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Poor Gabriel: How Ambiguous State Immunity Policies for Child Protection Agency Workers Fail Children of Color

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POOR GABRIEL: HOW AMBIGUOUS STATE IMMUNITY POLICIES FOR CHILD PROTECTION AGENCY WORKERS FAIL CHILDREN OF COLOR

SAMIKSHA MANJANI*

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I. INTRODUCTION

In 1980, after his parents' divorce, one-year-old Joshua DeShaney went to live with his father, Randy DeShaney.¹ Just three years later, a local hospital admitted Joshua with multiple abrasions and bruises.² After doctors reported child abuse suspicions, the Winnebago County Department of Social Services ("DSS") conducted a brief investigation but closed it shortly afterward.³ Joshua was again admitted to a local hospital with questionable abrasions and bruises a month later.⁴ Yet again, DSS opened an investigation and quickly closed it.⁵

Over the next six months, a DSS caseworker reported numerous suspicious injuries on Joshua's head.⁶ DSS took no action other than recording the incidents.⁷ Unfortunately, in March of 1984, Randy DeShaney, Joshua's father, beat him into a life-threatening coma.⁸ Due to severe brain hemorrhaging, Joshua lived with permanent brain damage until he died in 2015, and his father was incarcerated for only two years for child abuse.⁹ However, DSS and its social workers escaped civil and criminal

1. *E.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989) (noting that Joshua's father remarried shortly after gaining custody, but his second marriage also ended in divorce).

2. *See id.* at 192 (stating that Mr. DeShaney's second wife complained to the police that Joshua's father "hit the boy causing marks").

3. *See id.* (explaining that DSS interviewed Joshua's father, who denied all abuse allegations and signed a voluntary agreement where he promised to cooperate with DSS-outlined reunification goals).

4. *See id.* at 193 (clarifying that the emergency room notified the caseworker that Joshua was in the hospital again).

5. *See id.* at 192 (detailing that the caseworker concluded there was no basis for child abuse).

6. *See id.* (articulating that the caseworker conducted several home visits over the six-month period).

7. *See id.* at 192-93 (stating the caseworker meticulously documented the abuse but never initiated removal proceedings).

8. *E.g., id.* at 193 (detailing Joshua's surgery revealed extensive brain damage and several traumatic head injuries inflicted over years).

9. *E.g., id.* (stating that Joshua's father was subsequently convicted of child abuse); Bob Collins, *The Sad End of 'Poor Joshua'*, MPR (Nov. 12, 2015, 9:39 AM), <https://blogs.mprnews.org/newscut/2015/11/the-sad-end-of-poor-joshua/> (reporting that Joshua's father's sentence was influenced by testimony that Joshua fell down the stairs).

liability.¹⁰

In 2005, eight-year-old Gabriel Fernandez moved in with his mother, Pearl Fernandez, and her boyfriend, Isauro Aguirre, after being shuffled between his relatives' homes.¹¹ Pearl allegedly took Gabriel in to obtain welfare benefits.¹² However, after moving in with his mother, Gabriel's well-being took a drastic downturn.¹³

Over the next eight months, Pearl and Isauro habitually abused Gabriel.¹⁴ Investigators found that they: fed him cat litter, locked him in a small cupboard for many hours with a sock in his mouth, knocked out his teeth, shot him in the face with a BB gun, and pepper-sprayed him.¹⁵ Multiple people reported the potential child abuse to the Los Angeles County Department of Children and Family Services ("CFS") and the Los Angeles County Sheriff's Department.¹⁶ CFS records repeatedly indicated that Gabriel was at a high risk of being abused, but his caseworkers continuously closed his case.¹⁷

On May 22, 2013, Pearl and Isauro beat Gabriel so severely that he was

10. *E.g.*, *DeShaney*, 489 U.S. at 203 (holding that under current law, state officials acting in their capacity are not held liable for failure to act and noting that Wisconsin citizens are free to create such a system through legislation).

11. *See generally* Mahita Gajanan, *The Heartbreaking Story Behind Netflix's Documentary Series 'The Trials of Gabriel Fernandez'*, TIME (Mar. 3, 2020, 2:19 PM), <https://time.com/5790549/gabriel-fernandez-netflix-documentary/> (noting that when Gabriel first lived with his gay uncles, he was healthy and happy, but after Pearl transferred custody, as she was afraid Gabriel would become gay, his health declined).

12. *See id.* (reporting that Pearl's family thought she was neglectful despite her taking in Gabriel).

13. *See id.* (expressing that Pearl had been physically abused, suffered from mental health issues, and physically abused her other children).

14. *See* Beatrice Verhoeven, *'Trials of Gabriel Fernandez': 9 Most Shocking Details About the Murder at Heart of Netflix Documentary*, THE WRAP (April 9, 2020, 6:30 AM), <https://www.thewrap.com/trials-of-gabriel-fernandez-most-shocking-details-netflix-documentary/> (voicing they were homophobic and called him "gay" while abusing him).

15. *E.g.*, *id.* (explaining that Gabriel often wrote suicide notes saying that "he just wants to be a good boy. . .").

16. *See id.* (reporting that law enforcement had been called to Gabriel's residence multiple times for reports of child abuse); Jennifer Nied, *What Happened to Gabriel Fernandez's Social Workers Who Were Charged in His Murder*, WOMEN'S HEALTH (Mar. 18, 2020), <https://www.womenshealthmag.com/life/a31741999/gabriel-fernandez-social-workers/> (highlighting that Gabriel's first-grade teacher regularly called Gabriel's caseworker to report child abuse).

17. *See id.* (indicating that Gabriel's caseworkers falsified public records).

declared brain-dead after admission to the hospital.¹⁸ The next day, Gabriel died.¹⁹ The attending physician found Gabriel had a fractured skull, a broken nose, missing upper teeth, bite and burn marks, a BB bullet in his lung, and old and new rib fractures.²⁰ The judge sentenced Pearl to life in prison and Isauro to death for the murder and torture of Gabriel.²¹ However, like in Joshua's case, though nearly thirty years apart, CFS and Gabriel's social workers escaped civil and criminal liability.²²

This Comment argues that absolute civil state immunity for child protection agency workers violates all children's due process rights and children of color's equal protection rights under the Fourteenth Amendment of the United States Constitution.²³ Part II describes the evolution of the child welfare system and children's rights in America.²⁴ Part III argues that *DeShaney's* holding created a conflict among the circuits regarding social worker accountability in child maltreatment cases.²⁵ Part III also argues that *DeShaney* has disproportionately impacted children of color, thus creating disparate treatment, violating the Fourteenth Amendment.²⁶ Part IV

18. E.g., Gajanan, *supra* note 11 (reporting that the responding paramedic said Gabriel's case was the worst she had ever seen).

