despite further negative tests, requests from the family and their counsel to be released, and direction to the supervisor from her superior to release them.²⁸⁰

The Schulkers sued the social workers under § 1983 for violations of the Fourth and Fourteenth Amendments. They claimed that the in-school interviews were seizures violating the Fourth Amendment and that the imposition of the Prevention Plan without procedural protections or suspicion of abuse or neglect violated their due process

preventionplanning.aspx (last visited Feb. 6, 2022). See *supra* Part II for information on safety plans.

²⁶⁹ See *Schulkers*, 955 F.3d at 528.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 528–29.

²⁷³ *Id.* at 529.

²⁷⁴ *Id.* at 530.

²⁷⁵ *Schulkers v. Kammer*, 955 F.3d 520, 529 (6th Cir. 2020).

²⁷⁶ *Id.* at 530.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 531.

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rights under the Fourteenth Amendment.²⁸¹ The district court denied qualified immunity to the social workers, and they appealed.²⁸²

The Sixth Circuit first considered the Fourth Amendment claims and ultimately determined there was not a clearly established right violated in the in-school interviewing of the children.²⁸³ The court discussed Supreme Court precedent and its own precedent; it noted that the Supreme Court has never held that in-school interviews for child abuse investigations violated the Fourth Amendment.²⁸⁴

The court then turned to its own precedent. In 2015, the Sixth Circuit decided *Barber v. Miller*,²⁸⁵ which was factually similar to *Schulkers*. There, the court, in determining whether the social worker investigating abuse was entitled to qualified immunity, found that their warrantless in-school interview did not violate a clearly established right.²⁸⁶ In other words, there was no prior precedent that deemed the social worker's conduct unconstitutional. Thus, the court in *Barber* elected not to consider the second prong—whether it was constitutional²⁸⁷—and granted qualified immunity to the social worker.²⁸⁸ By doing so, it doomed itself to the same outcome in future cases—including the *Schulkers* case.²⁸⁹ After the *Barber* decision, the court could not find a clearly established right against warrantless in-school interviews because *Barber* did not clearly establish it. Therefore, the court in *Schulkers* found the social workers were entitled to qualified immunity.²⁹⁰ But the court in *Schulkers* took the analysis a step further by considering the constitutionality prong even after deciding the right was clearly established.²⁹¹

The Sixth Circuit decided that the social workers' warrantless in-school interviews pursuant to child abuse investigations were

²⁸¹ *Schulkers v. Kammer*, 955 F.3d 520, 531 (6th Cir. 2020).

²⁸² *Id.* at 532.

²⁸³ *Id.* at 533.

²⁸⁴ *Id.* at 534; *see also* *Camreta v. Greene*, 563 U.S. 692, 697–98 (2011) (refusing to decide on the Ninth Circuit's determination that warrantless seizure and interrogation of a child in school violated Fourth Amendment due to the claim later becoming moot). The Ninth Circuit then vacated the corresponding portion of its opinion. *Greene v. Camreta*, 661 F.3d 1201, 1201 (9th Cir. 2011).

²⁸⁵ *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015).

²⁸⁶ *Id.* at 845.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 847.

²⁸⁹ *Schulkers v. Kammer*, 955 F.3d 520, 535 (6th Cir. 2020).

²⁹⁰ *See id.* at 535–36.

²⁹¹ *Id.* at 536 (quoting *Pearson v. Callahan*, 555 U.S. 223, 224 (2009)) (“[W]e decide to reach [the constitutionality] question now in order to ‘promote[] the development of constitutional precedent.’”). It is unclear why the *Barber* court did not also follow the Supreme Court's guidance.

unconstitutional.²⁹² Following the typical procedure for determining Fourth Amendment search and seizure violations, it held that the children would not have felt free to leave.²⁹³ In determining reasonableness, the Sixth Circuit, like the Tenth Circuit in *Doe*, considered the special needs exception.²⁹⁴ Here, however, the court did not decide what standard of reasonableness would apply because the social workers' conduct failed under either test.²⁹⁵

