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Daniel L. Skoler

A Constitutional Right to Safe Foster Care? — Time For The Supreme Court To Pay Its I.O.U.

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I. INTRODUCTION

In 1989, in the widely publicized case of *DeShaney v. Winnebago County Department of Social Services*,[1] the United States Supreme Court held that a state child welfare agency and its workers had no affirmative duty under the fourteenth amendment's due process clause[2] to protect a child against life threatening violence by a natural parent. The court made that determination, hardly unusual in itself, even though the state took the child into temporary custody on a previous abuse complaint, continued to receive warnings and reports of possible continuing abuse after return to the parental home, was aware of the danger of further harm to the youngster, and took no action to remove the child from the parent's custody or otherwise protect the youngster from the heartbreaking injury that resulted in irreversible brain damage.

The Court was not indifferent to the horror story inherent in the

* J.D., Harvard Law School, 1952. Daniel L. Skoler is a member of the New York, Illinois, and District of Columbia Bars. Currently he is an adjunct professor at Georgetown University Law Center. Mr. Skoler has been Director of Continuing Education and Training, Federal Judicial Center since October of 1986 and currently chairs the Committee on Children's Rights of the American Bar Association's Section of Rights and Responsibilities. His previous posts have included service as Executive Director of the National Council of Juvenile and Family Court Judges for several years and Deputy Associate Commissioner with the Social Security Administration's Office of Hearings and Appeals. Mr. Skoler has published extensively in fields of law in which he has been engaged, including the juvenile justice and children's rights areas.

1. 489 U.S. 189 (1989).

2. "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 2.

DeShaney case,[3] nor did it minimize the seriousness of the state's omissions,[4] even suggesting that a cause of action under state tort law might be available to the aggrieved child.[5] In the final paragraph of the majority opinion the Court suggested that Wisconsin might consider a "system of liability" covering state neglect or inaction in such circumstances.[6] The Court made clear, however, that no due process duty existed to provide protection from an abusing parent nor was such a duty owed to a child in that natural parent's custody,[7] regardless of the fact that the parent was under official court supervision, there were reports of possible harm from several sources and, indeed, the state had declared its willingness and intention to prevent such harm. Hence knowledge, intention and even assurances of action were not enough. The state, said the Court, was not liable for injury of this kind because it had not, by affirmative exercise of its powers, taken the child into its custody or otherwise restrained his liberty or ability to act for his own protection.[8] Under this rationale, the Court distinguished prior case law and Section 1983 jurisprudence guaranteeing safety from violence and basic survival care for prison inmates[9] and institutionalized mental patients.[10]

Along with this major interpretation of the contours of fourteenth amendment substantive due process liberties—largely along the lines of "no custody, no duty"—the Court then speculated, in a widely quoted footnote, on a question easily as important to child welfare systems and their workers on the one hand and to child advocates on the other, as the *DeShaney* issue itself. That is, what if everything that happened to Joshua DeShaney had happened to a child not in the custody of a natural parent but under foster care supervision:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect . . . . We express no view on the

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3. "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them." *Id.* at 202-03.

4. "The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

5. "It may well be that, by voluntarily undertaking to protect Joshua against a danger concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against the danger." *Id.* at 201-02.

6. *Id.* at 201.

7. "[T]he State had no constitutional duty to protect Joshua against his father's violence . . . ." *Id.* at 202.

8. *Id.* at 201.

9. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (duty to provide prison inmates with adequate medical care), *reh'g denied*, 429 U.S. 1066 (1977).

10. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 314-25 (1982) (duty to provide adequate safety, food, clothing, shelter and medical care for involuntarily committed mental patients).

validity of this analogy, however, as it is not before us in the present case.[11]

Why the Supreme Court chose to make this point is not clear. Several plausible reasons, however, include: (i) a desire to emphasize the narrow confines of the holding; (ii) to illustrate in a child welfare context the importance of a custodial posture to any recognition of due process safety obligations on the part of state foster care systems; (iii) to reassure the child protection community that the massive arena of state regulated foster care placement was not being stripped of all federally-based protection; and (iv) to warn state officials in this field that *DeShaney* should not be viewed as an across-the-board shield from liability for misfeasance to children under state protection and care.