19. See generally *Doctor Describes Injuries to Gabriel Fernandez's Body, Testifies He was Determined Brain Dead*, ABC-7 L.A. (Oct. 27, 2017), <https://abc7.com/palmdale-boy-child-abuse-gabriel-fernandez-torture-isauro-aguirre/2572619/> (explaining that two separate exams, conducted twelve hours apart, found zero brain function).

20. E.g., *id.* (quoting the Deputy, who stayed with Gabriel, said "she saw bruises all over his body, bumps, cuts, his eyes were swollen shut and . . . small items were lodged under his skin.").

21. E.g., Marisa Gerber, 'Nothing Short of Evil': Judge Sentences Mother to Life in Prison and Her Boyfriend to Death in Gabriel Fernandez Murder Case, L.A. TIMES (June 7, 2018, 2:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-gabriel-fernandez-sentencing-20180607-story.html> (recounting that the judge said the abuse was "horrendous, inhumane, and nothing short of evil.").

22. See Nied, *supra* note 16 (reporting that the appellate court dismissed the criminal case because there was no probable cause to hold the state agency liable).

23. See generally, U.S. CONST. amend. XIV (establishing that US citizens cannot be deprived of life, liberty, or property without due process of the law or denied equal protection of its laws).

24. See *infra* Part II (discussing the rise in governmental child protection agencies, the overrepresentation of children of color in the child welfare system, and the development of children's rights).

25. E.g., *infra* Part III (arguing *DeShaney* created an accountability vacuum for child protection agency workers, regardless of their egregious disregard in child maltreatment cases).

26. See *infra* Part III (arguing children of color are disproportionately harmed by

recommends increasing resources, staffing, and cultural humility training for child protection agency workers to reduce the overrepresentation of minority children in the child welfare system.²⁷ Finally, Part V concludes by reiterating the Court should overturn *DeShaney*.²⁸

II. BACKGROUND

A. *The Development of the Child Welfare System*

1. *The Advent of an Overburdened Child Welfare State*

Before 1974, the federal government played a valuable but minor role in child protection.²⁹ In 1974, Congress took on a leadership role in passing the Child Abuse Prevention and Treatment Act of 1974 (“CAPTA”).³⁰ However, the expansion of the child protection system, particularly the rapid passage of laws requiring various professionals to report suspected child abuse and neglect mandatorily, unleashed a flood of cases that overwhelmed the child protection system.³¹ By the 1980s, the system was struggling to stay afloat.³²

Currently, child protection agency workers are overburdened and underfunded because the system is constantly brimming with cases.³³ The jobs of child protection agency workers require them to wear multiple hats,

social workers’ racial bias and *DeShaney*’s holding that children do not have due process rights).

27. See *infra* Part IV (suggesting remedies beyond the legal system to rectify the racial gaps in the child welfare system).

28. See *infra* Part V (concluding that the Fourteenth Amendment should protect children’s due process rights from private actors).

29. See generally John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 454 (2008) (detailing the historical shift from private to governmental child protection agencies).

30. *E.g., id.* at 457 (noting the expansion of the nation’s child welfare system so that every state had services available).

31. Cf. Stephen M. Krason, CHILD ABUSE, FAMILY RIGHTS, AND THE CHILD PROTECTIVE SYSTEM 19 (7th ed. 2013) (delineating that between 1972 and 1984, child abuse reports rose from 610,000 to 1.5 million).

32. See *id.* at 47 (acknowledging that in 30 to 55% of fatal cases from approximately 1975 to 2000, child protection agencies had been aware of child abuse or neglect).

33. See generally, Alyssa Sterkel, *Underpaid and Overworked: The Life of a Social Worker*, THE CURRENT (Mar. 21, 2011), <https://nsucurrent.nova.edu/2011/03/21/underpaid-and-overworked-the-life-of-a-social-worker/> (arguing that tremendous student debt and low remuneration makes social work an undesirable field).

operating as therapists, health specialists, and adoption professionals simultaneously.³⁴ Furthermore, high caseloads and paperwork, but low clerical support, overburdens social workers.³⁵ Despite the complexity of their jobs, social workers only receive an average national annual salary of about \$43,000 per year.³⁶ These factors have led to high turnover rates among caseworkers and have impaired states' ability to protect maltreated children in their communities adequately.³⁷

2. *The Overrepresentation of Children of Color in the Child Welfare System*

As of 2016, there were approximately 435,000 abused and/or neglected children in the child welfare system.³⁸ Historically, children of color are overrepresented in the child welfare system, particularly Black and Native American ("Native") children.³⁹ Before the passage of the Indian Child Welfare Act ("ICWA") in 1978, there was a systematic practice of removing Native children from their homes and communities.⁴⁰ Between 25 to 35% of all Native children, before the ICWA, had been removed from their

34. See *id.* (reporting that the Florida Department of Children and Families is open every hour of every day, oversees 18,000 foster children, and receives about 1,000 abuse hotline tips daily).

35. *E.g., id.* (citing an audit report, which suggested increasing salaries and clerical support to alleviate burdens on social workers).

36. *E.g., Social Work Education at a Glance*, COUNCIL ON SOC. WORK EDUC., <https://www.cswe.org/Students/Prepare-for-Your-Career/Social-Work-At-A-Glance> (last visited Oct. 28, 2021) (reiterating that social workers must have a master's degree, a license, and continuous education to maintain that license).

37. See Nat'l Ass'n of Soc. Workers, *Employment and the Child Welfare System 2* (2010), https://cdn.ymaws.com/www.naswtx.org/resource/resmgr/imported/Child_Welfare_and_Social_Workers_White_Paper.pdf (reporting that turnover rates nationwide are between 30 and 40% annually).

38. See Child. Bureau, CHILD WELFARE OUTCOMES 2016: REPORT TO CONGRESS 4 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cwo2016.pdf#page=15> (reporting that the overall national child victim rate was 9.1 child victims per 1,000 children).

39. See generally Susan Chibnall et al., *Children of Color in the Child Welfare System: Perspectives from the Child Welfare Community*, 3 (2003), <https://www.childwelfare.gov/pubPDFs/children.pdf> (correlating the overrepresentation of minority children in the foster care system to poverty).

