IT'S URGENT! EMERGENCY DECISION-MAKING, CHILD WELFARE, AND RETHINKING QUALIFIED IMMUNITY

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Over the past fifty years, the qualified immunity doctrine has greatly expanded. Originally intended as a modest good-faith exception for state actors, its current formation represents a systematic barrier to plaintiffs' ability to recover for constitutional rights violations. The consequences of expanded qualified immunity are made painfully clear when applied to child welfare litigation where, despite troubling allegations of neglect, recovery remains uncertain.

In search of a more workable path forward, research reveals courts' emphasis on pursuing their intuitions of fair notice and morality when resolving the two-pronged qualified immunity inquiry articulated most recently in Pearson v. Callahan*. Courts appear especially motivated to grant qualified immunity when state actors render decisions in emergency settings and often deny the defense when no such circumstances exist. Such conditions sometimes even prevail at the expense of concrete legal reasoning.*

To resolve this problem, this Note recommends a third qualified immunity prong which accounts for courts' deference to state actors responding to emergencies. Such an addition makes explicit courts' moral intuitions deferring to state actors' emergency response while also placing a demanding burden on defendants to justify their behavior. This limits courts' protection of unconstitutional state action while ensuring clearer paths to recovery for vulnerable plaintiffs.

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I. INTRODUCTION

When Alana was thirteen years old, her mom passed away.[1] Forced to enter custody with the Illinois Department of Child and Family Services ("DCFS") soon after, she became more and more distraught.[2] She eventually developed depression and suicidal ideation requiring psychiatric hospitalization but worked to prepare for release.[3] By the time she was ready, though, her adoptive grandmother was too sick to care for her; she remained with DCFS until she could be released to her sister.[4] Under their watch, Alana remained in the hospital for four months.[5] During this time, Alana turned fourteen.[6] Her hospitalization wore on her, and Alana decompensated to the point where she could not stay with her sister as planned.[7] She was ultimately placed in a foster home.[8] Her case, among

1. First Amended Complaint at 8, Golbert v. Walker, No. 18 C 8176 (N.D. Ill. June 25, 2020).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

others, is currently in federal court as a class action against DCFS.[9] Actors within the agency has raised, among others, the qualified immunity defense.[10]

Unfortunately, Alana's case is not an outlier. Child welfare misconduct is alarmingly high, particularly in Illinois.[11] Due in part to a lack of available placements for hospitalized children ready for discharge, too many children in state care continue to languish in psychiatric hospitals for weeks, or even months, beyond medical necessity.[12]

Like the Illinois child welfare system, qualified immunity also finds itself at a crossroads.[13] Qualified immunity is raised as a defense against lawsuits under 42 U.S.C. § 1983 ("Section 1983"),[14] which is considered the primary vehicle to recover for constitutional rights violations.[15] In recent years, courts have expanded qualified immunity, rendering recovery for constitutional violations increasingly tenuous.[16]

This Note will argue that the Supreme Court should recognize an additional prong in the current two-step qualified immunity inquiry, better enabling children in state care to recover for constitutional violations involving neglect. Part II will offer background on Section 1983 claims, qualified immunity, the current national foster care system, and finally the Illinois child welfare crisis.

Part III will first analyze the development of qualified immunity case law, exploring the manner in which the Supreme Court has broadened the defense to its current formulation. Next, Part III will focus on qualified immunity cases involving police, prosecutors, and child welfare workers. In assessing three vastly different positions, analysis will reveal courts' significant motivation to decide qualified immunity issues based on whether the state actors responded to emergency settings.[17] Part IV will recommend the Court formally acknowledge this motivation and add a third prong to the inquiry, explicitly recognizing the value courts place on the exigencies of the harm litigated when rendering their

9. *Id.*

10. Golbert v. Walker, No. 18 C 8176, 2020 WL 1182670, at *3 (N.D. Ill. Mar. 12, 2020).

11. *See, e.g.*, David Jackson & Duaa Eldeib, *Thousands of Foster Children Were Sent out of State to Mental Health Facilities Where Some Faced Abuse and Neglect*, PROPUBLICA ILL. (Mar. 11, 2020, 5:00 AM), https://www.propublica.org/article/illinois-dcfs-children-out-of-state-placements [https://perma.cc/J83E-SRGY].

12. Duaa Eldeib, *Hundreds of Illinois Children Languish in Psychiatric Hospitals After They're Cleared for Release*, PROPUBLICA ILL. (June 5, 2018), https://features.propublica.org/stuck-kids/illinois-dcfs-children-psychiatric-hospitals-beyond-medical-necessity/ [https://perma.cc/WQ4R-6BDZ].

13. *See* discussion *infra* Section II.B.

14. 42 U.S.C. § 1983.

15. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT MAG. (2017), https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983 [https://perma.cc/5ADW-UHNU].

16. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64–65 (2016).

17. This analytic approach and Note recommendation were developed with the help of Faculty Advisor Professor Jamelle Sharpe. *See* Interview with Jamelle Sharpe, Professor L., in Champaign, Ill. (Oct. 8, 2020).

decisions.[18] This would enable clearer avenues to recovery for the affected children.[19]

II. BACKGROUND

A. Section 1983 Claims

Originally passed by a Reconstruction-era Congress as part of the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("Section 1983") has significantly expanded in its scope.[20] Although the provision was initially intended as an instrument to prevent recently freed slaves from local government abuse, Section 1983 gradually became a "formidable tool" to seek damages from constitutional or legal rights violations by public officials acting under state law.[21] The provision also offers plaintiffs access to federal court, where it is often easier to assert claims against state officials, and provides an additional mechanism for recovering attorney's fees.[22] The Supreme Court has described the function of Section 1983 as a "vital component of any scheme for vindicating cherished constitutional guarantees."[23]

The text itself is relatively brief, stating in relevant part, "[e]very person who, under color of any statute . . . 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."[24] The Court has held that Section 1983 also contemplates municipalities and other local government units as "persons," so long as the alleged unconstitutional act "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[25] The Court has identified Section 1983 as not only intended to offer remedies to past victims, but "to serve as a deterrent against future constitutional deprivations, as well."[26] Given courts' gradually expanded substantive constitutional protections, Section 1983 has now become the "statute of choice" for litigating constitutional tort actions.[27]

18. *See id.*

19. *See* discussion *infra* Part IV.

20. *See* Linda Greenhouse, *THE LAW; 1871 Rights Law Now Used for Many Causes*, N.Y. TIMES (Aug. 26, 1988), https://www.nytimes.com/1988/08/26/us/the-law-1871-rights-law-now-used-for-many-causes.html [https://perma.cc/UGP8-HG3E].

21. *Id.*

22. *Id.*

23. Owen v. City of Independence, 445 U.S. 622, 651 (1980).

24. 42 U.S.C. § 1983.

25. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

26. *Owen*, 445 U.S. at 651.

27. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 24–25 (1989).

B. Qualified Immunity

1. Legal Development

Qualified immunity arose as a common law formulation in interpreting the Civil Rights Act of 1871 and, as a consequence, Section 1983.[28] The Court's first interpretation of qualified immunity envisioned a "good faith" defense to police officers in *Pierson v. Ray*.[29] In that case, decided in 1967, the Court held that common law defenses were applicable to Section 1983 claims.[30] *Pierson* provided the initial opportunity for the Court to create and modify qualified immunity in the 20th and 21st centuries.[31]

The Court articulated its first modern interpretation of qualified immunity in 1982, in *Harlow v. Fitzgerald*.[32] Considering both cumbersome discovery and costly trials against state actors subjected to "bare allegations of malice," the Court held that "government officials performing discretionary functions generally are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[33] The Court relied on "clearly established" law in order to preserve principles of notice and deterrence while also protecting against reckless behavior by state actors.[34] Specifically, the Court acknowledged that "a reasonably competent public official should know the law governing his conduct."[35]

Three years later, the Court further expanded qualified immunity protections in *Mitchell v. Forsyth*.[36] Under the "collateral order doctrine," the Court held defendants who were denied the qualified immunity defense are entitled to an immediate appeal even if the decision is interlocutory.[37] This exception enables defendants to circumvent the traditional appeals process and seek additional support for their qualified immunity defense.[38]

In the early 2000's, the Court clarified its modern interpretation of qualified immunity.[39] In *Saucier v. Katz*, the Court held that overcoming the defense

28. WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 2 (2020).

29. *Id.*

30. Pierson v. Ray, 386 U.S. 547, 557 (1967); WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 2 (2020).

31. *See* Leah Chavis, *Qualified Immunity After* Hope v. Pelzer*: Is 'Clearly Established' Any More Clear?*, 26 U. ARK. LITTLE ROCK L. REV. 599, 603 (2004).

32. 457 U.S. 800, 818 (1982).

33. *Id.* at 817–18.

34. *Id.* at 818–19 ("The public interest in deterrence of unlawful conduct . . . remains protected by a test that focuses on the objective legal reasonableness of an official's acts.").

35. *Id.* at 819.

36. 472 U.S. 511, 524–30 (1985); Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. 169, 173 (2019).

37. *Mitchell*, 472 U.S. at 524; Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. 169, 173 (2019).

38. *See* Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 11 (1998).

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

requires a two-step inquiry.[40] Courts were to ask, in order: (1) whether the plaintiff established a violation of his or her federally protected rights; and (2) whether those rights were clearly established at the time of the violation.[41] In *Hope v. Pelzer*,[42] the Court clarified the requirements for "clearly established" law.[43] Although acknowledging that state actors must have "fair warning" of the illegality of their acts, the Court stressed that facts need not be "materially similar" to other cases in order to clearly establish a constitutional violation.[44] *Pelzer* helped to accommodate the demanding "clearly established" standard, reducing plaintiffs' burden in successfully overcoming the qualified immunity defense.[45] In *Pearson v. Callahan*, the Court redefined *Saucier*'s two-step inquiry, holding that the "clearly established" prong may instead be addressed first in courts' analysis.[46]

In recent years, the Court has repeatedly emphasized that "clearly established law" is not to be defined "at a high level of generality."[47] Instead, the clearly established law must be "particularized" to the facts of the instant case.[48] If courts were able to construe "clearly established" law broadly, the Court has reasoned, "plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[49]

2. Qualified Immunity Criticisms in 2021

Qualified immunity itself largely remains intact since *Pearson*, but its current formulation has been increasingly attacked from ideologically-diverse academic, political, and judicial institutions.[50] Perhaps no aspect of qualified immunity has received more widespread criticism than its application to police excessive force cases, driven by increased demands for accountability in the wake of often lethal violence waged against racial minorities.[51] Despite this, per a *Reuters* investigation based on United States Court of Appeals records, courts have increasingly granted police immunity in recent years despite findings of

40. *Id.*
41. *Id.*
42. 536 U.S. 730, 741 (2002).
43. *Id.*
44. *Id.*
45. Chavis, *supra* note 31, at 601.
46. 555 U.S. 223, 236 (2009).
47. White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).
48. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
49. *Anderson*, 483 U.S. at 639.
50. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (acknowledging a "growing concern with . . . qualified immunity jurisprudence."); 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#avoiding-merits-entirely [https://perma.cc/Z5WK-5MJR] Emily Cochrane & Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/17/us/politics/police-reform-bill.html [https://perma.cc/6PYL-9L9L].
51. *See* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095 (2018).