The court next considered the claims for Fourteenth Amendment substantive and procedural due process violations. The court found that the Prevention Plan requiring Holly's supervision violated Holly's Fourteenth Amendment right to family integrity because there was no suspicion of abuse.²⁹⁶ It stressed that, while the children were never removed, the plan interfered with the "parent-child relation."²⁹⁷ Therefore, the defendants were on notice that the plan would violate a clearly established constitutional right. As for the procedural due process claim, the court recognized that the Schulkers' signing of the safety plan was based solely on the threats of removal made by the social workers and indicated on the face of the document; thus, their signing of the plan did not relieve the defendants from affording the Schulkers procedural protection before interfering with their Fourteenth Amendment right.²⁹⁸

While not relevant to the qualified immunity analysis, it is worth pointing out that the Schulkers' story is one of many like it²⁹⁹—although not all of those stories are heard. Diane Redleaf notes that safety plans of this type often violate procedural due process because they offer families no opportunity to object and have a neutral decision-maker decide.³⁰⁰ Like the Schulkers, these families would not dare to question CPS workers or refuse to cooperate at the risk of CPS taking their children away.³⁰¹

²⁹² *Id.*

²⁹³ *Id.* at 536–37.

²⁹⁴ *Id.* at 537.

²⁹⁵ *Schulkers v. Kammer*, 955 F.3d 520, 538 (6th Cir. 2020).

²⁹⁶ *Id.* at 542 (citing *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000)).

²⁹⁷ *Id.* (quoting *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006)).

²⁹⁸ *Id.* at 543.

²⁹⁹ See, e.g., Gupta-Kagan, *supra* note 44; REDLEAF, *supra* note 51, at 2; Diane Redleaf, *After the Hotline Call*, ATLANTIC (Jan. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/problem-child-protective-services/580771/>.

³⁰⁰ See REDLEAF, *supra* note 51, at 42.

³⁰¹ See *id.* at 2 ("Like 99.9 percent of parents faced with a demand for a safety plan, [this mother and father] would do anything to keep their children safe from removal by CPS. They cooperated fully.").

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Unfortunately, cooperating tends to be difficult for the families. In this case, only the mother had to be supervised when with the children.³⁰² But if the plan requires that neither parent be alone with the children, the burden falls on extended family—most often grandparents.³⁰³

Turning to the qualified immunity analysis, the court took a step that the *Doe* court was unwilling to. In *Schulkers*, the court, though finding that the law surrounding warrantless in-school interviews was not clearly established,³⁰⁴ decided to address the constitutionality of the in-school interviews in this case “to ‘promote[] the development of constitutional precedent.’”³⁰⁵ It acknowledges that it did not have to³⁰⁶ and in fact, chose not to in the previous case discussing that issue.³⁰⁷ But this is one way for lower courts to take qualified immunity reform matters into their own hands.³⁰⁸

In both *Schulkers* and *Doe*, we are provided small but meaningful glimpses into the minds of the children. In *Doe*, the court’s rendition of the facts tells us that I.B. did not like it when the social worker took all her clothes off.³⁰⁹ In *Schulkers*, the court tells us that the children were “terrified.”³¹⁰ Both of these facts reiterate the concern that mere investigations are traumatic for children and families.³¹¹

3. Capp v. County of San Diego

The facts of this case are relatively simple. Jonathan Capp shared custody of his two children with their mother.³¹² CPS received a call that Jonathan was neglecting and emotionally abusing the children.³¹³ The social worker asked to speak with Jonathan.³¹⁴ At this meeting, he first learned of the in-school interviews that CPS had conducted with his

³⁰² *Schulkers v. Kammer*, 955 F.3d 520, 530 (6th Cir. 2020).

³⁰³ See REDLEAF, *supra* note 51, at 23 (telling how a couple, whose safety plan required that neither of them be alone with their children, had one of their mothers take care of the children).

³⁰⁴ *Schulkers*, 955 F.3d at 535.

³⁰⁵ *Id.* at 536 (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)) (alteration in original).

³⁰⁶ *Id.* at 536.

³⁰⁷ See *Barber v. Miller*, 809 F.3d 840, 845 (6th Cir. 2015).

³⁰⁸ See *Schwartz*, *supra* note 140, at 1836.

³⁰⁹ *Doe v. Woodard*, 912 F.3d 1278, 1286 (10th Cir. 2019).

³¹⁰ *Schulkers v. Kammer*, 955 F.3d 520, 530 (6th Cir. 2020).

³¹¹ See *Coleman*, *supra* note 65, at 418.

³¹² *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1050 (9th Cir. 2019).