Whatever the case, the Court's analogy touched upon a "hot" question and one being tested with increasing frequency. In the two years since *DeShaney*, the appellate courts of at least five federal circuits have had occasion to deal with civil rights suits asserting constitutional or federal statutory rights to safe foster care.[12] The Supreme Court has denied petitions for certiorari in all three cases in which certiorari was sought,[13] apparently finding the time or occasion not right to pass on the custody analogy that it posited (but refused to answer) in *DeShaney*, or else considering the cases presented as so well decided on this or related grounds as not to require further guidance beyond *DeShaney*.

The Court's silence, however, is puzzling. Hopefully, it will not be long before it decides to answer the "footnote 9" query.[14] With al-

11. 489 U.S. 201 n.9 (citing two circuit court decisions both of which found involuntary state placement of children in a foster home to be analogous to prison and mental institution custody rendering state actors liable under section 1983 for fourteenth amendment violations in providing grossly deficient protection and care in that setting). *See* Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1985); Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141-42 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

12. Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2631 (1990) Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990) *cert. denied*, 111 S. Ct. 182 (1990); Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990); Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2560 (1990); K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990); Del. A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989); Milburn v. Anne Arundel County Dep't. of Social Servs., 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989).

13. *See Eugene D.*, *Bobbitt*, and *Babcock*, *supra* note 12.

14. Calls for and speculations about Supreme Court delineation of foster care liberty interests have not been wanting in recent years. *See, e.g.*, Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Ne-*

most 400,000 children in foster care,[15] a record of serious problems and strains pressing the foster care system, and a steady procession of "Joshua's" seeking federal redress, with stories often as compelling as that presented by *DeShaney*, it seems certain that Court will soon be pressed to confront its own challenge.

The post-*DeShaney* cases raise a number of questions beyond the "footnote 9" query as to whether foster care custody is sufficiently analogous to prison and mental institution custody to warrant substantive due process protection from known or clearly established threats to safety. These include: (i) the existence of section 1983 liability based on federal statutory mandates rather than the command of constitutional due process; (ii) the differences in the duty owed, if any, to children placed in state supervised foster care on a voluntary rather than mandatory basis; (iii) the availability of absolute or qualified immunity defenses against section 1983 claims grounded in either foster care constitutional liberty interests or federal statutory obligations; and (iv) the applicable standards ("deliberate indifference", failure to exercise reasonable professional judgment, or gross negligence) for measurement of state violations of safe care duties owed to foster children. This article explores each of these issues after a preliminary review of the status and legal character of foster care placement and custody in the United States.

II. FOSTER CARE STATUS

The foster care system evolved as a mechanism to provide a temporary home-like setting for the protection and nurturing of children unable to live in a parental home, whether due to conditions of neglect, abuse, abandonment or sheer parental incapacity. Available in all states, the foster care system removes the child from the natural home situation while deficiencies are being corrected or arrangements are made for a change in parental responsibility.[16]

Today, the nation's foster care population is at a record high. After some contraction in the early eighties, the number of children in foster care stood at about 275,000 in 1985, rose to 340,000 by 1988, and today aggregates nearly 400,000.[17] The spurt that took place around 1985 and continues today has been characterized by a number of

glect, 23 HARV. C.R.-C.L. L. REV. 199, 217-244 (1988); Donnella, *Safe Foster Care: A Constitutional Mandate*, 19 FAM. L.Q. 79 (1985).

15. *See infra* notes 17-18 and accompanying text.

16. See Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Function*, 20 FAM. L.Q. 213, 219-20 (1986); Comment, *Foster Child Abuse in Pennsylvania: Pursuing Actions Against the County Placement Agency*, 94 DICK. L. REV. 501, 502-503 (1990).