plaintiffs' civil rights violations.[52] The practice is especially popular in the South, as states including Texas, Louisiana, and Mississippi are among the most likely to grant qualified immunity in excessive force cases.[53]

Given persisting grants of immunity and heightened awareness of systemic racism in America, qualified immunity has emerged as a perceived manifestation of state-sanctioned violence, with little legal or moral justification.[54] The doctrine has received particularly sharp criticism from scholars questioning its legal rationale, characterizing it as "utterly untethered" from the text or legislative history of Section 1983.[55] In a 2014 editorial for the *New York Times*, Dean of Berkeley Law Erwin Chemerinsky implored the Court to reconsider qualified immunity, citing both its disconnect from clear constitutional rights violations and fundamental unfairness: "[h]ow many more deaths and how many more riots will it take before the Supreme Court changes course?"[56]

Qualified immunity has also encountered powerful bipartisan political criticisms in recent years, emerging as a flashpoint after persisting cases of police violence against racial minorities.[57] In fact, in the wake of protests following George Floyd's murder, both federal and state legislatures moved to action.[58] In June 2020, United States Senate Democrats introduced a police reform bill that would have eliminated both the good-faith defense and "clearly established" requirements for overcoming qualified immunity.[59] Although this bill was met with significant opposition from Republican Senators,[60] the push to eliminate qualified immunity has received prominent support from leading libertarian institutions such as the Cato Institute.[61]

State legislatures have weighed in on the debate as well.[62] In June 2020, Colorado Governor Jared Polis signed a sweeping law enforcement reform bill creating a new "civil action for deprivation of rights," enabling plaintiffs to

52. Andrew Chung, Lawrence Hurley, Andrea Januta, Jackie Botts & Jaimi Dowdell, *Shot by Cops, Thwarted by Judges and Geography*, REUTERS INVESTIGATES (Aug. 25, 2020, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/ [https://perma.cc/37RY-5CUN].

53. *See id.*

54. *See* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/575V-S6TD] (quoting Joanna Schwartz, a law professor at the University of California, Los Angeles, who argued, "It's a message that's sent in these cases – that officers can violate people's rights with impunity.").

55. Smith, *supra* note 51, at 2095–96.

56. Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [https://perma.cc/Y3G3-7SDQ].

57. Fuchs, *supra* note 54.

58. *Id.*

59. Cochrane & Broadwater, *supra* note 50.

60. *Id.* (quoting Senator Tim Scott, who asserted, "[m]y position has been that when the Democrats start talking about qualified immunity . . . that is a poison pill.") (emphasis omitted).

61. *See* Schweikert, *supra* note 50.

62. Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=46458664378a [https://perma.cc/9ZGB-TJNV].

circumvent federal qualified immunity and sue officers for damages in state court for violations of the Colorado Constitution.[63] In doing so, Colorado became the first state to enact legislation barring qualified immunity as a defense against state constitutional claims.[64] Further, in January of 2021, New Mexico Speaker of the House Brian Egolf announced he would introduce an amendment to the New Mexico Civil Rights Act that would prohibit the use of qualified immunity as a defense.[65]

Frustration over perceived unfairness in overcoming qualified immunity in police cases has even boiled over within Supreme Court chambers.[66] Dissenting in the denial of a petition for writ of certiorari, Justice Sonia Sotomayor labeled the denial as emblematic of a "disturbing trend regarding the use of [the] Court's resources."[67] Justice Sotomayor continued, observing "[w]e have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity. . . . But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases."[68] Justice Sotomayor's forceful dissent ultimately inspired the revealing *Reuters* investigation into the qualified immunity practices discussed above.[69]

C. Foster Care in Illinois and Nationwide

Foster care is a temporarily provided state service offered to children unable to live with their families.[70] As of the most recent data available, 437,000 children are estimated to be placed in foster care in the United States.[71] Of that group, nearly half live in nonrelative foster family homes, and almost one-third reside with a relative.[72] Six percent continue to live in institutions, although this marks nearly a 5% decrease from 2008.[73] DCFS is currently responsible for over 18,800 children, the vast majority of whom are twelve-years-old or younger.[74]

63. *Id.* (quoting COLO. REV. STAT. 13-21-131 (2020)).

64. *Id.*

65. Susan Dunlap, *New Mexico Civil Rights Bill Could End Qualified Immunity as a Civil Defense*, N.M. POL. REP. (Jan. 21, 2021), https://nmpoliticalreport.com/2021/01/21/new-mexico-civil-rights-bill-could-end-qualified-immunity-as-a-civil-defense/ [https://perma.cc/BQ8Q-7M6Y].

66. Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting).

67. *Id.*

68. *Id.* at 1282–83.

69. Katie Bart, *Ask the Author: Reuters on the Consequences of Qualified Immunity for Police Officers*, SCOTUSBLOG (May 15, 2020, 1:11 PM), https://www.scotusblog.com/2020/05/ask-the-author-reuters-on-the-consequences-of-qualified-immunity-for-police-officers/ [https://perma.cc/H96D-85DX].

70. *Foster Care*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/outofhome/foster-care/ (last visited Oct. 19, 2021) [https://perma.cc/6NW7-PMQ5].

71. *Foster Care Statistics 2018*, CHILD.'S BUREAU (May 2020), https://www.childwelfare.gov/pubPDFs/foster.pdf [https://perma.cc/G4KU-CPZ7].

72. *Id.*

73. *Id.*

74. ILL. DEP'T OF CHILD. & FAM. SERVS., NUMBER OF CHILDREN IN FOSTER CARE BY DEMOGRAPHICS 1 (2020), https://www2.illinois.gov/dcfs/aboutus/newsandreports/Documents/subdemogr.pdf [https://perma.cc/A78U-R5L6].

Over half of all children in foster care are Black or Hispanic, and roughly 46% are White.[75]

DCFS employs roughly 2,700 individuals and budgeted $1.3 billion for the 2020 fiscal year.[76] Full-time social worker positions are generally titled "Child Protection Specialists," and are tasked with completing "journeyman level child abuse and neglect investigations" including "interviews, home and family assessments, preparation of documentation, court preparation and testimony."[77] Child Protection Specialist positions typically demand at least one year of professional experience and a master's degree in social work.[78] DCFS as a whole is also expanding: in June of 2020, Illinois Governor J.B. Pritzker signed a budget allocating an additional $152 million in funding for the following year.[79]

D. The Illinois Child Welfare Crisis

In 1989, the American Civil Liberties Union led a class action representing children under DCFS care.[80] The class action identified systemic patterns of neglect and mistreatment, alleging both statutory and constitutional violations.[81] Among such allegations included children separated from their families for years, detained in psychiatric institutions after clearance for discharge, or even shepherded between six or more placements.[82] The class action resulted in the federal B.H. consent decree in 1991, intended to secure baseline living standards for children committed to state care.[83]

Since then, unfortunately, children in state care continue to endure psychiatric hospitalization beyond medical necessity.[84] Given too few beds in other facilities to relocate patients ready for discharge, children languish in hospitals throughout Illinois.[85] In fact, the problem has worsened in recent years: cases of children in DCFS care that are detained beyond medical necessity consistently grew from 2015 to 2017, reaching as many as 301 in a year.[86]

75. *Id.*

76. *Illinois Child Welfare Statistics at a Glance*, ILL. CT. APPOINTED SPECIAL ADVOC. (May 31, 2020)., https://illinoiscasa.org/who-we-are/illinois-child-welfare-statistics-at-a-glance.html [https://perma.cc/WH4Z-HG7V].

77. *Are You Interested in a Social Work Career with DCFS?*, ILL. DEP'T CHILD. & FAM. SERVS. (Sept. 5, 2017), https://www2.illinois.gov/dcfs/aboutus/Documents/bw_are_you_interested.pdf [https://perma.cc/GZM7-N7NZ].

78. *Id.*

79. Dan Petrella, *"A Monumentally Huge and Cruel Problem": Number of Children in DCFS Care Who Remain in Psychiatric Hospitals After Being Cleared for Release Continues to Grow*, CHI. TRIB. (Sept. 11, 2020, 5:42 PM), https://www.chicagotribune.com/politics/ct-dcfs-psychiatric-hospitals-20200911-6osiduc2tzcmthipxswu772jum-story.html [https://perma.cc/V4UX-KE7J].

80. Consent Decree at 1, 78, B.H. v. Johnson, No. 88 C 5599 (N.D. Ill. Dec. 20, 1991).

81. *Id.* at 2.

82. *Id.*

83. *Id.* at 9.

84. Eldeib, *supra* note 12.

85. *Id.*

86. *Id.*

Children are detained on average for sixty-four days, roughly six times the national average psychiatric hospital stay.[87] One girl was hospitalized for so long that staff were asked to provide her a winter coat—she was admitted the previous summer.[88] Detaining children for such lengths frequently causes lasting and profound damage.[89] Some receive just one or two hours of educational instruction per day and this largely involves only completing worksheets.[90] Doctors also confirmed that teachers rarely visited their hospitalized students.[91] Another boy had to repeat a full year of school because of his months-long hospitalization.[92] Beyond falling behind in school, however, perhaps the most significant impact of hospitalization beyond medical necessity involves psychiatric decompensation.[93] Child welfare advocates observed that because of prolonged hospitalization, children fell behind their peers in behavioral and social development.[94]

The practice also creates unnecessary expenses; per DCFS records, from 2015 to 2017, Illinois spent almost $7 million on hospitalizations beyond medical necessity.[95] In fact, hospitalization has been alleged as "the most expensive therapeutic housing situation possible."[96] Fortunately, as of September of 2020, it does not appear that any COVID-19 outbreaks have significantly affected hospitalized children in DCFS care.[97]

The Office of the Cook County Public Guardian has emerged as a primary voice speaking against the practice.[98] The Public Guardian is generally appointed to represent children as both an attorney and guardian ad litem when a case is filed in juvenile court alleging abuse, neglect, or dependency.[99] The current acting Public Guardian, Charles Golbert, referred to detaining children beyond medical necessity as "appalling"[100] and "a monumentally huge and cruel problem."[101] He further diagnosed the issue as a result of DCFS' absent "resources and competence."[102]

The Office of the Public Guardian ultimately filed a class-action lawsuit in the U.S. District Court for the Northern District of Illinois in late 2018, alleging DCFS systematically enabled psychiatrically hospitalized children in state care to be detained beyond medical necessity.[103] The class action sought relief

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. First Amended Complaint at 33, Golbert v. Walker, No. 18-C-8176 (N.D. Ill. June 25, 2020).
97. Petrella, *supra* note 79.
98. *See, e.g.*, *id.*
99. *About Us*, OFF. COOK CNTY. PUB. GUARDIAN, https://www.publicguardian.org/juvenile/about/ (last visited Oct. 19, 2021) [https://perma.cc/C7XA-QRZM].
100. Eldeib, *supra* note 12.
101. Petrella, *supra* note 79.
102. Eldeib, *supra* note 12.
103. Complaint at 2, Golbert v. Walker, No. 18-C-8176 (N.D. Ill. Dec. 31. 2018).