40. See *About ICWA*, Nat'l INDIAN CHILD WELFARE ASS'N, <https://www.nicwa.org/about-icwa/> (last visited Oct. 28, 2021) (arguing the systemic practice deeply impacted Native families and tribes).

familial homes.⁴¹ Furthermore, while Black children account for only 15% of all children in the United States, they account for 25% of substantiated maltreatment victims.⁴² Conversely, white children encompass 79% of the U.S. child population but 51% of substantiated child victims.⁴³ Of every 1,000 white children in the United States, 5.2 are in foster care, compared with 9.9 of every 1,000 Black children and 16.9 of every 1,000 Native children.⁴⁴

Scholars argue the disproportionate representation of minority children in the child welfare system is due to racial bias.⁴⁵ A series of decisions at different points along the child welfare continuum determine a child's trajectory: reporting, investigation and substantiation, family preservation and reunification, and foster care.⁴⁶ At "any number of points along" the child welfare continuum, research has found that children of color may be predominantly impacted by racial bias in child protection decisions.⁴⁷

B. The Evolution of Children's Rights in America

1. DeShaney: Do Children Have Due Process Rights?

In the 1980s, Joshua DeShaney, through his mother, brought a civil case under 42 USC Section 1983 against the Winnebago County Department of Social Services ("DSS") and some of its social workers.⁴⁸ The Supreme

41. *See id.* (reporting that 85% of removed Native children were placed outside of their communities, even when fit kin were available).

42. *E.g.*, Chibnall et al., *supra* note 39, at 3 (detailing that Black children are represented in the foster system at a rate of 1.66 times their proportion of the overall population).

43. *See id.* (finding that white children were more likely to receive support to stay at home, whereas Black children were predominantly recommended for foster care placement).

44. *E.g.*, Child. Def. Fund, THE STATE OF AMERICA'S CHILDREN 2021 28 (2021), <https://www.childrensdefense.org/wp-content/uploads/2021/04/The-State-of-Americas-Children-2021.pdf> (reporting that a child is put into foster care every two minutes).

45. *E.g.*, Chibnall et al., *supra* note 39, at 4 (arguing there is an overreporting of maltreatment of racial minority children and an underreporting of maltreatment of white children).

46. *E.g.*, *id.* (showing families of color are more likely to be investigated for child abuse and neglect than white families, despite similar substantiation rates across races).

47. *See id.* at 3, 6 (finding that minority families receive less support to stay unified compared to their white counterparts).

48. *E.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 193 (1989) (arguing DSS and its social workers deprived Joshua of his liberty without due

Court held that the Fourteenth Amendment does not impose a positive duty on the state to protect children's due process rights of life, liberty, and property from private entities.⁴⁹ The Court narrowly interpreted the Due Process Clause of the Fourteenth Amendment as only a limitation on the state's power to act and not as a guarantee of minimal levels of safety and security.⁵⁰ To justify its narrow reading of the Due Process Clause, the Court reasoned that Joshua's father harmed Joshua, not the state of Wisconsin.⁵¹ Even though Wisconsin had temporary custody of Joshua and returned him to his father, the Court held Wisconsin had not placed Joshua in a worse position than had it not acted at all.⁵² Thus, the Court described Wisconsin's actions, at best, as "inaction."⁵³

The Court's formalistic emphasis on positive versus negative rights foreshadowed its conclusion that the Fourteenth Amendment only protected against affirmative government action.⁵⁴ In his dissent, Justice Brennan argued that the majority's characterization of Wisconsin's behavior was inaccurate because Wisconsin took affirmative action in Joshua's case.⁵⁵ Through legislation, Wisconsin created and empowered DSS to help children like Joshua.⁵⁶ Although other governmental agencies and private parties were primarily responsible for reporting potential child abuse, Wisconsin's law channeled all reports to DSS and absolved mandatory

process of the law by failing to intervene and protect him from his father's abuse, which they knew or should have known about).

49. *E.g., id.* at 195 (emphasizing the Court could not be moved solely by "natural sympathy").

50. *See id.* (asserting the Due Process Clause generally does not give an affirmative right to governmental aid, even when it could protect rights the government itself could not inhibit).

51. *E.g., id.* at 201 (reasoning that while Wisconsin may have been aware of the dangers that Joshua faced, it did nothing affirmatively to render Joshua more vulnerable to those dangers).

52. *See id.* (contending the state is not the permanent guarantor of an individual's safety because it sheltered him once).

53. *E.g., id.* at 203 (Brennan, J., dissenting) (stating DSS "stood by and did nothing when suspicious circumstances dictated a more active role for them.").

54. *See id.* at 204 (implying the majority's narrow focus on positive versus negative rights was a "quibble over dicta" with severe ramifications).

55. *E.g., id.* at 204-05 (Brennan, J., dissenting) (asserting that Wisconsin gave DSS significant discretionary control over whether to protect children from suspected abuse).

56. *E.g.,* WIS. STAT. § 48.981(3) (1987-1988) (enabling statute giving DSS discretionary control in child abuse cases).

reporters from liability once they reported.⁵⁷

Ultimately, DSS decided to remove Joshua from his home.⁵⁸ DSS exercised that control by removing Joshua from his father's custody after Joshua's initial hospital visit.⁵⁹ When DSS ignores or dismisses child abuse suspicions, like how it ignored numerous questionable bruises and abrasions on Joshua's body, abused and neglected children are left to fend for themselves.⁶⁰ Wisconsin actively intervened in Joshua's life through DSS and knew that Joshua was in danger.⁶¹ The Court's previous rulings suggest that it could find a state complicit in an injury if it cuts off private sources of aid and then refuses aid itself, even if it did not directly create the harm.⁶²

Despite *DeShaney's* holding, child protection agencies continue to serve and protect child abuse and neglect victims in communities around the nation.⁶³ *DeShaney* created a vacuum of accountability and justice. As a result, maltreated children can suffer serious, sometimes even fatal, consequences because of their social workers' deliberate indifference.⁶⁴

57. See *DeShaney*, 489 U.S. at 204 (contending that Wisconsin relieved private actors and other government agencies from any obligation to do more than report suspicions of child abuse to DSS).

58. E.g., WIS. STAT. § 48.981(3)(c)(2) (1987-1988) (enabling statute giving DSS social workers the power to remove children from their home if DSS determines that it is in their best interest in terms of physical health and safety).

59. E.g., *id.* at 209 (noting that DSS convened an ad hoc "Child Protection Team" to consider whether to permanently remove Joshua from his father's custody after his first hospital visit).

60. Cf. Christian M. Connell et al., *Maltreatment Following Reunification: Predictors of Subsequent Child Protective Services Contact after Children Return Home*, 33 CHILD ABUSE & NEGLECT 218, 226 (2009) (reporting that within three years of reunification, 30% of children experience substantiated maltreatment again).

61. See *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting) (arguing that governmental oppression can result when a state monopolizes a vital duty, just to ignore that duty later).