17. HOUSE COMM. ON CHILDREN, YOUTH AND FAMILIES, H.R. REP. NO. 101-395, 101st Cong., 1st Sess. 17-19 (1990) [hereinafter HOUSE COMM.].

trends, including the following: (i) more children requiring repeat placements; (ii) younger children entering out-of-home placements at increasing rates; (iii) a disproportionately larger number of minority children in foster care (with longer stays there); (iv) a growing volume of placements related to drug and alcohol abuse or exposure; (v) deteriorating social conditions such as homelessness and family disarray; (vi) an insufficient supply of adequate foster family homes to meet demands; (vii) and child welfare caseloads accelerating beyond the ability of foster care systems to provide minimal care and services.[18] Present governmental funding of foster care exceeds $1 billion annually. About 53% of this amount is federally funded with the remaining 47% coming from state and local sources. The federal share is derived primarily from matching funds made available under article IV-E of the Social Security Act.[19]

Against this backdrop of caseload and spending growth is the existing legal structure to assure services and protection for children in foster custody. Under state or federal legislation, foster children have procedural rights and substantive rights to protection from abuse and neglect, as well as rights to services necessary for maintenance of health, well-being, and the fulfillment of basic childhood needs. Moreover, federal and state enactments have increasingly recognized implemented concepts of good practice and responsible oversight for children in foster care.[20] Both social work practice and federal policy, as reflected in preconditions and proper use of federal matching funds for foster care, adoption, and other child welfare purposes emphasize avoidance of unnecessary out-of-home placements, family reunification for children in foster custody wherever possible, the periodic review of the foster child's progress, permanent planning (including adoption) for children separated from natural parents for

18. HOUSE COMM., *supra* note 17, at 5-9. *Cf.* U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 36-37 (1990). What few studies have been conducted show that rates of abuse and neglect of children in foster care may be greater than those for children in the general population. *See* P. RYAN & E. MCFADDEN, NATIONAL FOSTER CARE EDUCATION PROJECT: PREVENTING ABUSE IN FAMILY FOSTER CARE 11 (1986) (national study); Vera Institute of Justice, Foster Home Child Protection 63-64 (Feb. 1981) (unpublished report covering New York City); *cf.* Mushlin, *supra* note 14, at 205-07; *but see* Besharov, *supra* note 16, at 218-19 (citing studies which suggest that reported foster parent abuse rates are lower than for the general population).

19. HOUSE COMM., *supra* note 17, at 67, 120-21.

20. The principal federal law governing child welfare practice in general and foster care systems, assistance, and regulation in particular is the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

extended periods, greater delegation of authority to foster parents, and increased state court (i.e., juvenile court) supervision of foster care placements.[21]

The vast majority of children who enter foster care do so as the result of a juvenile court order emanating from a neglect or dependency proceeding. This is known as "involuntary placement." In most cases, the court simply makes an award of custody to a child welfare agency which then arranges for the foster placement. In addition, a relatively small but nevertheless significant number of children are placed with the child welfare agency by parents without court proceedings. These "voluntary placements" are generally undertaken pursuant to a signed agreement between the agency and the child's natural parents. Such contracts are often regulated by state law and sometimes require court ratification. To the extent that voluntary placements seek federal assistance, they are subject to continuing court supervision and certain practice standards and policies. In assessing procedural and substantive rights, some courts have viewed voluntary and involuntary placements differently.[22] Although such distinctions are blurred by an increasing court and state welfare agency role in voluntary placements,[23] the differences may prove to be critical in the process of assessing the *DeShaney* footnote 9 query.

For the bulk of cases in which courts place custody in the child welfare agency, the rights and duties of foster parents are defined by and emanate from the agency's custodial authority. The agency typically delegates authority to the foster parents to provide day-to-day care of a routine nature. However, it retains general powers over a child's life and, in effect, supervises the foster parents. Thus, decisions such as education, medical care, and discipline are usually made by the agency or defined in its policies governing foster parents' obligations. The delegation of authority from agency to foster parents and the rules of the relationship may be established by "standard form" contracts, by statute or regulation, by the juvenile court's dispositional order, or by a combination of these devices. Frequently, the agency itself is limited in its freedom to delegate functions to foster parents, notwithstanding a recent trend to treat foster parents as part of a service delivery team (e.g., to participate in the development of case plans and to work with natural parents to insure readiness for

21. *See generally* M. HARDIN & A. SHALLECK, *Children Living Apart from their Parents*, in LEGAL RIGHTS OF CHILDREN (R. Horowitz & H. Davidson, eds. 1984).