³¹³ *Id.* at 1051.

³¹⁴ *Id.*

children.³¹⁵ When he asked the social worker to explain the allegations against him, she refused then left.³¹⁶ Jonathan, a lawyer, sent a strongly worded letter to CPS, calling the interview “Kafkaesque” and the allegations “*bogus and extremely offensive*,” and threatening to sue.³¹⁷ Not long after, he learned that the CPS worker had instructed his ex-wife to file in court to take custody from him.³¹⁸

Jonathan and his children brought suit under § 1983 for violations of their First, Fourth, and Fourteenth Amendments rights.³¹⁹ The court found that the instruction that Jonathan’s children should not see him anymore was retaliatory and, therefore, violated the First Amendment.³²⁰ While not finding a case with similar circumstances, the court concluded that “[a] reasonable official would have known that taking the serious step of threatening to terminate a parent’s custody of his children, when the official would not have taken this step absent her retaliatory intent, violates the First Amendment.”³²¹

The Fourth Amendment claim, like in *Doe* and *Schulkers*, was based on the in-school interviews of the children.³²² The court ultimately concluded that Jonathan did not provide enough information to allege a Fourth Amendment violation.³²³ But the court also articulated that even if it did, the law was not clearly established in that area, so the court would be “bound” to grant the social worker qualified immunity.³²⁴ The right was not clearly established because—while the Ninth Circuit did decide in *Greene v. Camreta* that a social worker’s seizure and interview of a child without a warrant, exigent circumstances, or parental consent was unconstitutional³²⁵—the Supreme Court vacated that ruling after finding recent facts rendered it moot.³²⁶ The court in *Capp* was then bound to find that the defendants had qualified immunity and said nothing more about the constitutionality of the interviews.³²⁷

This case has similarities to the cases previously discussed in this Comment. Like both *Doe* and *Schulkers*, *Capp* involves a school

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* (emphasis in original).

³¹⁸ *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1051 (9th Cir. 2019).

³¹⁹ *Id.* at 1052.

³²⁰ *Id.* at 1058.

³²¹ *Id.* at 1059.

³²² *Id.*

³²³ *Id.*

³²⁴ *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019).

³²⁵ *Id.* at 1059–60 (citing *Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009)).

³²⁶ *See Camreta v. Greene*, 563 U.S. 692, 694–95 (2011).

³²⁷ *Capp*, 940 F.3d at 1060.

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interview without parental consent. As in *Doe*, Capp leaves the constitutionality question open. As in *Schulkers*, the court in *Capp* seems to use a more general definition of clearly established than *Doe*. One important difference, however, is that Jonathan Capp is a very different plaintiff from either the Does or the Schulkers. He is a white, male, highly educated lawyer.³²⁸ He had no problem questioning the social worker, and he had no problem writing a letter threatening to sue.³²⁹ It is safe to infer that he knew his rights. So many parents, like the Schulkers, however, dare not question CPS.

B. Absolute Immunity

1. Turner v. Lowen

After her three-month-old son's leg began to swell, Keshia Turner took him to the hospital.³³⁰ X-rays and a nurse's examination revealed that her son (referred to as RBT) had "thirty-three fractures in his ribs, legs, and shoulder blade[s]."³³¹ The nurse instructed Keshia and her husband Roy to go to their local Sheriff's office, where they were assigned a CPS social worker.³³² Rather than keeping RBT in the local children's hospital where he was born, the social worker insisted that he be transferred to another hospital two-and-a-half hours away.³³³ When Keshia and Roy objected, the social worker threatened to have RBT removed.³³⁴ The doctor at the new hospital, a child abuse specialist who was also a defendant in this case, failed to complete a physical examination of RBT and instead relied on his medical records, interviews with the parents, and what information the social worker gave her.³³⁵ Even after considering that the fractures could be the result of brittle bones disease, which can develop in premature infants like RBT, she concluded that RBT was physically abused and needed protection "from further harm."³³⁶ The social worker filed an *ex parte* petition with the juvenile court for immediate removal of RBT, which

³²⁸ See *Jonathan C. Capp, Esq.*, L. OFFS. OF JONATHAN C. CAPP, <http://persinjuryattorney.com/attorney-profile/jonathan-c-capp-esq/> (last visited Nov. 11, 2020).