62. See generally, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (holding a restaurant liable for discriminatory conduct since its business was intertwined financially with the city).

63. See generally, Myers, *supra* note 29, at 454 (detailing the rapid expansion of governmental child welfare agencies post-CAPTA).

64. Compare *Butz v. Economou*, 438 U.S. 478, 516 (1978) (upholding qualified immunity for federal agency officers), with *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (barring judges from liability within their judicial jurisdiction), and *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (Black, J., concurring) (agreeing that members of Congress hold absolute immunity in intra-legislative statements and activities).

Further, courts have struggled to fill the void *DeShaney* created.⁶⁵ The Second Circuit Court of Appeals, Sixth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals have failed to craft a uniform standard to hold social workers accountable for professional misconduct in child abuse and neglect cases.⁶⁶

In *Duchesne v. Sugarman*, the Second Circuit held that social workers enjoy only qualified immunity when removing children without court proceedings and acknowledging a parent's demands for a hearing.⁶⁷ Conversely, in *Coverdell v. Department of Social & Health Services*, the Ninth Circuit held that social workers who suspected child abuse had absolute immunity for seeking, obtaining, and executing a court order to seize a child.⁶⁸ In another similar case, the Ninth Circuit held that social workers had absolute immunity in initiating child maltreatment investigations.⁶⁹ Finally, the Sixth Circuit ruled that, when initiating proceedings, social workers have absolute immunity but, when investigating abuse or conducting administrative functions, they do not.⁷⁰

Additionally, social workers' professional misconduct particularly impacts children of color's life outcomes within the child welfare system due to racial bias.⁷¹ The *DeShaney* decision exacerbated systemic racial

65. *E.g.*, *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987) (explaining that denying absolute quasi-judicial immunity for executing court orders would jeopardize judicial immunity recognized by the Supreme Court); *Meyers v. Contra Costa Cnty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987) (comparing the origins of prosecutorial immunity in removal proceedings and judicial immunity); *Duchesne v. Sugarman*, 566 F.2d 817, 832-33 (2d Cir. 1977) (defining qualified immunity not as good faith actions but by the bounds of the sphere of official responsibility).

66. *See Meyers*, 812 F.2d at 1157 (citing prior Ninth Circuit cases to demonstrate the Court's consistent stance that quasi-judicial actors receive absolute immunity).

67. *E.g.*, 566 F.2d at 827, 833 (emphasizing that the most fundamental social institution in American society is the family).

68. *E.g.*, 834 F.2d at 765 (reasoning that quasi-judicial functions need absolute immunity to maintain the integrity of the judiciary).

69. *See Meyers*, 812 F.2d at 1157 (comparing child protection agency workers to prosecutors in exercising discretion to initiate proceedings for child maltreatment).

70. *Compare Salyer*, 874 F.2d at 378 (finding that social workers have absolute immunity to start investigations), *with Achterhof*, 886 F.2d at 829-30 (concluding social workers have only qualified immunity during child abuse investigations), *and Kurzawa*, 732 F.2d at 1458 (finding social workers have similar absolute immunity as witnesses and other persons in judicial processes).

71. *E.g.*, Chibnall et al., *supra* note 39, at 6 (concluding that the overrepresentation of minority children in the child welfare system suggests that racial bias is affecting

inequality within child welfare services and thus, created an equal protection issue for children of color under the Fourteenth Amendment.⁷²

2. *An Overview: Equal Protection Rights for Children of Color*

The Fourteenth Amendment's Equal Protection Clause was created to combat racial discrimination.⁷³ Historically, the Supreme Court has used its equal protection jurisprudence to protect communities of color.⁷⁴ For example, in *Loving v. Virginia*, the Supreme Court struck down a Virginian law that prevented interracial marriage.⁷⁵ The Court applied strict scrutiny and found the law did not have a legitimate purpose separate from racial discrimination.⁷⁶ Thus, the Virginia law violated the Equal Protection Clause.

In *Regents of the University of California v. Bakke*, the Supreme Court held that the rigid racial quotas used by the University of California medical school violated the Equal Protection Clause.⁷⁷ However, the Supreme Court upheld affirmative action by allowing race to be one of several factors to be considered during college admission procedures.⁷⁸ Furthermore, in *Brown v. Board of Education*, the Supreme Court expanded its equal protection jurisprudence to Black children, holding that "separate but equal"

decision-making).

72. See *infra* Part III (recognizing that by not ensuring children's due process rights in *DeShaney*, the Court's decision amplified existing racial disparities in the child welfare system).

73. E.g., Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, THE CONST. CTR. (last visited Oct. 28, 2021), <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702> (explaining that racial discrimination was still persistent after the Fourteenth Amendment was passed).

74. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (upholding affirmative action programs in admissions policies as constitutional), with *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (concluding marriage rights require equal protection under the law), and *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (ruling separate educational facilities are inherently unequal) [hereinafter "*Brown I*"].

75. E.g., *Loving*, 388 U.S. at 12 (finding marriage is a fundamental right requiring equal protection under the law).

76. See *id.* at 11 (stating that equal application of a discriminatory law across races is unconstitutional).

77. E.g., *Regents*, 438 U.S. at 320 (upholding affirmative action because it is necessary to promote a substantial state interest).

78. E.g., *id.* at 313 (stating that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.") (internal quotations omitted).

educational facilities for racial minorities were inherently unequal, violating the Equal Protection Clause of the Fourteenth Amendment.⁷⁹ Thus, in using its Equal Protection Clause jurisprudence, the Court combatted the remnant effects of slavery to protect racial minority communities.⁸⁰

III. ANALYSIS

Despite the Court's holding in *DeShaney*, child protection agencies continue to serve and protect abused and neglected children around the nation.⁸¹ However, in the years following *DeShaney*, two significant consequences have emerged, detrimentally impacting the nation's child welfare system and the children in it.⁸² First, *DeShaney* failed to provide a legal standard to hold child protection agency workers accountable in child abuse and neglect cases.⁸³ Second, *DeShaney* failed to provide children of color equal protection under the law in the child welfare system.⁸⁴

A. DeShaney Failed to Provide a Standard to Hold Child Protection Agency Workers Accountable in Child Abuse and Neglect Cases

The United States Supreme Court has previously decided cases involving state actors' immunity in the legislative, executive, and judicial systems.⁸⁵

79. See *Brown I*, 347 U.S. at 494-95, n. 11 (1954) (finding that the racial segregation of public education instilled a sense of inferiority and detrimentally affected Black children); see also *Brown v. Bd. of Educ.*, 349 U.S. 294, 299-300 (1955) (enabling local judiciaries to enforce *Brown I*) [hereinafter "*Brown II*"].