pursuant to Section 1983, among other causes of action.[104] In March of 2020, the complaint was dismissed without prejudice given insufficient allegations against individual DCFS actors.[105] The Public Guardian re-filed in June of 2020, and the court denied DCFS' motion to dismiss in March of 2021.[106] The First Amended Complaint now remains before the court.[107] Despite the ongoing litigation and well-covered press conference in late 2018, however, the *Chicago Tribune* published an article in September of 2020 reporting that the "number of children in [DCFS] care who have remained in psychiatric hospitals after being medically cleared for release continues to grow."[108] Both parties have engaged directly with the qualified immunity analysis, which appears to maintain a central role in the litigation.[109]

III. ANALYSIS

The goal of Part III is to first identify the increased difficulty in overcoming qualified immunity, then the exigency-based factors affecting courts' decision-making. It will first offer an operational definition of "exigency" grounding the rest of this Note's analysis and then discuss the expanded qualified immunity doctrine.[110] Next, the discussion will turn to qualified immunity cases involving police, identifying the importance of emergency action to certain circuits' reasoning.[111] Because research highlighting police behavior is well-developed, this analysis will introduce crucial rationales driving courts' decision-making in cases involving other state actors.[112]

Next, Part III will explore qualified immunity cases involving prosecutors, which will serve as a "control group" from which to interpret courts' reasoning in cases largely free of exigent circumstances.[113] Discussion here will reveal hesitance to grant prosecutors deference given the more measured, calculated nature of their position.[114] The focus will then turn to cases involving child welfare state actors, whose exigency responsibilities lie in between the positions discussed above.[115] Research will reveal that certain circuits are particularly drawn to exigency-based arguments in child-welfare cases.[116] The analysis will culminate in

104. *Id.*
105. Golbert v. Walker, No. 18 C 8176, 2020 WL 1182670, at *5 (N.D. Ill. Mar. 12, 2020).
106. *Id.* at *4.
107. First Amended Complaint, Golbert v. Walker, No. 18 C 8176 (N.D. Ill. June 25, 2020).
108. Petrella, *supra* note 79.
109. *See* Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Complaint at 2, Golbert v. Walker, No. 18-C-8176 (N.D. Ill. Sep. 9, 2020); Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint at 1, Golbert v. Walker, No. 18-C-8176 (N.D. Ill. Aug. 5, 2020).
110. *See* discussion *infra* Section III.A.
111. *See* Interview with Jamelle Sharpe, *supra* note 17.
112. *See* discussion *infra* Section III.B.
113. *See* discussion *infra* Section III.C.
114. *See* discussion *infra* Section III.C.
115. *See* discussion *infra* Section III.D.
116. *See* discussion *infra* Section III.D.

a case study of *Golbert v. Walker*,[117] currently before the court, identifying significant barriers to recovery and ultimately forecasting the court's judgment.[118]

A. Defining "Exigency" and the Expanding Qualified Immunity

First, this Note will set forth an operational definition of "exigency" to ground its analysis when interpreting courts' reasoning. For the purposes of this Note, the meaning of the word "exigency" is informed by the Supreme Court's exigent circumstance jurisprudence which provides an exception to the Fourth Amendment warrant requirement.[119] Although not all cases discussed in this Note will involve Fourth Amendment analysis, its conception of "exigency" offers a useful baseline from which to frame discussion of emergency situations.[120] Further, Section 1983 actions involving child-welfare cases often implicate Fourth Amendment issues.[121]

The Supreme Court has held exigent circumstances enable police to conduct a warrantless search under "[a] variety of circumstances," including providing emergency assistance to a home occupant, engaging in "hot pursuit" of a fleeing suspect, or entering a burning building to put out a fire and investigate its cause.[122] Exigent circumstances also encompass imminent destruction of evidence; the exception as a whole is considered reasonable because the exigency creates a "compelling need for official action."[123] Thus, cases discussed in the foregoing analysis will implicate "exigency-based" decision-making when involving the situations articulated above.

Qualified immunity has developed significantly over the past fifty years.[124] Originally intended only as a "modest exception for public officials who had acted in 'good faith,'"[125] the doctrine currently represents a substantial, systemic barrier to recovery for constitutional rights violations.[126] After *Pearson v. Callahan*, courts now retain the discretion to reach the "clearly established" prong of the qualified immunity inquiry first.[127] As a result, courts are empowered to ignore the claim's merits, instead merely focusing on whether the relevant law or right was "clearly established" at the time the violation occurred.[128] This

117. First Amended Complaint at 1, Golbert v. Walker, No. 18-C-8176 (N.D. Ill. June 25, 2020).

118. *See* discussion *infra* Section III.E.

119. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 462 (2011).

120. *See id.* (analyzing the manner in which Fourth Amendment jurisprudence interacts with emergency situations).

121. *See, e.g.*, Sanchez v. Hartley, 810 F.3d 750, 753–54 (10th Cir. 2016).

122. Missouri v. McNeely, 569 U.S. 141, 149 (2013).

123. *Id.* (citing Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

124. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

125. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, APPEAL (June 19, 2019), https://theappeal.org/the-lab/explainers/qualified-immunity-explained/#:~:text=The%20Supreme%20Court%20invented%20qualified,conduct%20was%20authorized%20by%20law.&text=Fitzgerald%2C%20the%20Court%20drastically%20expanded%20the%20defense [https://perma.cc/EEL3-BZRL].

126. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 7 (2015).

127. 555 U.S. 223, 236 (2009).

128. Schweikert, *supra* note 50.

creates a vicious cycle, freezing potential constitutional rights development.[129] Because courts are not required to analyze whether a right was violated if they conclude defendants are entitled to qualified immunity, many legal rights may never become clearly established at all.[130]

In practice, *Pearson* has presented serious issues for plaintiffs seeking recovery for constitutional violations.[131] Research into the manner in which circuits have navigated *Pearson* is illustrative.[132] Based on a 2015 study analyzing over 800 qualified immunity decisions, researchers have found *Pearson* substantially affects the development of constitutional law.[133] First, the study found that in over 25% of cases, the courts simply held that the right was not clearly established and granted qualified immunity, made possible by *Pearson*.[134]

Courts determined the constitutional right was clearly established at the time of its violation, resulting in the denial of qualified immunity in only approximately 28% of all other cases examined, presenting a significant barrier to recovery.[135] Further, when courts reached the constitutional violation question, the holding resulted in a novel constitutional violation in only 8% of cases.[136] Thus, *Pearson*'s added flexibility has also empowered courts to avoid findings of new rights violations, substantially hindering plaintiffs from overcoming qualified immunity when presenting novel constitutional claims.[137]

B. Policing, Qualified Immunity, and Exigency-Based Decision-Making

Although courts explicitly apply the "clearly established" prong in police cases, their analysis frequently focuses on the inherent exigencies of police decision-making as a justification for granting immunity.[138] In the landmark *Graham v. Connor*, the Court forcefully endorsed deference to police behavior.[139] In remanding for further review, the Court indicated that no Fourth Amendment violation existed after officers employed force when arresting a diabetic individual who appeared to be suffering from a sugar reaction; the arrest resulted in a broken foot, cuts on his wrists, a shoulder injury, and hearing impairment.[140] The Court urged, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof."[141]

129. *Id.*
130. *Id.*
131. *See* Nielson & Walker, *supra* note 126, at 7.
132. *See id.* at 27.
133. *Id.* at 6.
134. *Id.* at 34.
135. *Id.*
136. *Id.* at 35.
137. *Id.* at 6.
138. *See* Interview with Jamelle Sharpe, *supra* note 17.
139. 490 U.S. 386, 396–97 (1989) (articulating an objective reasonableness standard of review in police excessive force cases).
140. *Id.* at 389–90, 97.
141. *Id.* at 396.

Soon after, lower courts resoundingly echoed the Court's conception of policing, insisting, "under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene."[142] In fact, two years after *Graham*, the Fifth Circuit deferred to police judgment in an excessive force claim involving an officer who shot and killed a suspect even after the suspect's vehicle was completely surrounded.[143] The court held that "despite the presence of numerous police officers," the suspect still could have retrieved a gun.[144]

Police deference is also the topic of well-developed academic research, providing a deeper understanding of the rationales guiding courts' willingness to entertain broad readings of qualified immunity in emergency situations.[145] Specifically, deference to police's rapid decision-making maintains psychological backing.[146] Research suggests that when police engage in high-risk activity, reasoning is "categorical, unreflective, and action-oriented," with reduced basis in rational decision-making.[147] The actual implementation of lethal force in police practices appears rare; a 2015 study found officers resort to using their gun in just 0.1% of arrest situations.[148]

As a result, decision-making in these emergency situations "may not have the opportunity of becoming proceduralized," and police officers instead likely rely more on "the informational support of emotions" to dictate their reactions.[149] Such decision-making significantly undermines the effectiveness of officers' fair notice of clearly established law—the stated foundation of qualified immunity—in deterring constitutional violations.[150] In other words, instead of relying on their understanding of the law to inform the reasonableness of their actions, police more likely rely on emotions and instinct.[151] In fact, the Court endorsed this view of police behavior in *Graham*: "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[152]

Subsequent analysis will identify this rationale as a key factor influencing courts' reasoning in qualified immunity cases involving both police and other

142. Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992) (continuing the discussion by insisting, "[w]e must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.").

143. Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991).

144. *Id.*

145. *See, e.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997–98 (2017).

146. *See* Shanique G. Brown & Catherine S. Daus, *The Influence of Police Officers' Decision-Making Style and Anger Control on Responses to Work Scenarios*, 4 J. APPLIED RSCH. MEMORY & COGNITION 294, 295 (2015).

147. *Id.* (describing System 1 thinking, which is identified as a useful description of high-risk police work).

148. *Id.*

149. *Id.*

150. *Compare id.*, *with* Pearson v. Callahan, 555 U.S. 223, 236 (2009), and Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

151. *See* Brown & Daus, *supra* note 146, at 295.

152. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

state actors.[153] Deference to exigency-based police decision-making remains especially prominent in Section 1983 claims for excessive force,[154] and maintains particular relevance in the First, Fifth, and Sixth Circuits.[155] The practices of each will be discussed in turn.