22. *See, e.g.*, Jorand v. Tennessee, 738 F. Supp. 258, 260 (M.D. Tenn. 1990) (voluntary admittance of a boy to a state facility for severely retarded individuals does not give rise to constitutionally protected safety and basic care rights).

23. *See* M. HARDIN, *Setting Limits on Voluntary Foster Care*, in FOSTER CHILDREN IN THE COURTS (M. Hardin & D. Dodson, eds. 1983).

a return home) and not merely as daily care givers,[24] and to provide some procedures for foster parents to challenge agency removal action or other foster care decisions.[25] Thus, even day-to-day care must generally be scrutinized by the agency. Some state laws specify nondelegable rights which the agency as custodian must retain.[26]

III. THE CONSTITUTIONAL RIGHT TO SAFE FOSTER CARE

The Supreme Court expressly declined in *DeShaney* to rule whether state-ordered foster care, by analogy to prison custody or involuntary mental commitment, could give rise to a due process duty to assure the safety of children placed in such custody. It is intriguing that the Court took time to note that "several Courts of Appeals" had favored such a duty, citing two cases for the proposition.[27] The Court did not identify contrary authority and the Court seemed to be inviting lower courts to make the analogy. If so, responses were not long in coming. In the two years since *DeShaney*, a number of cases have arisen in the circuits which potentially presented the question.[28] Two circuits, departing from *DeShaney* principles, have made the protected safety interest analogy. The Court of Appeals for the Sixth Circuit in *Meador v. Cabinet for Human Resources*[29] held "that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."[30] Similarly,

24. M. HARDIN & A. SHALLECK, *supra* note 21, at § 9.04.

25. *Id.* at § 9.05. However, courts have been sparing in recognition of constitutionally protected interests of foster parents vis-a-vis children placed with them. *See, e.g.*, Drummond v. Fulton County Dep't of Family and Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (no constitutionally protected familial right to privacy in foster parent/foster child relationship).

26. M. HARDIN & A. SHALLEK, *supra* note 21, at 362.

27. Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied sub nom.*, Catholic Home Bureau v. Doe, 464 U.S. 864 (1983) (finding potential Civil Rights Act liability on part of municipal department and its designated supervisory welfare agency in failing to respond to a known and continuing safety risk to a foster child subjected to physical beatings and sexual abuse by foster father but remanding for determinations as to "deliberate indifference" and causation of harm); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (finding due process liberty interest in safe living conditions for child involuntarily placed in custody of abusing foster parent).

28. Meador v. Cabinet for Human Resources, 902 F.2d 474, (6th Cir. 1990); K.H. Through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990); Milburn v. Anne Arundel County Dep't of Social Servs., 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989); Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990).

29. 902 F.2d 474 (6th Cir. 1990).

30. *Id.* at 476.

in *K.H. v. Morgan*,[31] the Seventh Circuit stated:

> Here . . . the state removed the child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the fourteenth amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered without violating his rights . . . under . . . the Eighth Amendment . . . if he was a convicted prisoner or the due process clause if he was awaiting trial.[32]

In a third case from the Fourth Circuit, *Millburn v. Anne Arundel County Dep't of Social Services*, the court, on facts strikingly similar to *DeShaney*, did not find the requisite exercise of a state power in removing the child from free society which the Supreme Court posited in footnote 9. Instead, this court noted that the abused child "was voluntarily placed in the foster home by his natural parents" and thus was not in state custody or in a predicament created by state action.[33]

In yet a fourth case, *Babcock v. Tyler*, the Ninth Circuit sidestepped the *DeShaney* query, finding, without reference to *DeShaney* in particular or to due process liberty interests in general, that state welfare workers, both in their prosecution of neglect and dependency proceedings and subsequent fulfillment of post-adjudication responsibilities under the terms of court dispositions, were entitled to absolute immunity from liability for placement with a sexually abusing foster father.[34] Since the bulk of children in foster custody are placed there pursuant to court order, this decision would appear to have the curious effect of insulating all child welfare workers from liability for disregarding clear danger signals to children in court-ordered foster care.