³²⁹ See *Capp*, 940 F.3d at 1051.

³³⁰ *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *2 (6th Cir. July 24, 2020).

³³¹ *Id.* at *2, *4-5.

³³² *Id.* at *2-3.

³³³ *Id.* at *3.

³³⁴ *Id.*

³³⁵ See *id.* at *3-4.

³³⁶ *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *4-5 (6th Cir. July 24, 2020).

the court granted.³³⁷ The Turners requested further testing for brittle bones disease.³³⁸ Their new social worker informed them that CPS would do no further testing, then substantiated the case, indicating that Keshia had abused her son.³³⁹ Time passed, and Keshia had another son, who CPS also removed via a granted *ex parte* petition for emergency removal.³⁴⁰ After this tragedy, Keshia and Roy sought the opinions of two different experts, who both concluded that RBT suffered from brittle bones disease and that the disease was the cause of his injuries.³⁴¹ The social worker took no action after learning of either expert's determination.³⁴² Two years later, after a Tennessee circuit court determined that the injuries were the result of disease and not abuse, the Turners finally got their children back.³⁴³ RBT was around three years old.

The sons brought suit against the doctor and the social workers under § 1983, claiming violations of the Fourth and Fourteenth Amendments.³⁴⁴ They alleged that the social workers failed to conduct an appropriate investigation and withheld exculpatory evidence from the court, leading to a seizure without probable cause.³⁴⁵ The district court dismissed the case after granting absolute immunity to the social workers.³⁴⁶

In affirming, the Sixth Circuit explained that, as discussed, “[t]he scope of immunity enjoyed by social workers is remarkably broad.”³⁴⁷ As long as the social worker is acting as a legal advocate, the court can grant absolute immunity—even for “knowing and intentional misrepresentations.”³⁴⁸ Here, the brothers alleged that the first worker intentionally omitted exculpatory evidence from the petition for removal and that, once CPS removed them, the second social worker failed to provide the court with the omitted exculpatory information and to investigate RBT's injuries adequately.³⁴⁹ For the first social worker,

³³⁷ *Id.* at *5.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at *6.

³⁴¹ *Id.* at *6–7.

³⁴² *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *6–7 (6th Cir. July 24, 2020).

³⁴³ *Id.* at *7.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at *7–8.

³⁴⁶ *Id.* at *8.

³⁴⁷ *Id.* at *9.

³⁴⁸ *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *9 (6th Cir. July 24, 2020) (citing *Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015)).

³⁴⁹ *Id.* at *10–11.

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the court determined that the petition and decision to rely on the doctor's assessment were associated enough with the judicial process to warrant quasi-judicial immunity.³⁵⁰ For the second social worker, the court likewise determined that when social workers act in an advisory role in recommending to the court whether a child should return home, that role is also "intimately related to the judicial phase of the child custody proceedings."³⁵¹

The family was therefore left without recourse. If the decision to withhold information in a petition to remove is covered by absolute immunity, and the decision to recommend to the court that the child not return home is covered by absolute immunity, then how would this family be able to obtain justice and redress for the wrongs they suffered? They took RBT out of his parents' care for three years; his younger brother just under two. RBT had a metabolic bone disease the entire time. CPS's intervention turned what was already a nightmare into an even worse nightmare.

The story that unfolds in *Turner v. Lowen* is unfortunately common.³⁵² The parent, noticing an injury, rightfully brings the child to the hospital or doctor's office.³⁵³ The personnel there, being mandatory reporters and likely thinking it is better to err on the side of caution, notify CPS.³⁵⁴ CPS is then involved in that family, often, as in *Turner*, making a bad situation worse.³⁵⁵ It is here that we see the importance of believing families.

The stories in these cases, as the statistics and literature in Parts I and II explain, happen—whether the families sue or not. But holding social workers accountable when families bring suit against them helps the whole system by setting an example and encouraging the development of both constitutional law and CPS policies.

³⁵⁰ *Id.* at *11.

³⁵¹ *Id.* (quoting Rippy *ex rel.* Rippy v. Hattaway, 270 F.3d 416, 422–23 (6th Cir. 2001)).