1. First Circuit Court of Appeals

In *Hunt v. Massi*, the First Circuit Court of Appeals considered whether officers handcuffing an individual behind his back constituted excessive force.[156] Brian Hunt, the plaintiff, informed the arresting officers that he recently underwent surgery on his stomach, but they nonetheless forced him to the floor, kneeing him in his back and leg.[157] He later complained of pain and was transported by ambulance to the hospital where he remained for roughly ten hours.[158] Hunt alleged that in the wake of the incident, he suffered knee and back pain, as well as emotional distress.[159] Hunt brought an action against the arresting police officers alleging excessive force under Section 1983.[160]

In analyzing qualified immunity, the court noted that other circuits had reached differing conclusions as to whether the police behavior violated a clearly established constitutional right for Hunt to be handcuffed with his hands in front of him.[161] Despite this, the court ultimately concluded that based on First Circuit case law, such a right was not clearly established.[162] In applying the facts to relevant precedent, however, the court's analysis began to diverge.[163] The court initially addressed First Circuit law leading to the district court's finding of a "clearly established" constitutional violation against Hunt.[164] The court took great pains to overturn the district court's finding: "[t]he district court relied on four cases to reach this conclusion . . . . Two are easily distinguishable . . . . [and] [t]he other two . . . are simply insufficient."[165] After addressing favorable First Circuit law, the majority pivoted again as it neared its holding, emphasizing Hunt's potential danger to the officers.[166]

When discussing whether reasonable officers would have understood specifically that they violated a clearly established constitutional right by engaging in excessive force, the court merely offered that they "encountered some admitted resistance" and, less-relatedly, "knew of Hunt's serious and recent criminal

153. *See* discussion *infra* Sections III.C–D.
154. *See* Hunt v. Massi, 773 F.3d 361, 368 (1st Cir. 2014).
155. *Id.* at 372; Smith v. Freland, 954 F.2d 343, 348 (6th Cir. 1992); Hathaway v. Bazany, 507 F.3d 312, 322–23 (5th Cir. 2007).
156. *Hunt*, 773 F.3d at 368–69.
157. *Id.* at 364–65.
158. *Id.* at 365.
159. *Id.*
160. *Id.*
161. *Id.* at 368–69.
162. *Id.* at 370.
163. *See id.* at 368–70.
164. *Id.* at 367–68.
165. *Id.* at 368.
166. *Id.* at 370.

history."[167] The court also presented curious grounds for distinguishing the case from other clearly established law, noting that "[m]ost of the cases finding excessive force incident to handcuffing involve injuries to the shoulder or arm."[168] Finally, the court presented remarkably revealing reasoning in a policy-focused footnote with no basis in qualified immunity case law.[169] "[A]s a policy matter . . . 'courts do not want to vest suspects with casual veto power over efforts to handcuff them . . . . [this would] perhaps[] expose [police] . . . to unnecessary risk in rapidly evolving situations.'"[170] The police's behavior was "a judgment call, pure and simple."[171]

After this analysis, the court held that the officers were entitled to qualified immunity.[172] Thus, the court appeared to offer only cursory qualified immunity analysis, instead relying more heavily on its general intuitions of whether the officers reacted reasonably given the quickly developing situation they faced.[173] Certainly, the court did not completely ignore qualified immunity, or devote its attention solely to exigency-based arguments detached from the case law.[174] Despite this, *Hunt* nonetheless represents a vivid case study of courts' desire to afford police added discretion based on the perceived exigencies of their position, with less focus on offering justifications firmly grounded in binding precedent.

Three years later, *Hunt*'s influence would continue. In *Ciolino v. Gikas*, the First Circuit considered another excessive force case.[175] "George Gikas, a police officer on crowd-control duty, grabbed Alfonso Ciolino from behind by the collar" after seeing him taunt K-9 dogs, "caus[ing] Ciolino to sustain a torn rotator cuff."[176] Ciolino sued Gikas under Section 1983 for violation of his Fourth Amendment right to be free from excessive force.[177] The court considered whether to sustain the district court's post-verdict denial of qualified immunity to Gikas.[178] Notably, Gikas' arguments to establish the reasonableness of his conduct turned almost exclusively on whether he rendered a "split-second judgment."[179]

Although undertaking the formal two-pronged qualified immunity inquiry, the court also incorporated "general excessive force principles" originally introduced in *Graham v. Connor*.[180] The court held that Ciolino "present[ed] no indications of dangerousness" and that the officer had "no need to make 'split-second judgments' in response to 'tense, uncertain, and rapidly-evolving'

167. *Id.*
168. *Id.*
169. *Id.* at 369 n.6.
170. *Id.*
171. *Id.* at 370 (quoting Calvi v. Knox Cnty., 470 F.3d 422, 428 (1st Cir. 2006)).
172. *Id.*
173. *See id.* at 369–70.
174. *Id.* at 368–69.
175. Ciolino v. Gikas, 861 F.3d 296, 298 (1st Cir. 2017).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 304.
180. *Id.* at 304–05.

circumstances."[181] Further, the court discussed specific video evidence to disprove that Gikas acted in response to a quick decision.[182] As a result, the court affirmed, denying qualified immunity to Gikas.[183] Thus, taken together, *Hunt* and *Ciolino* demonstrate the First Circuit's inclination to prioritize exigency-based reasoning as a key piece of the two-pronged qualified immunity inquiry.

2. Sixth Circuit Court of Appeals

The exigency-based justifications driving judicial decision-making in the Sixth Circuit originate with *Smith v. Freland*. In *Freland*, Patricia Smith brought an excessive force claim on behalf of her son, who was shot by a policeman while fleeing in his car.[184] Holding that the policeman acted reasonably and thus did not violate the victim's rights, the court affirmed the district court's grant of qualified immunity.[185] The Sixth Circuit cemented the *Freland* reasoning in *Scott v. Clay County*, in which the court held that firing into a moving vehicle under similar circumstances was "as a matter of law . . . objectively reasonable."[186]

Despite this, the crucial piece of *Freland* set forth general policy principles, introduced in *Graham*, prioritizing deference to police in emergency situations:

> [A]ll parties agree that the events in question happened very quickly. Thus, under Graham, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.[187]

The above dicta presented a crucial turning point in exigency-based reasoning and remains a significant influence on courts' decision-making.[188] Thus, the Sixth Circuit's particularly deferential policy standards articulated in *Freland* would linger in both the Sixth Circuit and elsewhere.

181. *Id.* at 304 (quoting *Raiche*, 623 F.3d 30, at 39).

182. *See id.* at 299–300.

183. *Id.* at 306.

184. Smith v. Freland, 954 F.2d 343, 344 (6th Cir. 1992).

185. *Id.* at 348.

186. Scott v. Clay Cnty., Tenn., 205 F.3d 867, 878 (6th Cir. 2000)

187. *Freland*, 954 F.2d at 347.

188. While this Note focuses on decision-making in United States courts of appeals, the *Freland* language also gained traction in state courts, including California. *See, e.g.*, Koussaya v. City of Stockton, 268 Cal. Rptr. 3d 741, 764 (Cal. Ct. App. 2020); Brown v. Fournier, No. 2015-CA-001429-MR, 2017 WL 2391709, at *5 (Ky. Ct. App. June 2, 2017); State v. White, 142 Ohio St. 3d 277, 2013-Ohio-51, 988 N.E.2d 595, at ¶ 71 (Ct. App. Oh. 2014); Johnson v. Metro. Gov't of Nashville & Davidson Cnty., No. M200800551COAR3CV, 2008 WL 5206303, at *6 (Tenn. Ct. App. Dec. 12, 2008).

3. Fifth Circuit Court of Appeals

The policy rationales articulated in *Freland* especially influenced the Fifth Circuit. Two years after *Freland*, in *Stroik v. Ponseti*, police officers shot two fleeing individuals believed to be involved in a robbery.[189] The court referenced *Freland*'s "aptly point[ed] out" dicta as a basis for reversing the magistrate judge's decision denying judgment as a matter of law to Ponseti.[190] *Stroik* thus represented a key turning point in the sweep of *Freland*'s influence, as it enabled district courts throughout the Fifth Circuit to explicitly rely on the reasoning from its sister circuit.[191]

In fact, the Sixth Circuit's particularly deferential policy standards articulated in *Freland* would extend beyond its own jurisdiction, influencing the decision-making of other circuits as well. For the court, *Hathaway* turned on whether a rapidly developing situation involving shooting into a fleeing vehicle offered insufficient time for the officer to perceive "new information indicating the threat was past."[192] The *Hathaway* court, however, also identified "our circuit's general acknowledgment that police officers are often required to make instantaneous decisions that ought not be second-guessed merely because other options appear plausible in hindsight."[193]

This well-established line of reasoning persists. In 2020, the court considered *Malbrough v. Stelly*, in which police shot and permanently disabled Anthony Campbell while executing a search warrant after he attempted to flee.[194] In granting qualified immunity, the court again reiterated the "general acknowledgment" of police's obligation to render instantaneous decisions originally introduced in *Hathaway*.[195] Thus, over the course of three decades, *Freland*'s language would grow from an aside to a widely employed signpost empowering multiple United States courts of appeals to grant state actors qualified immunity after rendering emergency decision-making.

C. Qualified Immunity for Prosecutors

This Note now briefly turns to qualified immunity for prosecutors, a position involving significantly less exigent decision-making than that of police officers.[196] Assessing prosecutorial immunity cases will serve as an exigency-based "control group" to compare against courts' reasoning in police cases. This discussion will further illustrate that although all state positions are subject to the same two-pronged *Pearson* inquiry, courts employ reasoning grounded in their intuitions of morality when granting or denying the defense.

189. Stroik v. Ponseti, 35 F.3d 155, 156 (5th Cir. 1994).

190. *Id.* at 158–59 (quoting *Freland*, 954 F.2d at 347).

191. *See, e.g.*, Herman v. City of Shannon, MS., 296 F. Supp. 2d 709, 713 (N.D. Miss. 2003).

192. Hathaway v. Bazany, 507 F.3d 312, 322 (5th Cir. 2007).

193. *Id.* at 321 (quoting Herman v. City of Shannon, 296 F. Supp. 2d 709, 713 (N.D. Miss. 2003)).

194. 814 F. App'x 798, 799 (5th Cir. 2020).

195. *Id.* at 804–05.

196. *See Prosecution Function*, AM. BAR ASS'N (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/6TY7-F9JJ].

Prosecutors benefit from both absolute and qualified immunity.[197] Under absolute immunity, plaintiffs are completely forbidden from suing prosecutors when acting within the scope of their prosecutorial duties or advocacy functions.[198] This includes, for example, deciding whether to prosecute, presenting the State's case, and preparing for trial.[199] Prosecutors also enjoy the protections of qualified immunity, which applies only when prosecutors perform administrative or investigatory functions.[200] This encompasses both statements to the media and collecting evidence for pending litigation.[201] In order to remain consistent with litigation across other state positions, this Note will forego direct discussion of absolute immunity, limiting analysis to prosecutorial qualified immunity.

This Note addresses prosecutorial immunity to identify a baseline level of "exigency" grounding courts' analysis. As an initial matter, prosecutors are rarely, if ever, required to render emergency assistance or respond to an ongoing crisis.[202] Instead, a prosecutor's role only arises after such crises have ended and remedial measures are required.[203] In fact, the American Bar Association's "Prosecution Function" guidelines expressly separate the function of prosecutors from the responsibilities of police.[204] Prosecutors are instead merely obligated to provide police legal advice regarding their actions and duties in criminal matters.[205] Further, a prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts.[206]

This measured, risk-free environment offers no added incentive for courts to defer to prosecutors when considering the constitutionality of their conduct. [207] Courts may even modify their interpretations of qualified immunity to deny the defense in such cases, furthering their conceptions of morality and justice. [208] Close scrutiny of a 2014 Seventh Circuit case is especially illuminating.[209] In *Fields v. Wharrie*, a prosecutor fabricated evidence that he later introduced against Nathson Fields, a defendant facing trial.[210] As a result of the fabrication, Fields was wrongfully convicted of two murders and imprisoned

197. *See* Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (holding prosecutors are entitled to absolute immunity under Section 1983 in "initiating a prosecution and in presenting the State's case"); Buckley v. Fitzsimmons, 509 U.S. 259, 275–77 (1993) (emphasizing that prosecutorial activity that is not advocacy-related, such as preliminary investigation of an unsolved crime, is protected only by qualified immunity).

198. *Imbler*, 424 U.S. at 431.