80. See *Regents*, 438 U.S. at 320 (finding that affirmative action is not unconstitutionally discriminatory).

81. See generally Childs. Bureau, *Trends in Foster Care & Adoption: FY 2010-2019*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 6, 2020), <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption-fy-2010-2019> (reporting that between 2014 and 2019, the proportion of removed children exiting the foster care system through adoption rose from 21.5% to 26.5%).

82. See *infra* Part III (discussing that *DeShaney* created an accountability vacuum for social workers and exacerbated racial inequality in the child welfare system).

83. E.g., *infra* Part III section A (insisting that qualified immunity for social workers is necessary to protect maltreated children).

84. See *infra* Part III section B (declaring that because children do not have substantive due process rights, children of color do not have equal protection under the law).

85. E.g., *Butz v. Economou*, 438 U.S. 498, 517 (1978) (concluding that federal employees are entitled to qualified immunity); see also *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (insisting that judges cannot be civilly liable for decisions); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (holding members of Congress have absolute

However, it has failed to provide lower courts with a standard that defines to what extent social workers are immune from civil liability resulting from their misconduct in child protection cases.⁸⁶ Thus, the Second Circuit Court of Appeals, the Sixth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals disagree on the level of immunity for social worker misconduct in child protection cases.⁸⁷

In *Duchesne*, the Second Circuit held that a mother could sue four child protection agency workers for depriving her of her due process rights when they removed her two children without court proceedings and refused to acknowledge the mother's demand for a hearing.⁸⁸ The court emphasized that the most fundamental social institution in American society is the family and that the child protection agency workers deprived the mother and children of their rights to live together because of their forced separation.⁸⁹ It stressed that the Civil Rights Act Section 1983 provided a cause of action to any person who suffered a constitutional deprivation by a state actor.⁹⁰

Conversely, in *Coverdell*, the Ninth Circuit held that a social worker who suspected a child's mother of sexual abuse had absolute immunity when seeking, obtaining, and executing a court order to seize the newborn baby from her mother's care.⁹¹ The Ninth Circuit held that the social worker was entitled to absolute immunity because she was performing a quasi-prosecutorial role in seeking and obtaining the court order, and she was

immunity).

86. See *Rinderer v. Del. Cnty. Child. & Youth Servs.*, 703 F. Supp. 358, 361 (E.D. Pa. 1987) (stating that the majority view is that social workers do not enjoy absolute immunity); but see *Jenkins v. Cnty. of Orange*, 212 Cal. App. 3d 278, 286 (1989) (clarifying that social workers tend to enjoy absolute immunity in federal cases).

87. Compare *Duchesne v. Sugarman*, 566 F.2d 817, 833 (2d Cir. 1977) (explaining that a social worker's sincere belief that they were doing right did not provide them with qualified immunity), with *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 759 (9th Cir. 1987) (holding that a social worker enjoyed quasi-judicial absolute immunity for executing a court order).

88. See *Duchesne*, 566 F.2d at 824 (stating the family had been separated more than two years before the social worker-initiated court proceedings for the children).

89. E.g., *id.* at 824, 833 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)) ("freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

90. See *id.* at 829 (noting that social workers are state actors as provided by the Civil Rights Act § 1983).

91. See *Coverdell*, 834 F.2d at 759, 765 (finding the mother and her husband were emotionally unstable, easily angered, and violent).

performing a quasi-judicial role when executing the court order.⁹²

In a similar case, the Ninth Circuit held that a social worker had absolute immunity for investigating a child's parent after abuse complaints arose.⁹³ The Ninth Circuit reasoned that social workers needed absolute immunity to execute their duties successfully.⁹⁴ The court added that the risk of retaliation could severely affect social workers because discretionary decision-making, in high stakes but uncertain situations, is integral to the job.⁹⁵ The court reasoned that absolute immunity is justified because social workers need protection to make the necessary and quick decisions that are crucial to a child's safety.⁹⁶

In a rare combination of both approaches, the Sixth Circuit Court of Appeals ruled that, when initiating proceedings, social workers have absolute immunity but, when investigating abuse, they do not.⁹⁷ Like the Ninth Circuit, the Sixth Circuit reasoned that child protection agency workers are responsible for prosecuting child abuse and neglect cases, and they must be able to do their jobs without fear of harassment or intimidation.⁹⁸ However, the Sixth Circuit qualified its position by ruling that social workers do not enjoy absolute immunity in all aspects of their

92. *E.g., id.* at 762 (explaining the parallel between social workers bringing dependency proceedings and prosecutors bringing criminal charges because both positions exercise independent judgment about when to bring such proceedings).

93. *Cf. Meyers v. Contra Costa Cnty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987) (comparing social workers to prosecutors when they exercise discretion in prosecuting child maltreatment).

94. *E.g., Whelehan v. Cnty. of Monroe*, 558 F. Supp. 1093, 1098-1099 (W.D.N.Y. 1984) (citing *Butz v. Economou*, 438 U.S. 498, 516 (1978)) (stating that not giving social workers or prosecutors immunity would be detrimental to society and the judiciary).

95. *See Coverdell*, 834 F.2d at 765 (predicting that without absolute immunity, social workers will not intervene when a child could be in danger because of fear of retaliation).

96. *See, e.g., Mazon v. Shelton*, 637 F. Supp. 330, 335 (N.D. Cal. 1986) (arguing that social workers' attention would shift from protecting abused and neglected children toward protecting themselves from retaliatory litigation).

97. *See Salzer v. Patrick*, 874 F.2d 374, 378 (6th Cir. 1989) (citing *Meyers*, 812 F.2d 1154, 1157 (9th Cir. 1987)) (explaining that immunity rests not on status or title, but on the function performed and that prosecutorial functions receive absolute immunity); *see also Achterhof v. Selvaggio*, 886 F.2d 826, 830 (1989) (finding social workers have only qualified immunity during child abuse investigations); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (concluding social workers have absolute immunity in initiating proceedings).