The *DeShaney* rationale for constitutionally protected foster care treatment may prove problematic in the case of voluntary placements. That rationale, as expressed in the Court's opinion, focuses on state-imposed restraints:

> The rationale . . . is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to

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31. 914 F.2d 846 (7th Cir. 1990).

32. *Id.* at 842; *see also B.H. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (class action on behalf of children removed from parents and put under custody of state social services agency for foster and other out-of-home placement, finding constitutional rights to safe foster care and basic maintenance plus statutory rights to case review system and individualized plan services); Artist M. v. Johnson, 726 F. Supp. 690, 699 (N.D. Ill. 1989) (class suit for injunctive relief finding, on motion to dismiss, both statutory and constitutional causes of action, but dismissing the latter for lack of allegations of indifference to physical and emotional safety of children in foster care or under home supervision).

33. Milburn v. Anne Arundel County Dept. of Social Servs., 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989).

34. Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990).

> care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.[35]

When parents request or voluntarily consent to a foster care custody arrangement for a child, can it be fairly said that the state has so restrained the liberty of the child that it must acknowledge and assume an affirmative duty to protect? Prior to *DeShaney*, courts did not generally distinguish between voluntary and involuntary placements in the face of section 1983 claims, largely on the grounds that once a child had come into the hands of the state or its agents, that dependence alone, particularly for minors and incompetents in institutional settings, was sufficient to generate affirmative care responsibilities.

The Second Circuit was so persuaded in a class action for mentally retarded children where it found a number of "basic care" due process violations. The court stated, "We need not decide whether SDC [Suffolk Developmental Center] residents are at SDC 'voluntarily' or 'involuntarily' because in either case they are entitled to safe conditions and freedom from undue restraint."[36] Several district courts reached similar conclusions about equal status for voluntary and involuntary admittees to state facilities,[37] in some cases positing that voluntary parental placement in state hands, however it might estop parents from asserting personal harm or deprivation, could never compromise the constitutional rights of children under age or mental disabilities to be protected from dereliction leading to violence or substandard care.[38]

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35. 489 U.S. 189, 199-200 (1989).

36. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1245 (2d Cir. 1984).

37. McCartney v. Barg, 643 F. Supp. 1181, 1185-86 (N.D. Ohio 1986)

> Defendants' neat "quid pro quo" analysis — that it is only the involuntary nature of the initial commitment that gives rise to the due process rights at issue — fails to account for practical realities surrounding the commitment of one such as plaintiff who has been under the care of state institutions since age ten.

Id. See also Goodman v. Parwiatikar, 570 F.2d 801, 804 (8th Cir. 1978); Kilpak v. Bell, 619 F. Supp. 359, 378 (N.D. Ill. 1985) (in damages claim for fatal beating of retardate, court commends logic in the cases that find voluntary and involuntary residents entitled to the same constitutional rights to a safe environment).

38. *See, e.g.*, Fialkowski v. Greenwich Home for Children, Inc., 683 F. Supp. 103 (E.D. Pa. 1987) (rights of mentally retarded do not turn on voluntary or involuntary nature of submission to state care); Naughton v. Bevliaqua, 458 F. Supp. 610, 617-18

After *DeShaney*, courts were less inclined to find the distinction between voluntary and involuntary placement irrelevant. Thus, in *Milburn v. Anne Arundel County Department of Social Services*,[39] the Fourth Circuit held that a child voluntarily placed in a foster home by his natural parents and then severely physically abused in that foster home had no due process right against the social services agency when its workers neglected to remove the child after reports of probable abuse.[40] The court found, comparing the case to *DeShaney*, that the State of Maryland had not restrained the foster child's liberty and that the ward's resulting injury during foster custody was caused by individuals who were not state actors.[41] The court reached this conclusion notwithstanding the fact that the state agency located and contracted with these foster parents for the required care, and inspected and approved the foster home for the voluntary placement. Similarly, in Tennessee, a federal district court found that a child voluntarily committed to a state facility for severely retarded individuals could claim no due process right to a safe environment, at least when the boy's parents were familiar with conditions at the facility and the state did nothing affirmative to require the child to remain there.[42]

It would be unfortunate if the *DeShaney* rationale for safe custody obligations did not include voluntary placements. Several federal courts have rejected the anomaly of imposing liability upon institutional officials for taking no action when involuntarily committed children are brutalized or deprived of basic needs, but finding no comparable duty toward voluntarily committed children.[43] If the custody analogy holds for foster placement, then a child in the care and residence of state selected, licensed, and regulated foster parents is arguably as much in "custody" as the child housed in a state run institution or group home. Custody should warrant affirmative duties of safekeeping for both "involuntary" and "voluntary" placements, at least in cases involving formal agency selection and supervisory responsibilities.