³⁵² See LaQuana Chappelle, 'They Will Not Win,' RISE (Jan. 18, 2017), <https://www.risemagazine.org/2017/01/they-will-not-win/> (telling the story of a mother whose children were removed after she took her infant to the hospital for a head injury she did not know the cause of); Editorial, *Pediatrician Group Wrong to Blame Reporting on Child Abuse*, HOUS. CHRON. (Jan. 23, 2020), <https://www.houstonchronicle.com/opinion/editorials/article/Pediatrician-group-wrong-to-blame-reporting-on-14995477.php>; Redleaf, *supra* note 299.

³⁵³ Redleaf, *supra* note 299.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

V. CONSIDERATIONS FOR IMMUNITY AND CPS REFORM

Perhaps, given the rationales of immunity, social workers are perfect candidates: they have terrible work environments, have to make life or death decisions, experience trauma—the trauma of others as well as their own—and do so with little training or resources. But this assertion assumes that immunity fixes things; it does not. This Comment argues that holding social workers accountable to some degree for constitutional violations will deter deliberate misconduct and discourage an “invade the family’s privacy now, think later” approach. As Rebecca Aviel acknowledged, social worker immunity is not CPS’s most pressing issue.³⁵⁶ That is why this Comment proposes reforms for both immunity doctrine and the CPS system that would make invasions of family integrity less frequent.

A. *Both Qualified and Absolute Immunity Need to be Clearer and Narrower*

Scholars point out that qualified immunity has no real basis in law.³⁵⁷ Nor does it accomplish, at least for law enforcement, its stated goals.³⁵⁸ But there should be a stronger pushback for abolishing qualified and absolute immunity for social workers. As already discussed, social workers are overworked, underpaid, and deal with a lot of stress. They have difficult jobs. Many would argue, rightfully so, that the system is to blame, not the individual social worker. Yet, as the cases discussed in this Comment show, this broad grant of immunity denies justice to traumatized families even for unreasonable conduct. Should the mother and daughter in *Doe* be prevented from recovering damages after the social worker performed such an uncomfortable and invasive investigation of the child’s body?³⁵⁹ Below are several reforms that may protect families like the Does.

First, absolute immunity need not be absolute to accomplish its intended goals. If courts retain immunity for social workers when they perform acts associated with the judicial process, they must impose some limits. One option is the denial of immunity where the plaintiff shows bad faith. For example, California Government Code Section 820.21 denies state civil immunity to social workers who maliciously

³⁵⁶ See Aviel, *supra* note 211, at 407.

³⁵⁷ See Baude, *supra* note 165, at 47; Schwartz, *supra* note 140, at 1801; Schweikert, *supra* note 165.

³⁵⁸ Schwartz, *supra* note 140, at 1800 (“[Qualified immunity] almost never shields government officials from costs and burdens associated with discovery and trial in filed cases.”).

³⁵⁹ See Section IV.A.1.

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commit perjury, fabricate evidence, fail to disclose exculpatory evidence, or obtain testimony under duress, fraud, or undue influence.³⁶⁰ This statute, while not applicable to § 1983 claims, cabins public officials' immunity under California Government Code Section 820.2 for discretionary activities.³⁶¹ California enacted it in response to concern surrounding a trial court's grant of absolute immunity to a social worker whose acts resulted in a child's removal.³⁶² Applying similar constraints for immunity in § 1983 claims would deter conduct like that in *Turner*,³⁶³ where the workers failed to disclose exculpatory evidence that would have reunited the family.

As some commentators have pointed out in a prosecutorial context, applying qualified immunity in lieu of absolute immunity is enough to protect defendants from frivolous lawsuits, and thus, there is no need for absolute immunity.³⁶⁴ Courts may also limit qualified immunity by considering subjective intent, an approach the Court rejected in *Harlow v. Fitzgerald*.³⁶⁵ This would allow consideration of good or bad faith where such evidence is available. While not perfect, it would deter conduct performed in bad faith and grant victims access to justice. It also would protect those social workers acting without malice or on a supervisor's authority.

At the very least, a broader and more articulate "clearly established" definition would be appropriate.³⁶⁶ Joanna Schwartz suggests a "higher level of factual generality" that allows recognition for "obvious constitutional violations" without reference to another factually similar case.³⁶⁷ This might have affected the outcome in *Doe*, where the court found no clearly established law from a case with similar facts.³⁶⁸ The dissent argued that the previous cases were sufficient to put the social worker on notice that her conduct—

³⁶⁰ CAL. GOV'T CODE § 820.21 (Deering 1996).