199. *Id.*; Martin A. Schwartz, *Prosecutorial Immunity Denied for 'Fake Subpoenas,' Fabricating Evidence and Directing Raid*, LAW.COM (July 6, 2020, 12:30 PM), https://www.law.com/newyorklawjournal/2020/07/06/prosecutorial-immunity-denied-for-fake-subpoenas-fabricating-evidence-and-directing-raid/?slreturn=20210002113752 [https://perma.cc/R52U-JYJY].

200. *Buckley*, 509 U.S. at 275–77.

201. *Id.* at 277.

202. *See Prosecution Function*, *supra* note 196.

203. *See id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Fields v. Wharrie, 740 F.3d 1107, 1113 (7th Cir. 2014).

208. *See id.*

209. *See id.*

210. *Id.*

for seventeen years until he was finally acquitted in a retrial.[211] Fields brought a Section 1983 claim alleging violation of his due process constitutional rights, among others.[212]

In his majority opinion, Judge Richard Posner repeatedly used forceful language condemning the prosecutor's behavior.[213] Judge Posner observed that in raising immunity as a defense, the prosecutor "is asking . . . [the court] to bless a breathtaking injustice," and that an outcome in the prosecutor's favor would amount to "an offensive and senseless result."[214] In fact, in holding that the prosecutor was not entitled to qualified immunity, the court hardly even engaged with the modern test, referencing *Pearson* only once in an earlier section of the opinion.[215] Instead of considering both prongs in turn, the court offered an abbreviated analysis, insisting that granting immunity would represent an inherently unsettling outcome.[216] Although briefly referencing the existence of some clearly established law,[217] the court also articulated that "the test for qualified immunity is the 'objective legal reasonableness of an official's acts,'" citing only *Harlow v. Fitzgerald*.[218]

Judge Sykes' concurrence in part and dissent in part engaged more formally with the qualified immunity analysis test, arguing that the prosecutor should be entitled to the defense because his actions "did not violate clearly established constitutional rights."[219] In fact, Judge Sykes directly challenged the court's cited cases purporting to create such a clearly established violation: "these cases do not hold that fabricating evidence violates due process."[220] Instead, Judge Sykes' argued Seventh Circuit law reflected precisely the contrary.[221]

Notably, the subtext of Judge Sykes' opinion further suggests the majority insufficiently engaged with the qualified immunity inquiry.[222] Referring to the court's position as "strong words" and suggesting that "[n]o one doubts" the case's injustice, Judge Sykes' pointed qualified immunity analysis indicated the court engaged in a superficial discussion, driven by the defendant's "serious moral claim to a compensatory remedy."[223] Thus, the moral outrage of a prosecutor's wrongdoing potentially resonated enough to deviate from the modern qualified immunity inquiry, instead aligning the doctrine with the majority's perceptions of right and wrong.[224]

211. *Id.* at 1109.
212. *Id.*
213. *Id.*
214. *Id.* at 1113.
215. *Id.* at 1111.
216. *Id.* at 1113.
217. *Id.* at 1114.
218. *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).
219. *Id.* at 1107, 1124 (Sykes, J., concurring in part and dissenting in part).
220. *Id.* at 1123 (Sykes, J., concurring in part and dissenting in part).
221. *Id.* at 1117 (Sykes, J., concurring in part and dissenting in part) ("In our decision . . . we held that coercing or otherwise soliciting a witness to falsely incriminate a suspect . . . does *not* violate any established constitutional rights [against the suspect].").
222. *Id.* at 1123 (Sykes, J., concurring in part and dissenting in part).
223. *Id.* (Sykes, J., concurring in part and dissenting in part).
224. *See id.* (Sykes, J., concurring in part and dissenting in part).

Instead of responding to an emergency or rendering a snap decision, the prosecutor's fabrication of evidence suggests a measured, calculated effort to mislead the justice system.[225] The prosecutor was charged with intentional infliction of emotional distress, among other allegations, and accused of coercing defendants to provide testimony that the prosecutors "knew to be false."[226] To the court, such planned and deliberate behavior likely appeared especially reprehensible, significantly informing their reasoning under the substantive qualified immunity doctrine.[227]

It is true that judges are required to remain impartial and refrain from considering personal views in rendering decisions.[228] Despite this, Judge Posner has nonetheless acknowledged that "a great deal of [judges'] thinking is unconscious . . . . We start with a preconception, which . . . nonetheless often affects the outcome."[229] Thus, *Fields* offers an illuminating example of courts' willingness to interpret qualified immunity flexibly based on principles of inherent morality, informed partially by the exigency-based demands of the state actor whose behavior is challenged.

D. Qualified Immunity and Child Welfare

As a result of the expanded qualified immunity doctrine, recovery against child welfare agencies has become exceedingly difficult.[230] Courts nonetheless rely on exigency-based decision-making to inform their reasoning.[231] This Section will first explore the challenges in asserting child-welfare claims across multiple circuits.[232] Next, this Section will identify the exigency-based arguments motivating courts' qualified immunity judgments.[233]

1. Qualified Immunity in Child Welfare Cases

As an initial hurdle to recovery in child-welfare cases, there remains a presumption of no duty on behalf of state actors to private citizens.[234] In *DeShaney v. Winnebago County*, the Court rejected the notion that states maintain an affirmative constitutional duty to protect its citizens.[235] Interpreting *DeShaney*, the Ninth Circuit expressed deference to child-welfare expertise, noting that "[t]he

225. *See id.* at 1109.

226. *Id.* at 1109.

227. *See id.* at 1113.

228. *See*, MODEL CODE OF JUD. ETHICS r. 1.2 (AM. BAR ASS'N 2018) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary.").

229. Paul Wachter, *Posner on How Judges Think*, COLUM. L. SCH., https://www.law.columbia.edu/news/archive/posner-how-judges-think (last visited Oct. 19, 2021) [https://perma.cc/QB4P-RL2A].

230. *See, e.g.*, J.P. by & through Villanueva v. Cnty. of Alameda, 803 F. App'x 106, 108 (9th Cir. 2020); Dahn v. Amedei, 867 F.3d 1178, 1189 (10th Cir. 2017).

231. *See* Interview with Jamelle Sharpe, *supra* note 17.

232. *See* discussion *infra* Section III.D.1.

233. *See* discussion *infra* Section III.D.2.

234. *See* DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 195 (1989).

235. *Id.* at 197; Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 684 (1990).

Supreme Court has recently held . . . that a state agency, with far more expertise in child welfare than the [Immigration and Naturalization Service ("INS")], could not be held liable under section 1983 . . . ."[236] Despite this, if a state is able to show a "special relationship" with an individual, then it assumes at least a rudimentary duty of care.[237] With respect to children committed to state institutions, the Seventh Circuit also held the Constitution requires the state to ensure basic levels of physical and psychological care.[238]

Beyond *DeShaney*, broad qualified immunity interpretations in child welfare cases persist across circuits.[239] In the Tenth Circuit, for example, the court held that county caseworkers were entitled to qualified immunity after allegations of failure to sufficiently monitor reports of abuse and neglect.[240] Because no clearly established law existed demonstrating that investigating reports of abuse created a "special relationship" with the child in a neighboring state, the court held that the plaintiff failed to satisfy the qualified immunity inquiry.[241] Further, the Ninth Circuit held no law clearly established that child welfare workers could be held liable to a child suffering emotional distress after the death of his sibling while both were in foster care.[242] Thus, both *DeShaney* and broad qualified immunity interpretation render recovery especially difficult in child welfare cases.[243]

2. Exigency-Based Reasoning

Although relying on the traditional qualified immunity inquiry, courts' analysis in child welfare cases often falls into thinly veiled commentary turning on the exigencies of the harm litigated.[244] As an initial matter, work in child-welfare agencies varies in the degree of exigency-based decision-making required.[245] For example, research suggests civil liability against child-welfare actors comprises three central areas: inadequate protection of a child, violating parental rights, and inadequate foster care services.[246]

236. Flores *ex rel.* Galvez-Maldonado v. Meese, 942 F.2d 1352, 1363 (9th Cir. 1991) (citing *Deshaney*, 489 U.S. at 201).

237. Monfils v. Taylor, 165 F.3d 511, 516 (7th Cir. 1998) (holding that the state has a special relationship with a person when it has custody over that person, cutting off alternative avenues of aid).

238. *See* K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) ("[T]he Constitution requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically.").

239. *See, e.g.*, J.P. *ex rel.* Villanueva v. Cnty. of Alameda, 803 F. App'x 106, 108 (9th Cir. 2020); Dahn v. Amedei, 867 F.3d 1178, 1189 (10th Cir. 2017).

240. *Amedei*, 867 F.3d at 1189.

241. *Id.* at 1189, 1191.

242. *Villanueva*, 803 F. App'x at 108.

243. *See* discussion *supra* Section III.D.1.

244. *See* Interview with Jamelle Sharpe, *supra* note 17.

245. *See generally* Diane DePanfilis & Marsha K. Salus, *Child Protective Services: A Guide for Caseworkers*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2003), https://www.childwelfare.gov/pubPDFs/cps.pdf [https://perma.cc/D42S-JQJK].

246. Douglas J. Besharov, *Malpractice in Child Placement: Civil Liability for Inadequate Foster Care Services*, 63 CHILD WELFARE 195, 195–96 (1984).

Excluding immediate safety concerns, liability stemming from violation of parental custody rights or inadequate foster services generally appears incompatible with this Note's conception of "exigency" requiring immediate action.[247] Courts have acknowledged, however, that "there is a sufficient emergency to warrant officials' taking custody [of a child] without a prior hearing if a child is . . . bereft of adequate care or supervision."[248]

The Department of Human and Health Services also maintains a varied conception of cases requiring emergency response based on its "Guide for Caseworkers in Child Protective Services," which provides examples of scenarios requiring different degrees of response.[249] Per the Guide, observing seven- and ten-year-old children absent over one-half of school days, with poor hygiene, dirty clothes, and a mother who has been noncommunicative with the school, does not require a twenty-four hour response.[250] Examples of "emergency services" nonetheless include providing necessary medical attention, food, clothing, and shelter.[251] Thus, because child-welfare cases present a less-clear setting for situations requiring emergency response as compared to cases involving police or prosecutors,[252] courts often gravitate to exigency-based arguments to frame the moral justification of their qualified immunity analysis.[253]

Certain situations are clearer than others.[254] In cases that plainly do not require emergency response—that is, when exigency-based decisions are not at issue—courts remain less eager to grant qualified immunity.[255] For example, courts appear particularly reluctant to grant the defense in more administrative cases, such as when social workers fail to provide sufficient documentation or create an ineffective plan in ensuring resources are provided to foster parents.[256] Where cases require more urgent action to protect children from abuse or neglect, however, courts offer forceful defenses of qualified immunity that are often only loosely tethered to the law.[257] This Section will proceed by identifying patterns in such reasoning across circuits.

a. Second Circuit Court of Appeals

The Second Circuit offers a strong defense of emergency-based action for child welfare actors in qualified immunity cases. In *Tenenbaum v. Williams*, the Second Circuit affirmed qualified immunity in favor of child welfare agents

247. *See supra* Section III.A.

248. Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987).

249. *See* DePanfilis & Salus, *supra* note 245, at 37.

250. *Id.*

251. *Id.* at 49.

252. *See* discussion *supra* Sections III.B–C.