It is significant that *Youngberg v. Romeo*,[44] the anchor and proto-

(D.R.I. 1978); Seide v. Prevost, 536 F. Supp. 1121, 1135 (S.D.N.Y. 1982) (any distinction between voluntary and involuntary admittees would violate equal protection clause).

39. 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990).

40. *Id.* at 476.

41. *Id.*

42. Jordan v. Tennessee, 738 F. Supp. 258, 259 (M.D. Tenn. 1990).

43. *See* cases cited *supra* note 37. *See also* Association for Retarded Citizens of N.D. v. Olsen, 561 F. Supp. 473, 484-85 (D.N.D. 1982); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); New York State Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165 (E.D.N.Y. 1982), *rev'd*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

44. 457 U.S. 307 (1982).

type of the Court's current doctrine regarding when involuntary civil custody arrangements generate substantive due process obligations, involved a retarded young person whose mother literally asked the local court to admit her son to a state facility on a permanent basis.[45] The mother's choice in *Youngberg* demonstrates how blurred the voluntary/involuntary placement classifications regarding child custody can be. Moreover, this country's legal doctrine has frequently recognized that the interests of children and their neglectful or abusive parents do not always coincide;[46] thus the law should not unquestioningly accept parents as proxies for making "voluntary" custody decisions on behalf of their children. In *Smith v. Organization of Foster Families*,[47] the Supreme Court itself gave voice to this dilemma, by stating "[t]he extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned . . . . For example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent."[48]

There is a stark and meaningful difference between a state returning an "at risk" child to its natural parents' custody, as in *DeShaney*, and a state accepting custodial obligations with parental consent. In the former case, the state has not really created a new hazard by its action. In the latter situation, however, the locking of a child into a state-run and regulated system directly affects the child's right to traditional parental care, whether affected voluntarily or not. It must also be recognized that reports and investigations alleging neglectful or abusive behavior on the part of the parent carries its own coercive elements which may make a parent's decision to relinquish custody not truly voluntary.[49]

In light of the foregoing considerations, a *per se* rule that a "volun-

45. *See, e.g.*, Kolpak v. Bell, 619 F. Supp. 359, 378 (N.D. Ill. 1985) ("it is significant that the plaintiff in *Youngberg* was committed upon his mother's application.").

46. *See, e.g.*, AMERICAN BAR ASS'N AND INST. OF JUDICIAL ADMIN. JUVENILE JUSTICE STANDARD, COUNSEL FOR PRIVATE PARTIES § 2.3(b) (1980) (calling for independent representation of children, apart from counsel for respondent parents, in neglect, dependency, custody, and adoption proceedings).

47. 431 U.S. 816 (1977).

48. *Id.* at 834. (rejection of foster parents' challenge to New York statutory and regulatory procedures for removing foster children from foster homes).

49. These elements may not be as clearcut as in neglect and dependency proceedings leading to court orders. It is true that some voluntary placement schemes by overwhelmed parents may fall short of a "state custody" model even when welfare system counseling and assistance is present to help the troubled parents deal with those decisions.

tary" placement always excuses official liability for extreme indifference to known safety and care hazards would surely be detrimental to children and mental incompetents.[50] More often than not, there will be the same state court or state agency supervision of "voluntary" placements as is imposed on court-ordered placements. Indeed, the Adoption Assistance and Child Welfare Act of 1980,[51] which provides funding for voluntary foster care placement, mandates court review and a determination as to the appropriateness of any such placements as a condition of federal assistance if placement continues beyond 180 days.[52] All this further blurs the soundness of voluntary/involuntary placement distinctions in assessing safe care duties owed to children in foster custody.