³⁶¹ See CAL. GOV'T CODE § 820.2 (1963); *Williams v. Cnty. of Monterey*, No. 19-cv-01811-BLF, 2019 U.S. Dist. LEXIS 180058, at *14–19 (N.D. Cal. Oct. 17, 2019) (discussing state law immunity).

³⁶² See *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1119 (9th Cir. 2017).

³⁶³ *Turner v. Lowen*, No. 19-6235, 2020 U.S. App. LEXIS 23446, at *6, *9–11 (6th Cir. July 24, 2020).

³⁶⁴ See Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 *FORDHAM L. REV.* 509, 534 (2011); Johns, *supra* note 186, at 136–38.

³⁶⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982); see also Schwartz, *supra* note 140, at 1834 (arguing that, given qualified immunity's policy goals, "[i]t makes no sense to ignore evidence of government officials' subjective intent").

³⁶⁶ See Schwartz, *supra* note 140, at 1834.

³⁶⁷ *Id.*

³⁶⁸ See *Doe v. Woodard*, 912 F.3d 1278, 1299 (10th Cir. 2019).

examining the child's private areas—was unconstitutional even under the reasonableness standards of the special needs exception.³⁶⁹ Perhaps, under a broader standard like the one Schwartz suggests, that argument might have been successful.

Schwartz points out that qualified immunity is useless in the law enforcement context because departments often indemnify defendants.³⁷⁰ But perhaps indemnification of social workers by CPS would be beneficial in certain situations. For instance, it might be appropriate in cases where the social worker is following CPS policy or norms or is otherwise acting in good faith.³⁷¹ This would give social workers the breathing room that is so crucial to the Supreme Court's qualified immunity rationale because they would not be personally liable. Rather, it would put the burden on CPS. At the same time, parents and children can have their § 1983 claims go to trial. Their voices would be heard, their injuries would be redressed, and someone would be held accountable. Because this allows the removal of qualified immunity, constitutional law could develop. The court would have to decide if social workers violated a constitutional right; if they did, it sets a precedent for courts, social workers, and CPS to follow. This would also motivate CPS to make changes to the system's structure or policies to prevent violations of constitutional rights in the first place.

B. CPS Can Adopt Policies That Are Less Invasive

Abolishing immunity would allow for the development of the law, setting precedent for courts and examples for social workers. For the sake of social workers and the families they serve, however, reform cannot stop there. The root of the infringement on the rights of families is the system itself.

Before considering changes in the CPS system, it is important to acknowledge that abolition of the child welfare system may be the only way to truly solve the problems of family regulation.³⁷² But, as the Center for the Study of Social Policy explains, that is a slow, piece-by-piece dismantling of the system accompanied by the building of supports in communities and families that replace CPS and accomplish

³⁶⁹ *Id.* at 1302–05 (Briscoe, J., dissenting).

³⁷⁰ *See* Schwartz, *supra* note 140, at 1804–06.

³⁷¹ *See, e.g.,* Schulkers v. Kammer, 955 F.3d 520, 548 (6th Cir. 2020) (showing that defendants argue that their conduct was “reasonable and in accordance with their own policies”).

³⁷² *See* Sharon M. McDaniel, *White Privilege in Child Welfare: What Racism Looks Like*, IMPRINT (June 23, 2020, 11:50 PM), <https://imprintnews.org/opinion/white-privilege-in-child-welfare-what-racism-looks-like/44662>; Roberts, *supra* note 5.

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what CPS never could: making families safe, happy, and healthy.³⁷³ That work is outside of the scope of this Comment, but there are reforms that, in the meantime, CPS departments can implement to improve the system for those already in it.³⁷⁴

In fighting implicit bias, experts point to exposure to “countertypical associations.”³⁷⁵ This is exposure to people of different groups towards whom the implicit bias might be directed.³⁷⁶ Applied to the child welfare context, this could mean making the workforce more diverse, from social workers to those in higher positions of authority. Law Professor Tanya Asim Cooper also points out the need for cultural competency, which is responding respectfully and effectively to people of different cultures and backgrounds in a way that recognizes their values and preserves dignity.³⁷⁷

Along this line, the decision-making process can be standardized with “culturally relevant guidelines” pertaining to what constitutes abuse and neglect to minimize error.³⁷⁸ Social workers need to have less discretion. Many of the issues relating to the constitutional violations discussed here stem from the difficult decisions they need to make: to substantiate a case or not; what “services” to provide the family; whether or not the child is in immediate danger and should be removed; and whether or not the child can return home. These are decisions that cause stress for both the worker and the family. They are also exactly where implicit and explicit biases play a huge part, resulting in the disproportionate number of people of color and low-income individuals in the system.³⁷⁹ Providing a more structured and standardized approach, perhaps through supervisors, will help mitigate these issues. It should be acknowledged, however, that there are risks in eliminating discretion completely.