98. *See Kurzawa*, 732 F.2d at 1458 (granting social workers absolute immunity in starting removal proceedings); *see also Salzer*, 874 F.2d at 378 (holding that social workers have prosecutorial absolute immunity to start removal proceedings).

job.⁹⁹ Instead, the court held that administrative or investigatory functions of social work are only entitled to qualified immunity.¹⁰⁰

Despite the apparent split among the circuit courts, the Supreme Court has refused to hear cases regarding social workers' civil immunity.¹⁰¹ Although the rationale behind absolute social worker immunity¹⁰² is easy to follow, a social worker's deliberate indifference can result in a fatality or a serious child injury.¹⁰³ The Second Circuit's qualified immunity approach, whereby courts can hold social workers civilly liable for due process violations, is the most consistent with the United States Constitution and 42 USC Section 1983.¹⁰⁴

Qualified immunity for child protection agency workers protects children's Fourteenth Amendment due process rights.¹⁰⁵ As the Second Circuit noted, the most fundamental right is privacy in family matters, and the right should be free from unnecessary governmental interference.¹⁰⁶ The Second Circuit also acknowledged that this right was reciprocal for both parents and children.¹⁰⁷ Thus, when the government takes affirmative steps

99. See *Achterhof*, 886 F.2d at 830 (explaining state law required child protection agencies to maintain a central registry regarding child maltreatment cases, so qualified immunity was necessary to enforce the law).

100. See *id.* (noting that state law did not relieve child protection agencies from investigating child abuse reports even during removal proceedings, so absolute immunity would be inappropriate).

101. E.g., *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) (granting quasi-judicial absolute immunity); see also *Duchesne v. Sugarman*, 566 F.2d 817, 822 (2d Cir. 1977) (holding qualified immunity).

102. See *Meyers v. Contra Costa Cnty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987) (arguing that social workers will not intervene when a child is in danger in fear of retaliation).

103. Cf. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (arguing that child protection agencies are often the last hope of escape for abused and neglected children).

104. See *Duchesne*, 566 F.2d at 833 (holding that social workers enjoy only qualified immunity, even if acting with good faith).

105. See *id.* at 828-30 (noting that the social worker's failure to properly conduct removal proceedings was a violation of due process rights, and qualified immunity was necessary to rectify that deprivation via 42 USC § 1983).

106. E.g., *id.* at 824 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (reaffirming the right to privacy in family life as integral to America's history and tradition).

107. See *id.* at 826 (explaining that children's right to privacy regarding family protects them from unnecessary dislocation from the emotional intimacy of daily association with parents).

that impact a removed child's right to privacy in family matters, the Fourteenth Amendment demands due process in the form of investigation, substantiation, and removal proceedings.¹⁰⁸

State statutes charge child protection agency workers, as state actors, with conducting due process functions, such as investigation, substantiation, and removal proceedings.¹⁰⁹ When they act with deliberate indifference, it directly impacts children's right to privacy in the family realm.¹¹⁰ Thus, qualified immunity is also consistent with 42 USC Section 1983 because it would allow mistreated children, through an adult, to file actions against state social workers for depriving them of their due process rights.¹¹¹

Additionally, qualified immunity does not interfere with the rationale behind absolute immunity.¹¹² Qualified immunity does not guarantee guilt against social workers in every suit.¹¹³ Judges would retain the power to dismiss frivolous claims, and they could create a standard of offering social workers maximum leeway except in extremely reckless cases.¹¹⁴ Qualified immunity would simply allow cases deserving judicial intervention a chance to get in front of a judge or jury.¹¹⁵

B. DeShaney Failed to Provide Abused and Neglected Children of Color Equal Protection Under the Law

An equal protection issue arises because child welfare agencies' policies

108. See *DeShaney*, 489 U.S. at 207 (Brennan, J., dissenting) (arguing that a state can be liable when it ignores a vital duty that it monopolized); see also *Duchesne*, 566 F.2d at 826 (clarifying that while emergency removal of endangered children is constitutional, further detention without notice and an opportunity to be heard is unconstitutional).

109. See WIS. STAT. § 48.981(3) (1987-1988) (enabling statute giving social workers discretionary control in child abuse cases).

110. E.g., *Duchesne*, 566 F.2d at 831 (explaining that 42 USC § 1983 does not require direct action causing harm to impose liability, but simply that state actors promoted an affirmative policy which allowed the type of action that caused the harm to happen).

111. See 42 USC § 1983 (empowering U.S. citizens to sue state actors for deprivations of rights, privileges, or immunities secured by the Constitution).

112. Cf. *Mazor v. Shelton*, 637 F. Supp. 330, 335 (N.D. Cal. 1986) (arguing that social workers would drown in retaliatory litigation and be distracted from protecting maltreated children).

113. See *Duchesne*, 566 F.2d at 831 (stating plaintiffs have the burden of proving that the defendant's acts caused the constitutional deprivation).

114. See Fed. R. Civ. P. 12(b)(6) (empowering judges to dismiss cases for failure of the complaint to state a claim on which relief can be granted).

115. See *Duchesne*, 566 F.2d at 833 (reasoning that juries could evaluate good faith defenses, among others, in § 1983 claims).

and their social workers' actions negatively discriminate against children of color.¹¹⁶ However, children of color seeking justice have been severely impaired by the Court's holding in *DeShaney* which states they do not have a substantive due process right to be protected from deprivations of their life, liberty, and property from private actors—since equal protection claims are generally dependent on there being a substantive due process right.¹¹⁷ If the Court were to overturn *DeShaney*, children of color could bring equal protection claims under 42 USC Section 1983 and argue that child welfare enabling statutes have a discriminatory impact on them based on race.¹¹⁸ Historically, the Court has used a strict scrutiny analysis when analyzing racially discriminatory laws.¹¹⁹

The Court in *Brown I* held that racial discrimination in the public education sphere was unconstitutional.¹²⁰ It also held that all federal, state, and local laws, permitting such discrimination were unconstitutional.¹²¹ Like the school boards in *Brown I* and *Brown II*, which had the primary responsibility for elucidating, assessing, and solving problems in school systems, child welfare agencies are solely responsible for investigating, substantiating, and beginning removal proceedings for maltreated children.¹²²

116. See Chibnall et al., *supra* note 39, at 3 (arguing that racial bias impacts minority children's outcomes negatively at each point along the child welfare system's decision-making continuum).

117. Compare *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (concluding marriage requires equal protection), with *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding free speech has equal protection).

118. See 42 USC § 1983 (empowering U.S. citizens to sue states for deprivations of their rights, privileges, or immunities secured by the Constitution).

119. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 264, 320 (1978) (applying strict scrutiny when analyzing rigid quota schemes designed to improve diversity), with *Loving*, 388 U.S. at 11 (using strict scrutiny when analyzing laws prohibiting and punishing interracial marriage), and *Brown I*, 347 U.S. at 495 (employing strict scrutiny when analyzing "separate but equal" educational systems).

120. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "separate but equal" educational facilities are inherently unequal and violate the Equal Protection Clause of the Fourteenth Amendment).

121. Cf. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300 (1955) (establishing that courts may oversee and resolve discriminatory problems related to administration, arising from the physical condition of schools, the school transportation system, personnel, revision of school districts and more).