253. *See, e.g.*, Tenenbaum v. Williams, 193 F.3d 581, 605 (2d. Cir. 1999); Roska ex rel. Roska v. Sneddon, 437 F.3d 964, 978 (10th Cir. 2006).

254. *Compare* D.C. *ex rel.* Cabelka v. Cnty. of San Diego, 445 F. Supp. 3d 869, 887 (S.D. Cal. 2020), *with* Tenenbaum v. Williams, 193 F.3d 581, 605 (2d Cir. 1999).

255. *See, e.g.*, *Cabelka*, 445 F. Supp. 3d at 887.

256. *Id.*

257. *See, e.g.*, *Tenenbaum*, 193 F.3d at 605.

removing a child from an abusive home.[258] *Tenenbaum* involved a Section 1983 action against child welfare workers asserting several constitutional violations.[259] Plaintiffs alleged that their daughter, Sarah, was taken from school to a hospital where she was detained for several hours before being ultimately returned to her family.[260] Thus, plaintiffs argued, Sarah was illegally seized in violation of her Fourth Amendment rights.[261]

In its opinion, the Second Circuit separated the Fourth Amendment violation and qualified immunity issues into discrete categories.[262] In addressing the Fourth Amendment violation, the court held that when state officers reasonably believe that a child is subject to abuse, exigent circumstances may permit warrantless removal.[263] Because a reasonable jury could have concluded a Fourth Amendment violation occurred, however, the court reversed the district court's grant of summary judgment.[264] The court next turned to qualified immunity, holding that no clearly established Fourth Amendment violation occurred.[265] The court explained, "it is particularly difficult to conclude that the individual defendant's behavior was wrongful under 'clearly established' Fourth Amendment principles in light of the district court's . . . decision that it did not violate the Fourth Amendment at all."[266]

Although appearing to resemble straightforward qualified immunity analysis, the court's discussion next began to stray from the two-pronged inquiry, instead exploring a broader policy discussion of the relationship between qualified immunity, emergency situations, and child welfare.[267] The court "emphasiz[ed] again the importance of the availability of qualified immunity where child welfare workers are seeking to protect children from abuse."[268] Judge Jacobs echoed these sentiments in his concurrence, quoting a nonbinding Seventh Circuit opinion plainly declaring, "[w]hen a child's safety is threatened, that is justification enough for action first and hearing afterward."[269]

Neither issue raised above—that is, the general utility of qualified immunity in abuse cases, nor the Seventh Circuit articulating the importance of "acting first" when child safety is in jeopardy—maintained legal significance in resolving the "clearly established" inquiry before the court.[270] Despite this, broader policy concerns regarding emergencies involving child safety nonetheless

258. *Id.*
259. *Id.* at 591.
260. *Id.* at 602.
261. *Id.* at 601.
262. *Id.* at 605.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 608 (Jacobs, J., concurring in part and dissenting in part) (quoting Lossman v. Pekarske, 707 F.2d 288, 291 (7th Cir. 1983)).
270. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009). While this case took place prior to the modern qualified immunity test, *Harlow v. Fitzgerald* nonetheless required an inquiry into "clearly established" law, relevant to the court's analysis here. 457 U.S. 800, 818 (1982).

appeared significant in the courts' decision to grant qualified immunity.[271] In the wake of *Tenenbaum*, other courts would come to recognize the Second Circuit's strong position favorable to child welfare actors' emergency decision-making.[272]

b. Tenth Circuit Court of Appeals

The Tenth Circuit adopted much of *Tenenbaum*'s reasoning into its own case law. Its modern qualified immunity doctrine begins, however, with *Roska ex rel. Roska v. Sneddon*.[273] In *Roska*, the Tenth Circuit considered a Section 1983 action brought against caseworkers for the Utah DCFS.[274] Plaintiffs included Rusty, a twelve-year-old boy, his siblings, and parents.[275] In 1999, caseworkers removed Rusty from his home after being informed by his school that Rusty appeared ill and pale, wearing a parka in warm weather.[276] The year prior, DCFS launched an investigation against Rusty's mother after allegations of abuse.[277] The caseworkers consulted Rusty's physicians and ultimately determined he should be removed from his home.[278] His family alleged various rights deprivations under the Fourth and Fourteenth Amendments, including the constitutional right to maintain a family relationship.[279]

In a previous appeal, the court determined that no emergency circumstances existed because Rusty was not in immediate danger of harm.[280] The court ultimately concluded that the caseworkers' removal of Rusty without a warrant or pre-deprivation hearing violated the plaintiffs' clearly established constitutional right to maintain a family relationship, remanding to the district court to make a qualified immunity determination.[281] The district court denied the caseworkers' motion for summary judgment on qualified immunity, and Rusty's family appealed soon after.[282]

In its opinion, the court first noted that reliance on a state statute may overcome otherwise "clearly established" law, weighing in favor of the actor's reasonable conduct.[283] The court did so because Rusty's family specifically claimed the district court erred with respect to their consideration of the relevant Utah statute.[284] Thus, the central issue before the court was whether the caseworkers' reliance on a Utah child removal statute was reasonable such that they should be entitled to qualified immunity.[285] The statute read in part, "[i]f possible,

271. *See Tenenbaum*, 193 F.3d at 608 (Jacobs, J., concurring in part and dissenting in part).
272. See discussion *infra* Section III.D.2.b.
273. Roska *ex rel.* Roska v. Sneddon, 437 F.3d 964, 967 (10th Cir. 2006).
274. *Id.*
275. *Id.* at 968.
276. *Id.* at 967–68.
277. *Id.*
278. *Id.* at 968.
279. *Id.* at 968–69.
280. Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1250 (10th Cir. 2003).
281. *Roska*, 437 F.3d at 978–79.
282. *Id.*
283. *Id.* at 971.
284. *Id.* at 970.
285. *See id.* at 971–72.

consistent with the child's safety and welfare, before taking a child into protective custody, the [caseworker] shall also determine whether there are services that . . . would eliminate the need to remove the child."[286] The statute made no mention of emergencies in its discussion of reasonableness.[287]

Relevant Tenth Circuit case precedent[288] acknowledged that "'emergency circumstances which pose an immediate threat to the safety of a child' might justify the absence of pre-deprivation procedures."[289] However, the court already decided in the first appeal "that Defendants' removal of Rusty without a warrant . . . deprived Plaintiffs of their clearly established constitutional right to maintain a family relationship."[290] Thus, this issue should have been settled by the case's second appeal, with the court's only remaining inquiry involving compliance with the Utah statute.[291]

Although acknowledging the statute as a key consideration,[292] the majority's discussion nonetheless highlighted whether sufficient evidence of an emergency existed despite the statute never mentioning such a requirement.[293] In its discussion, for example, the court reiterated that "Rusty's health and safety were not in immediate danger" and "at no time prior to arriving at the Roskas' home did [the caseworker] indicate . . . that there was an emergency."[294] Similar to the reasoning supporting narrow qualified immunity for prosecutors,[295] the court reasoned that the caseworkers maintained sufficient time and information to understand the unreasonableness of their decision to remove Rusty.[296] For example, the court cited advice from Rusty's doctor cautioning that "it would be harmful . . . to remove [Rusty] from the home."[297]

Judge O'Brien's dissent expressly identified the court's conflation of the issues: "[t]he Majority confuses the discussion regarding whether the law was clearly established, i.e., the necessity of 'emergency circumstances . . .' and the question whether the social workers complied with the statute."[298] In fact, he emphasized in a footnote that "at the time of Rusty's removal, the statute did not require exigent circumstances."[299] Judge O'Brien reiterated that the "key issue on appeal is whether the social workers in fact complied with the statute."[300] In doing so, the dissent emphasized a well-rounded analysis: "[W]e must remember the statute required the child's health, safety and welfare to be the deciding

286. UTAH CODE ANN. § 62A-4a-202.1(3)(a) (West 2018).
287. *Roska*, 437 F.3d at 971 n.4.
288. *See id.* at 974; Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1250 (10th Cir. 2003) (citing Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997)).
289. *Roska*, 328 F.3d at 1250 (citing *Hollingsworth*, 110 F.3d at 739 (10th Cir. 1997)).
290. *Roska*, 437 F.3d at 971 (citing *Roska*, 328 F.3d at 1245–46, 1250).
291. *See id.* at 985 (O'Brien, J., dissenting).
292. *See id.* at 970.
293. *See id.* at 974–75; UTAH CODE ANN. § 62A-4a-202.1(3)(a) (2018).
294. *Roska*, 437 F.3d at 975–76.
295. *See* discussion *supra* Section III.C.
296. *See, e.g.*, *Roska*, 437 F.3d at 968, 975 n.9.
297. *Id.* at 968.
298. *Id.* at 985 (O'Brien, J., dissenting) (citations omitted).
299. *Id.* at 980 n.3.
300. *Id.* at 979.

factor . . . . [T]he 'touchstone' of our inquiry is the 'totality of the circumstances.'"[301]

The dissent, for example, highlighted medical and factual history supporting an inference of Rusty's mother's psychological disorder, as well as the family's "history of noncompliance with medical treatment plans."[302] The dissent further chastised the majority for its "cavalier treatment" of additional sources such as school personnel accounts, and for relying "almost exclusively" on the doctor's report of increasing family stability.[303] Thus, Judge O'Brien argued the totality of the circumstances supported a reasonable inference of compliance with the Utah statute.[304]

Notably, the Utah state legislature amended the statute after the events that gave rise to *Roska*, requiring exigent circumstances before DCFS could remove a child without a warrant.[305] Although not in effect at the time the events occurred, the majority nonetheless appeared to reference the amended statute in a footnote.[306] The court highlighted that "the amended statute . . . requires exigent circumstances."[307] Thus, *Roska* presents an example of the Tenth Circuit's eagerness to view qualified immunity analysis through an exigency-based lens despite its uncertain legal basis, particularly within the child-welfare context.

The Tenth Circuit returned to the *Roska* analysis in *Gomes v. Wood*, where the court sought to identify a clear standard required under the Due Process Clause to remove a child from the home without prior notice and a hearing.[308] In crafting the standard, the court granted significant deference to the policies outlined by the Second Circuit in *Tenenbaum*.[309] Drawing directly from *Tenenbaum*'s discussion of emergency situations justifying warrantless removal, the court adopted a "reasonable suspicion of an immediate threat to the safety of the child" test.[310]

After articulating the standard, the court turned to qualified immunity.[311] Relying on *Roska*, the *Gomes* court granted qualified immunity to a social worker who placed a child in protective custody in part because the removed child's health and safety "were not in immediate danger."[312] The court further acknowledged, however, that its holding is "supported by the policies underlying the qualified immunity doctrine."[313] The court highlighted that, "[w]hen confronted

301. *Id.* at 980 (citing Phillips v. James, 422 F.3d 1075, 1080 (10th Cir. 2005)).

302. *Id.* at 989.

303. *Id.* at 981, 984.

304. *See id.* at 989 (identifying an overall "toxic environment suspected of contributing to his seriously deteriorating condition").

305. *Id.* at 971 n.4; UTAH CODE ANN. § 78A-6-106(2) (2018).

306. *Roska*, 437 F.3d at 971 n.4.

307. *Id.* The footnote later clarified that all "subsequent references in this opinion . . . are to the [previous] versions of the statutes." *Id.*

308. *See* Gomes v. Wood, 451 F.3d 1122, 1127–30 (10th Cir. 2006).