Of course, having a more standardized decision-making process will not be useful if social workers continue to work in an overwhelmed environment. Cooper lists lack of sufficient social work staff and heavy

³⁷³ See *What Does it Mean to Abolish the Child Welfare System as We Know It?*, CTR. STUDY OF SOC. POL’Y (June 29, 2020), <https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it/>.

³⁷⁴ See *id.*

³⁷⁵ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012).

³⁷⁶ See *id.* at 1170 (encouraging the diversifying of the courtroom, as well as neighborhoods and friendship circles to fight bias in the legal system).

³⁷⁷ See Cooper, *supra* note 29, at 269 (quoting CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 5 (2011)).

³⁷⁸ *Id.* (quoting CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 8 (2011)).

³⁷⁹ See Sankaran, *supra* note 12.

caseloads of workers as two factors contributing to unintended biases.³⁸⁰

Perhaps to help ease the burden on social workers and the system itself, CPS could narrow its scope.³⁸¹ In other words, CPS could be reserved for well-grounded reports of physical or sexual abuse or serious forms of neglect (such as refusal of life-saving medical treatment).³⁸² Reports of neglect and administration of services for whatever treatment or resources families may need should be delegated to other departments better equipped to handle them.³⁸³ Michael Wald has suggested a system expanding the Women, Infants, and Children and Early Head Start Programs to provide needed services to at-risk families without the stigma of CPS or court involvement or the threat of child removal.³⁸⁴ Since most reports are for neglect, this would free up social workers and CPS resources to adequately assess and care for serious threats to child safety. Better yet, this noncoercive offering of direct services to families would contribute to the prevention of abuse and neglect in the first place, as would a child allowance.³⁸⁵ Where there is less opportunity for the coercion and secrecy of CPS, there is less opportunity for a violation of constitutional rights.

VI. CONCLUSION

The CPS system's intrusions into children's and families' lives contradict its intended purpose: to keep children and families safe and healthy. Acting for the system, but with little control over it, are social workers. They are put in positions that allow them to violate the constitutional rights of families. Victims of the CPS system whose rights have been violated may sue under § 1983, yet qualified and absolute immunity prevents their cases from going to trial. Families deserve to have the barrier of immunity removed and their stories heard. Yet CPS social workers deserve an improved working environment that does not constantly burden them with the discretion to carry out such violations.

³⁸⁰ Cooper, *supra* note 29, at 253.

³⁸¹ See Wald, *supra* note 70, at 53.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 60–63.

³⁸⁵ See Roberts, *supra* note 5. Indeed, the expanded Child Tax Credit—which was implemented in response to the COVID-19 pandemic as part of the American Rescue Plan and which Congress failed to extend past its initial one-year duration—was estimated to have kept 3.8 million children out of poverty in November 2021. Ben Casselman, *Child Tax Credit's Extra Help Ends, Just as Covid Surges Anew*, N.Y. TIMES (Jan. 2, 2022), <https://www.nytimes.com/2022/01/02/business/economy/child-tax-credit.html>.

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This Comment has proposed reforms on both sides of the story: the CPS system and the immunity doctrine. The system must take more affirmative action in addressing its racism and classism—that of the system as a whole and its individual workers—by diversifying and attacking implicit biases. Additionally, this Comment has proposed narrowing the scope of CPS to lighten the burden put on individual social workers and give them less discretion. The immunity doctrine must change as well. This Comment has suggested denying absolute immunity where bad faith is shown and similarly requiring consideration of subjective intent in qualified immunity analysis. Additionally, a broader and more precise definition of “clearly established” would be more efficient and allow more families to recover for violations.

With these reforms, perhaps we can take a step toward a society in which families are safer, happier, and healthier.