122. See *id.* (recognizing that local bodies are best equipped to handle local populations and problems); see also *Brown I*, 347 U.S. at 493 (explaining that one of the most important functions of local governments is providing public education).

Since there were legitimate reports that racially segregated schools were equalized, the Court in *Brown I* looked beyond individualized tangible factors.¹²³ Instead, the Court observed the discriminatory effect systemic segregation had on public education as a whole.¹²⁴ Similarly, child welfare enabling statutes may be facially neutral and may not appear to discriminate racially, but the systemic practices of child welfare agencies are discriminatory at all points along the child welfare continuum.¹²⁵ Additionally, the *Brown I* Court highlighted that education is one of the most essential functions of state and local government, although education is not a constitutionally recognized positive right.¹²⁶ Similarly, although the *DeShaney* Court held that there is no positive right for children to be protected from harm from private citizens, child welfare agencies are arguably one of the most important actors in state and local governments today.¹²⁷

Brown I's glaring similarities suggest that children of color could successfully file an equal protection claim under Section 1983 regarding child welfare policies even without a substantive due process right.¹²⁸ However, if the Supreme Court overturns *DeShaney*, children of color will have a substantive due process right to base their claims on and bolster their argument.¹²⁹ The Court would likely see that the discriminatory policies in the child welfare system, which negatively impact children of color, are

123. See *Brown I*, 347 U.S. at 492 (explaining that racially segregated schools equalized regarding facilities, qualifications and salaries of teachers, and other tangible factors).

124. See *id.* at 494 (arguing segregation instilled a sense of inferiority that affected the motivation of Black children to learn and negatively impacted their development).

125. E.g., Chibnall et al., *supra* note 39, at 3 (arguing that racial bias impacts social workers' decision-making and their ability to protect minority children).

126. See *Brown I*, 347 U.S. at 493 (articulating that compulsory school attendance laws and the continuous significant expenditures for education demonstrated the nation's recognition of the importance of education to society).

127. See Sterkel, *supra* note 33 (reporting the Florida Department of Children and Families oversees 18,000 foster children and receives about 1,000 abuse hotline tips daily).

128. See *Brown I*, 347 U.S. at 495 (reasoning that a service that the state has undertaken to provide is a right which must be made available to all citizens on equal terms).

129. Cf. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (protecting the substantive due process right to marry and stating that it automatically affords equal protection under the law).

similar to those in public school segregation policies.¹³⁰ Just as social science studies substantiated the harmful effects racial segregation had on Black children's well-being and development that influenced the *Brown I* Court, the Supreme Court could look to the abundant research demonstrating the overrepresentation of children of color in the child welfare system is due to racial bias and creates poor life outcomes.¹³¹

On the other hand, an equal protection claim against child welfare agency statutes could present difficulties because child welfare enabling laws are facially neutral.¹³² Unlike the statute in *Loving*, which prohibited interracial marriage and was on its face discriminatory, child welfare enabling statutes are facially neutral and do not bring up distinctions based on race.¹³³ Similarly, unlike in *Regents*, where a state medical school's unique admissions program employed strict racial quotas, child welfare enabling statutes do not delineate any service based on race.¹³⁴ As a result, counsel for children of color could likely argue that child welfare agencies' systemic practices have a discriminatory impact on children of color and deprive them of equal protection under the law.¹³⁵ However, the Supreme Court may be reluctant to embrace the proposition that a law without a discriminatory purpose is unconstitutional even if it has a discriminatory impact.¹³⁶

The Supreme Court has previously been hesitant to accept this theory of liability in fear that it would suspect any difference in treatment amongst racial groups, regardless of whether the differential treatment lacks racial motivation and could otherwise have a rational purpose.¹³⁷ Nevertheless, the

130. See *Brown I*, 347 U.S. at 494 (stating segregationist policies stunted the educational and mental development of Black children).

131. E.g., *id.* at n. 11 (citing psychological studies showing racial segregation inhibits Black children's growth).

132. See *Loving*, 388 U.S. at 11 (analyzing an anti-miscegenation law that criminally charged and punished interracial marriage).

133. See *id.* (arguing that equal application of a statute containing racial classifications is not enough to protect it from the Fourteenth Amendment's equal protection clause).

134. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 264, 320 (1978) (striking down a special admissions program under which positions in the class were reserved for minority students).

135. See 42 USC § 1983 (1996) (empowering U.S. citizens to sue state actors for deprivations of their civil rights).

136. E.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (quoting "[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution.").

137. See *id.* at 240 (citing *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972)) (arguing that a basic equal protection principle is that the invidious quality of a law claimed to be

Court has left some room open for facially neutral claims by stating that it may infer an invidious discriminatory purpose from the totality of the relevant facts.¹³⁸

Another potential avenue for equal protection claims against child protection agency statutes exists under 42 USC Section 1983.¹³⁹ Children of color could base their Section 1983 claims on their substantive due process right to privacy in familial matters.¹⁴⁰ As the Second Circuit noted in *Duchesne*, privacy in familial matters is one of the most fundamental rights in American society.¹⁴¹ Children of color would argue that the right to privacy in family matters demands due process in the form of investigation, substantiation, and removal proceedings.¹⁴² Furthermore, children of color could argue that child protection agencies' racially discriminatory policies and practices, which disproportionately and negatively impact them at each due process stage, deprive them of equal protection of their due process right to privacy in familial matters.¹⁴³ The Court would likely find that children of color's right to privacy in familial issues are afforded equal protection under the law.¹⁴⁴

IV. POLICY RECOMMENDATION

Children hold a vulnerable place in society because they cannot control the environment they grow up in or the behavior of the adults around them.¹⁴⁵

racially discriminatory must ultimately be traced to a racial discriminatory purpose).

138. *See id.* at 242 (including the fact, if it is true, that the law is more consequential on one racial group than another).

139. *See* 42 USC § 1983 (1996) (enabling U.S. citizens to sue the government and state actors for civil rights violations).

140. *E.g.*, *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (explaining that children's right to privacy in family matters means not being unnecessarily dislocated from the emotional attachments derived from the intimacy of daily association with parents).

141. *See id.* at 824 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (noting that removing children from their homes without substantiation and due process threatens the most essential and basic aspect of the right to familial privacy).

142. *See id.* at 826 (qualifying that while emergency removal of endangered children is constitutional, further detention without due process is unconstitutional).

143. *See* 42 USC § 1983 (1996) (enabling citizens to sue the government and state actors for deprivations of civil rights).

144. *See e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding the right to marry is afforded equal protection).