309. *Id.* at 1130–31 (citing Tenenbaum v. Williams, 193 F.3d 581, 584 (2d Cir. 1999)).

310. *See id.* at 1130.

311. *Id.* at 1133.

312. *Id.* at 1138 (quoting *Roska*, 328 F.3d at 1250).

313. *Id.*

with evidence of child abuse, [social workers] may be required to make 'on-the-spot judgments on the basis of limited . . . information.'"[314] Thus, in addition to a Due Process standard deferential to emergency based decision-making, the Tenth Circuit defers to child welfare actors at the qualified immunity stage as well.

The cases discussed in this Section do not suggest all courts render decisions motivated by exigency-based reasoning; many courts quickly resolve child welfare cases in straightforward qualified immunity analysis.[315] Instead, the foregoing research identifies emergency decision-making only as a recurring theme signaling courts' motivations and general focus.[316] In certain cases, courts may even shift their attention from concrete legal reasoning to accommodate the exigencies involved, grounding the moral justification of their qualified immunity conclusions.[317]

E. Putting it All Together: Qualified Immunity and Golbert v. Walker

This Note now turns to whether the qualified immunity doctrine will preclude recovery in *Golbert v. Walker*, which remains before the Northern District of Illinois.[318] The plaintiffs will likely demonstrate a breach of the state's duty of reasonable care, as the Seventh Circuit "requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically."[319] Despite this, the class action has already encountered difficulties; although referring to the problem as "a troubling one," the court dismissed the first complaint, holding that plaintiffs "fail to adequately identify the specific involvement by each, or any, of the Defendants that g[ave] rise to the claims."[320] After plaintiffs later amended their complaint, however, the court denied DCFS' motion to dismiss.[321]

In its opinion, the court directly addressed both parties' qualified immunity arguments.[322] The court first agreed that Plaintiffs stated a claim for violation of substantive due process rights.[323] In addressing the clearly established prong, however, the court indicated the case would present challenges.[324] Although

314. *Id.* (quoting Hatch v. Dep't for Child., Youth & Their Fams., 274 F.3d 12, 22 (1st Cir. 2001)).

315. *See, e.g.*, Khai v. Cnty. of Los Angeles, 730 F. App'x 408, 411 (9th Cir. 2018) (resolving the qualified immunity issue in only one paragraph, affirming the district court's ruling and identifying that "the social workers were following state law that mandated the reporting at issue.").

316. *See Roska*, 437 F.3d at 974, 976; Tenenbaum v. Williams, 193 F.3d 581, 605 (2d. Cir. 1999). The *Gomes* court acknowledges, for example, that the Eleventh Circuit maintains a different standard than other circuits for constitutional violations in the child removal setting. *Gomes*, 451 F.3d at 1129. In *Doe v. Kearney*, the Eleventh Circuit criticized the Second Circuit's "sole focus [on] whether there is time to obtain a court order" in *Tenenbaum*, and instead adopted a more holistic test. 329 F.3d 1286, 1295, 1297 (11th Cir. 2003).

317. *Roska*, 437 F.3d at 971; *Tenenbaum*, 193 F.3d at 605.

318. *See* Golbert v. Walker, No. 18 C 8176, 2021 WL 1056989 (N.D. Ill. Mar. 18, 2021).

319. *See* K.H. through Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

320. Golbert v. Walker, No. 18 C 8176, 2020 WL 1182670, at *3–4 (N.D. Ill. Mar. 12, 2020).

321. *Golbert*, 2021 WL 1056989, at *8.

322. *Id.* at *7–8.

323. *Id.* at *7.

324. *Id.*

relying on the B.H. consent decree as sufficient to hold that Plaintiffs pled violation of a clearly established right, the court also referenced its limited persuasive weight in the Seventh Circuit.[325] At the end of its qualified immunity discussion, the court emphasized the early stage of litigation, holding only that "Defendants are not entitled to qualified immunity at this stage."[326]

Plaintiffs' claim thus remains vulnerable at the summary judgment stage. In fact, qualified immunity issues are most commonly raised at summary judgment.[327] The resolution of DCFS' qualified immunity defense will likely turn on Plaintiffs' ability to prove the facts alleged in its First Amended Complaint. In doing so, Plaintiffs must rely almost entirely on the B.H. consent decree as sufficient notice to overcome the "clearly established" prong of the inquiry.

Plaintiffs bear the burden of identifying a case "on point or closely analogous" to detaining children beyond medical necessity.[328] Further, the only existing precedent regarding the impact of consent decrees on qualified immunity is nonbinding.[329] Given courts' significant flexibility in interpreting qualified immunity demonstrated above,[330] Plaintiffs' claim remains susceptible at summary judgment.[331] Thus, overcoming qualified immunity solely on the basis of the B.H. consent decree will present significant challenges, and renders plaintiffs' claim tenuous.

IV. RECOMMENDATION

Given its expansion and inconsistent readings, the qualified immunity doctrine finds itself at a crossroads.[332] Not only has qualified immunity precluded recovery in situations far beyond its original construction, but courts have inconsistently read the doctrine across circuits.[333] After *Pearson*, courts have increasingly distorted the qualified immunity inquiry to exert undue scrutiny against

325. *Id.* at *8.

326. *Id.*

327. David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 201 (1994).

328. *See* Sebesta v. Davis, 878 F.3d 226, 234 (7th Cir. 2017) (quoting Boyd v. Owen, 481 F.3d 520, 527 (7th Cir. 2007)).

329. In *Greene v. Cook County Sheriff's Office*, the U.S. District Court for the Northern District of Illinois held that consent decrees remain relevant to the qualified immunity analysis. 79 F. Supp. 3d 790, 814 (N.D. Ill. 2015). However, the court continued, "[n]either the Supreme Court nor the Seventh Circuit has held that a consent decree can 'clearly establish' a right for the purposes of qualified immunity." *Id.* at 815. The court further acknowledged that consent decrees often "impose broad protections," likely hinting that including them in "clearly established" analyses may prove unfair. *Id.* at 816. Ultimately, the consent decree at issue in *Greene* did not defeat the defense; the court granted both qualified immunity and summary judgment with respect to the implicated defendant. *Id.* at 820. Two years later, the Seventh Circuit Court of Appeals endorsed *Greene* in *Houlihan v. City of Chicago*, holding that "[consent] decrees are not an edict encapsulating the contours of the constitutional rule . . . the *Greene* court held as much . . . ." Houlihan v. City of Chi., 871 F.3d 540, 548 (7th Cir. 2017).

330. *See* discussion *supra* Sections III.B–D.

331. *See id.*

332. *See* discussion *supra* Sections III.A–C.

333. *See* discussion *supra* Part III.

Section 1983 claims, perpetuating cycles of underdeveloped case law.[334] Further, when conducting the *Pearson* two-prong analysis, courts rely heavily on exigency-based behavior to advance their conceptions of morality and justice.[335]

After substantial national conversations regarding police violence and heightened criticism of the doctrine, political and legal institutions have gathered significant momentum to revisit its current formulation.[336] Thus, it is clear modification of the existing doctrine is necessary. Part IV will first introduce the framework for an exigency-based third prong adding to the qualified immunity inquiry, then address justifications under stare decisis principles for modifying the doctrine. Finally, Part IV will reiterate the overall function and limited scope of the third prong within the broader qualified immunity inquiry.

A. Exigency-Based Third Prong

To preserve its original intent and accommodate courts' desires to afford exigency-based positions added discretion, the Court ought to add a third prong[337] to the qualified immunity inquiry: "Is the defendant entitled to added discretion based on the exigencies of their action?" Adding a third prong preserves the test introduced in *Saucier* and later clarified in *Pearson*, but also recognizes the different standards courts apply based on the exigencies of the state position involved.[338]

In practice, the first prong would remain unchanged; courts would assess whether plaintiff's constitutional rights have been violated. Courts would next turn to the "second stage" of analysis, which incorporates both the "clearly established" and "exigency" questions. This second stage would operate as balancing test; courts would weigh the two inquiries to reach their qualified immunity conclusions. If the defendant obviously violated a clearly established constitutional right, emergency decision-making would bear little influence on the inquiry overall, and qualified immunity would likely be denied. In closer cases, however, the actors' emergency response would more significantly impact the qualified immunity outcome in favor of defendants.

The "exigency" inquiry would also remain intentionally restrained. In order to prevent the continued expansion of courts' deference to state actors in qualified immunity cases, the burden of satisfying the third prong would remain with the defendant. Defendants would also only receive added discretion if they satisfy their burden by a clear and convincing evidence standard. By demanding a high evidentiary burden, the third prong protects against the unrestrained defense of unconstitutional state action rendered in such situations.[339] While protecting against such expansion, the "third prong" also makes overt courts' longstanding

334. Schweikert, *supra* note 50.
335. *See* discussion *supra* Sections III.B–D; Interview with Jamelle Sharpe, *supra* note 17.
336. *See* discussion *supra* Subsection II.B.2.
337. *See* Interview with Jamelle Sharpe, *supra* note 17.
338. *See id*.
339. *See* discussion *supra* Sections III.B–D.

practice of affording state actors added discretion after engaging in emergency decision-making.

The third prong further presents tangible legal gains for classes struggling to overcome expanded qualified immunity in child welfare cases. In *Golbert v. Walker*, for example, the third prong would provide plaintiffs clearer avenues to recovery despite facing challenging institutional barriers.[340] As discussed above, the 1991 B.H. consent decree does not unequivocally "clearly establish" constitutional violations in detaining children beyond medical necessity.[341]

Applying the third prong, however, DCFS would unsuccessfully satisfy their burden and qualified immunity would be denied. Walker, after all, is premised on weeks of delay in proper action, not snap judgments gone awry.[342] The more balanced inquiry would thus empower the court to pursue its intuitions condemning DCFS' problematic behavior without resorting to subtext. In fact, the court admitted its moral discomfort with the allegations in its first opinion, expressly identifying the issue alleged as "a troubling one."[343] The exigency-based third prong thus affords clearer avenues to recovery for the affected class of children despite underdeveloped case law.[344]

B. Stare Decisis Justifications

Adding a third prong would require modification of longstanding qualified immunity case law, running against stare decisis principles. The Court has articulated that "[s]tare decisis . . . the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'"[345] Despite this, the strength of stare decisis remains subject to significant debate.[346] The Court has also acknowledged that the rule is not an "inexorable command," and instead a "principle of policy."[347] The recent *Allen v. Cooper* offers helpful insight into the strength of stare decisis under the modern Court.[348]

In *Allen*, Justice Kagan wrote for the majority, noting that "[t]o reverse a decision, we demand a 'special justification,' over and above the belief 'that the

340. *See* discussion *supra* Section III.E.

341. *See* Houlihan v. City of Chicago, 871 F.3d 540, 548 (7th Cir. 2017); Greene v. Cook Cnty. Sheriff's Off., 79 F. Supp. 3d 790, 815 (N.D. Ill. 2015).

342. First Amended Complaint at 2, Golbert v. Walker, No. 18 C 8176 (N.D. Ill. June 25, 2020).

343. *Golbert*, 2020 WL 1182670, at *4.

344. *See* discussion *supra* Section III.A (discussing expanded qualified immunity and identifying the structural barriers in recovering for novel constitutional violations).