145. *E.g.*, *Children in Vulnerable Situations*, CHILD RTS. INT'L. NETWORK, <https://archive.crin.org/en/home/rights/themes/children-vulnerable-situations.html> (last

Although there are compelling reasons behind absolute immunity for social workers, the Supreme Court should resolve the split among the circuits and hold that social workers are only entitled to qualified immunity.¹⁴⁶ If the Supreme Court is unwilling to resolve the issue, state legislatures should pass laws outlining that child protection agency workers only have qualified civil immunity for misconduct in child maltreatment cases.

Absolute immunity is contrary to notions of accountability and justice.¹⁴⁷ *DeShaney* departed from international consensus that governments have a positive obligation to protect children from harm from private actors.¹⁴⁸ Additionally, *DeShaney*'s holding contradicts rationales foundational to the United States' civil court system: it was built upon the belief that people deserve redress for injuries caused by negligent or reckless behavior.¹⁴⁹ When social workers display deliberate indifference, abused and neglected children suffer the most.¹⁵⁰ Most, if not all, states place the sole responsibility of removing abused and neglected children from their homes in state child welfare agencies.¹⁵¹

Proponents of absolute immunity often tout the overburdened and underfunded life of child protection agency workers to justify removing accountability mechanisms.¹⁵² However, the solution is not to create a

visited Oct. 6, 2021) (insisting children need special protections because they are more vulnerable to violations of their rights than adults).

146. See *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 762 (9th Cir. 1987) (declaring that social workers need absolute immunity, or they will not be willing to intervene when a child could be in danger in fear of retaliation).

147. See *Project on Immunity and Accountability*, INST. FOR JUST., <https://ij.org/issues/project-on-immunity-and-accountability/> (last visited Oct. 6, 2021) (voicing that state actor immunity makes the Constitution an empty promise).

148. See, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989) (ratifying 194 countries to the United Nations Convention on the Rights of the Child except Somalia, South Sudan, and the United States, and it was passed the same year *DeShaney* was decided).

149. See *The Purpose of the Civil Law System*, CHRISTIAN & CHRISTIAN, <https://www.cclawfirm.com/blog/2018/october/the-purpose-of-the-civil-justice-system> (Oct. 29, 2018) (stating that civil lawsuits have been declining for decades, despite perception that the system is overrun with frivolous lawsuits).

150. E.g., *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 210 (1989) (Brennan, J., dissenting) (arguing that maltreated children are entirely dependent on child welfare agencies to save them from harm).

151. See *id.* at 210 (explaining that states' mandatory reporting laws absolve other actors from doing more than reporting potential abuse to child welfare agencies).

152. See generally *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>

vacuum of justice, whereby abused and neglected children suffer the most. Instead, the better solution is to increase salaries, staffing, clerical support, and lower caseloads for social workers.¹⁵³ These changes would ensure that social workers can provide individualized and thorough support to each child.¹⁵⁴ Lastly, social workers need racial bias and cultural humility training to address racial disparities in the child welfare system.¹⁵⁵ Research demonstrates that at each point along the decision-making continuum, racial bias negatively impacts the outcomes of children of color, particularly Black and Native children, in the child welfare system.¹⁵⁶ Thus, child protection agencies should adopt anti-bias policies and continuously conduct anti-bias training.¹⁵⁷

V. CONCLUSION

DeShaney had a cataclysmic impact on the nation's child welfare system: it set off a series of litigation, led to clashes between circuits on how to hold social worker misconduct accountable, and left the nation's maltreated children even more vulnerable.¹⁵⁸ Despite its detrimental effect on the child welfare system, the Supreme Court has continuously denied certiorari to

(suggesting the toxic work environment encourages social workers to cut corners).

153. See Gary Bailey et al., *Members Describe Their Experiences in Child Welfare*, NAT'L ASS'N OF SOC. WORKERS 1, 18 (June 2004), <https://www.socialworkers.org/LinkClick.aspx?fileticket=Mr2sd4diMUA%3D&portalid=0> (recommending less paperwork, more funding, and more staffing).

154. *E.g.*, *id.* at 15 (recommending caseloads between twelve-fifteen children per worker as opposed to the current average of between twenty-four-thirty-one).

155. See Childs. Bureau, *Child Welfare Workforce Development and Workplace Enhancement Institute: Knowledge Development and Application Meeting Report*, CHILD WELFARE INFO. GATEWAY (2006), <https://www.childwelfare.gov/pubs/wf-institute/key/> (recommending accountability measures to ensure culturally competent services are provided).

156. *E.g.*, Chibnall et al., *supra* note 39, at 3 (arguing that the overrepresentation of minority children in the child welfare system is because of racial bias).

157. See Dinah Schuster, *Honing Cultural Humility Skills Can Improve Health Care as a Whole*, PENN MED. (May 13, 2021), <https://www.pennmedicine.org/news/news-blog/2021/may/honing-cultural-humility-skills-can-improve-health-care-as-a-whole> (noting that the use of cultural humility trainings in the medical field, another field responsible for the health and well-being of others, has a direct positive impact on readmissions, pain management, surgical, and general health outcomes).

158. Compare *Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977) (concluding that a social worker's good faith alone did not afford them qualified immunity), with *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) (holding social workers have absolute immunity for executing a court order).

resolve the time bomb it created.¹⁵⁹ While the Court has avoided resolving *DeShaney*, vulnerable young children, like Joshua and Gabriel, continue to fall victim to an overburdened and underfunded child welfare state.¹⁶⁰

Thus, the Supreme Court should grant certiorari and overturn *DeShaney*, holding that children have a substantive due process right to be protected from harm.¹⁶¹ In doing so, not only would the Supreme Court resolve the circuit split and uplift children's rights, but it would also guarantee equal protection under the law for children of color.¹⁶²

159. See *Hoffman v. Harris*, 511 U.S. 1060, 1061 (1994) (cert. denied) (affirming absolute immunity for initiating child dependency proceedings).

160. See generally Kate Giammarise, *Report: Child Welfare Caseworkers Overworked, Underpaid — putting Kids at Risk*, PITTSBURGH POST-GAZETTE (Sept. 14, 2017), <https://www.post-gazette.com/local/city/2017/09/14/child-abuse-Pennsylvania-Human-Services-CYS-caseworkers-audit-Eugene-DePasquale/stories/201709140136> (noting that social workers often are overburdened with high caseloads and paperwork, which negatively impacts their ability to protect children).

161. See *supra* Part III (insisting that the Court should overturn its decision in *DeShaney* because children in the child welfare system have been negatively impacted by *DeShaney*'s ruling).

162. See *infra* Part III (articulating that social workers create an equal protection issue when they make racially discriminatory decisions).