345. Kimble v. Marvel Ent., 576 U.S. 446, 455 (citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)) (emphasis omitted).

346. *See, e.g.*, Vikram Amar, *What We Can Learn About Stare Decisis* (*Respect for Precedent*) *from the Last Supreme Court Term*, JUSTIA: VERDICT (Aug. 6, 2018), https://verdict.justia.com/2018/08/06/what-we-can-learn-about-stare-decisis-respect-for-precedent-from-the-last-supreme-court-term#:~:text=The%20Court%20observed%20that%20while,prior%20case%20was%20wrongly%20decided.%E2%80%9D [https://perma.cc/UGL8-PR65].

347. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

348. Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

precedent was wrongly decided.'"[349] This marks a shift from previous cases before the Court overturning precedent, suggesting a heightened standard for when a court may deviate from stare decisis.[350] In 2018, for example, the Court never relied upon "special" circumstances justifying their ruling.[351] However, the Court's opinion in *Allen* relied on cases involving statutory stare decisis rather than constitutional stare decisis.[352] The Court has acknowledged that stare decisis is "at its weakest when we interpret the Constitution," because the interpretation can be changed only by overruling the decision or a constitutional amendment.[353] Cases involving statutory stare decisis, on the other hand, can be more easily amended by Congress and are thus entitled to heightened deference.[354]

Qualified immunity is not constitutionally protected and remains a construction of the common law.[355] However, its overly broad construction directly bears on the ability of plaintiffs to enforce their constitutionally enshrined rights.[356] As demonstrated in *Golbert v. Walker*, this construction creates institutional barriers to recovery, directly jeopardizing constitutional protections.[357] Thus, the Court's position in *Allen* is distinguishable from the qualified immunity issue;[358] its modification should be exempt from the "special justification" standard.

There also remains significant justification under a reliance rationale for modifying qualified immunity. Substantial academic scholarship has identified reliance as a central factor informing the Court's stare decisis determinations.[359] Reliance contemplates "'facts on the ground' that properly influence the application of retrospective judicial power"[360] In considering reliance, qualified immunity admittedly maintains a longstanding doctrinal history in the United States.[361] First introduced in 1871, qualified immunity has long represented a robust, well-established common law creation.[362] State actors have indeed relied on the modern conception of qualified immunity since *Harlow v. Fitzgerald* in 1982 as a tool to empower their decision-making and afford substantial latitude

349. *Id.*

350. *See* Amar, *supra* note 346.

351. *Id. See generally Allen*, 140 S. Ct. at 998–1009.

352. *Allen*, 140 S. Ct. at 998–1009.

353. Amar, *supra* note 346.

354. *See id.*

355. CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 2 (2020).

356. *See* discussion *supra* Section III.A.

357. *See, e.g.*, discussion *supra* Section III.E.

358. *See* discussion *supra* Section III.D–E (identifying systematic barriers to overcoming qualified immunity and thus recovering for constitutional violations in child welfare cases).

359. *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 419 (2010); Akhil Reed Amar & Vikram David Amar, *Precedent on the High Court*, FINDLAW (Dec. 27, 2002), https://supreme.findlaw.com/legal-commentary/precedent-on-the-high-court-more-on-and.html [https://perma.cc/C3BG-DY38].

360. Amar & Amar, *supra* note 359.

361. *See* discussion *supra* Section II.B.1.

362. CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 2 (2020); *see* Malley v. Briggs, 475 U.S. 335, 340–41 (1986); *see also* discussion *supra* Part II.

to carry out their positions.[363] However, as highlighted in Part II of this Note, qualified immunity finds itself at a crossroads.[364] There has perhaps never been such a confluence of diverse American institutions calling for its overhaul.[365]

In fact, Justice Clarence Thomas acknowledged increasing concern with the state of qualified immunity in 2017.[366] Significantly, he repeated these sentiments three years later in a 2020 dissent from the denial of certiorari in a case involving a Section 1983 action, expressing "strong doubts about our §1983 qualified immunity doctrine."[367] Justice Thomas observed that qualified immunity "appears to stray from the statutory text," and would thus grant the petition to reconsider the doctrine.[368]

The Court inched further toward revisiting the doctrine in 2020 after *Tanzin v. Tanvir*.[369] In a unanimous opinion authored by Justice Thomas, the Court indicated perhaps its most overt openness to revisiting the doctrine.[370] The Court held that while there "may be policy reasons why Congress may want to shield Government employees from personal liability . . . . there are no Constitutional reasons why we must do so in its stead."[371]

Although *Tanvir* specifically addressed the viability of damages as an appropriate remedy for constitutional violations, the opinion marked a significant change in the Court's stance toward qualified immunity.[372] As discussed above, previous dialogue from the Court surrounding the doctrine's modification appeared limited to Justice Thomas in certiorari denials.[373] Further, state legislatures in Colorado and New Mexico have already begun to eliminate traditional qualified immunity, moving to ban the doctrine altogether as a defense against state constitutional violations.[374] Finally, leading academic and political institutions have offered longstanding criticisms of qualified immunity.[375] Thus, given its near-universal critique across legal, academic, and political institutions,[376] the

363. 457 U.S. 800, 818 (1982).

364. *See* discussion *supra* Section II.B.2.

365. *See id.*

366. Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (acknowledging "growing concern with . . . qualified immunity jurisprudence."); *see also* Smith Jr., *supra* note 51, at 2095.

367. Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting).

368. *Id.* at 1862 (Thomas, J., dissenting).

369. Anya Bidwell & Patrick Jaicomo, *The Supreme Court Might be Finding Its Way to Overturning 'Qualified Immunity'*, USA TODAY (Dec. 20, 2020, 8:23 AM), https://www.usatoday.com/story/opinion/2020/12/20/supreme-court-decision-could-step-ending-qualified-immunity-column/3909636001/ [https://perma.cc/9VAF-SAFY]; *see* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

370. *See* Bidwell & Jaicomo, *supra* note 369.

371. *Id.* (quoting *Tanvir*, 141 S. Ct. at 493).

372. *Tanvir*, 141 S. Ct. at 489; Bidwell & Jaicomo, *supra* note 369.

373. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1869–70 (2017) (Thomas, J., concurring in part and concurring in the judgment).

374. *See* discussion *supra* Section II.B.2; Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=46458664378a [https://perma.cc/9ZGB-TJNV].

375. *See* discussion *supra* Section II.B.2.

376. *See* discussion *supra* Section II.B.2.

Court retains added authority to modify the current construction of the qualified immunity doctrine.

C. Scope and Purpose of the Exigency-Based Third Prong

Finally, this recommendation is intentionally limited in scope. While it represents a significant change, it does not seek to significantly upend the disposition of all Section 1983 actions. It is further essential to acknowledge that the third prong does not intend to empower or offer additional latitude to police finally encountering increased, legitimate criticism for abuses of power when responding to quickly developing situations.[377] In fact, the third prong would explicitly place the burden on police to justify their actions as a legitimate emergency response by a clear and convincing evidence standard. This would weigh against police in more egregious cases where harms occur after legitimate danger has subsided.[378]

In addition, the third prong would return qualified immunity to its original intent. As discussed above,[379] qualified immunity initially represented a "modest exception for public officials acting in 'good faith.'"[380] In *Pierson v. Ray*, the court's first articulation of qualified immunity, the court acknowledged that state actors who "reasonably believed in good faith" that their actions were constitutional ought to enjoy protection from the law.[381] The third prong thus returns qualified immunity to a more "modest" doctrine by narrowing the expanded pool of claims in which defendants may benefit from exigency-based arguments; "clear and convincing evidence" remains a significant evidentiary burden. By granting defenses only to defendants truly responding to emergency situations, the third prong preserves claims where, as in *Pierson*, the actors reasonably believed they acted in good faith.

Further, momentum already appears to be growing to undertake a more wholesome overhaul of the qualified immunity doctrine in the near future.[382] Until then, transparency and accountability in courts' reasoning is crucial. Accordingly, the exigency-based third prong contemplates a measured, practical step in this direction: it seeks to formally recognize the theories of justice already undergirding courts' legal reasoning, providing them the tools to explicitly incorporate their rationales into the qualified immunity analysis.

Further, while the third prong makes overt the rationales driving courts' decisions, it remains grounded in the original formulation of the doctrine. For example, in *Golbert v. Walker*,[383] the court would still rely heavily on (1) whether DCFS violated the constitutional rights of the affected children, and (2) whether those rights were clearly established. Weighed against the clearly

377. *See* discussion *supra* Section II.B.2.
378. *See, e.g.*, Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991).
379. *See* discussion *supra* Section III.A.
380. *See* Ali & Clark, *supra* note 125.
381. Pierson v. Ray, 386 U.S. 547, 557 (1967).
382. *See* discussion *supra* Sections II.B.2, IV.B.
383. *See* Golbert v. Walker, No. 18 C 8176, 2020 WL 1182670, at *1 (N.D. Ill. Mar. 12, 2020).

established question, the exigency-based third prong would only supplement the current qualified inquiry, enabling the court to pursue its senses of notice and morality without relying on subtext or strained legal reasoning. This creates clearer avenues to recovery for neglected children in state care.

V. CONCLUSION

Qualified immunity must be modified in order to enable proper avenues for recovery and better illuminate courts' reasoning in granting or denying the defense. After *Pearson v. Callahan*,[384] courts have permitted qualified immunity to expand well beyond its initial framework, inhibiting plaintiffs' ability to recover against state actors for constitutional rights violations.[385] Further, the doctrine has been subject to inconsistent analysis, often detached from the specific two-pronged inquiry.[386]

Regardless of the state actor raising qualified immunity, however, a common thread underlies courts' reasoning.[387] Courts remain inclined to resolve cases based on their underlying perceptions of notice and morality.[388] In particular, courts are influenced by the presence or absence of exigency-based decision-making; they appear motivated to grant qualified immunity when state actors render decisions in emergency settings.[389]

The consequences of courts' overly broad interpretation of qualified immunity are most sharply seen when applied to litigation involving child welfare agencies.[390] In particular, the Department of Child and Family Services in Illinois has perpetuated a longstanding and painful practice of detaining psychiatrically hospitalized children in state care beyond medical necessity for weeks, or even months, at a time.[391] Although this practice has received significant media attention,[392] it persists; the Office of the Cook County Public Guardian filed a class action on behalf of affected children in late 2018.[393] DCFS raised the qualified immunity defense in response, and based on underdeveloped Seventh Circuit case law, recovery remains tenuous.[394] To resolve this issue, courts must incorporate an exigency-based third prong into the qualified immunity inquiry. This would enable courts to make explicit their moral intuitions deferring to state actors' emergency decision-making, enabling clearer avenues to recovery for neglected children.

384. 555 U.S. 223, 236 (2009).
385. *See* discussion *supra* Section III.A.
386. *See* discussion *supra* Sections III.B–D.
387. *See* discussion *supra* Sections III.B–D.
388. *See* discussion *supra* Sections III.B–D.
389. *See* discussion *supra* Sections III.B–D.
390. *See* discussion *supra* Sections III.D–E.
391. *See* discussion *supra* Part II.
392. *See, e.g.*, Petrella, *supra* note 79.
393. *See supra* note 103.
394. *See* discussion *supra* Section III.E.