IV. IMMUNITY OF AGENCIES AND OFFICIALS

If *DeShaney* has served as a torch for definition and debate on the contours of a constitutional right to safe foster care, it has also fueled ambivalence on questions of official responsibility that attend emerging due process strictures of this kind. In virtually every post-*DeShaney* case to reach federal appellate courts, the defense of official immunity has been asserted.[53]

In the Sixth Circuit[54] and the Seventh Circuit,[55] defendants asserted qualified immunity defenses based on summary judgment motions in civil rights actions brought on behalf of abused foster children. Both circuits soon declared the existence of a substantive due process right to safe foster care, although each had difficulty, in their first encounter with the issue, in finding that the law was sufficiently and clearly established to put the defendants on notice of their duties to the foster children.[56]

Under governing legal principles, the doctrine of qualified immunity protects public officials performing discretionary duties from liability for violation of constitutional or statutory rights unless (i) the rights allegedly violated more clearly established at the time of the challenged conduct and (ii) they would understand, by reference to

50. Children and incompetents have always been considered to have legal disabilities and to need special state protection and care. *See e.g., New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). For an excellent analysis of *Millburn* and the deficits of voluntary/involuntary placement distinctions, see Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C.L. REV. 113, 133-47 (1990).

51. 2 U.S.C. § 672(e) (1982).

52. 42 U.S.C. § 622 (1980).

53. *See, e.g., infra* note 54-55 and accompanying text.

54. *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2631 (1990).

55. Doe v. Bobbit, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2560 (1990).

56. *Eugene D.*, 889 F.2d at 706; *Bobbitt*, 881 F.2d at 510.

an "objective reasonableness" test, that what they were doing amounted to such a violation.[57] In *Eugene D. v. Karman*,[58] the Sixth Circuit was unable to discern any clearly established constitutional duty for child welfare officials to protect foster children "from bodily harm at the hand of a state licensed foster parent."[59] The appellate court could identify only one case[60] which could have put the defendants on notice; and there were no Supreme Court opinions on point. Nor would the illegality of the action, in the court's view, be apparent from Supreme Court precedent on affirmative duties to assure the safety and basic needs of prison inmates and state mental institution patients, since their situation involved significant differences from the community-based life of a foster child.[61]

In *Doe v. Bobbitt*,[62] the Seventh Circuit made similar observations about a period of foster abuse that extended from late 1983 into 1984:

> [W]e are unable to conclude that in early 1984 a substantial consensus had been reached that placing a child in a potentially dangerous environment in a foster home was a violation of the due process clause. At that time, only the Second Circuit had held that such a right existed and that case was not directly on point since it involved placement in a licensed foster home on a permanent basis . . . . Moreover, the decision in *Doe* depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by either the Supreme Court or the Seventh Circuit.[63]

In these analyses, the courts acknowledged the wisdom and hints of the *DeShaney* decision but viewed that decision as little more than hindsight in a complex and novel area. Moreover, the existing Sixth and Seventh Circuit interpretive doctrine was deemed to neutralize the Second Circuit precedent. Decisions of both circuits accorded little credit to case law in other jurisdictions for purposes of determining whether a constitutional right had been "clearly established" for

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57. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982):

> [Q]ualified immunity would be defeated if an official "*knew* or *reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury."

Id. at 815-19 (emphasis in original); *See also Anderson v. Creighton*, 483 U.S. 635 (1987) (qualified immunity is an affirmative defense to a "clearly established" right).

58. 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2631 (1990).

59. *Eugene D.*, 889 F.2d at 709-10.

60. *Id.* at 708; *See* Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *cert. denied sub nom.*, Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

61. *Eugene D.*, 889 F.2d at 709-10.

62. 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2560 (1990).

63. *Id.* at 511-12.

state actors in the home circuit.[64]

These growing pains for the emerging right were temporary. It has now been recognized in four circuits,[65] and, of course, the *DeShaney* footnote 9 query has put all state governments on notice of the likely custodial status duties and liberty interests applicable to court-ordered foster placement. In addition, the nation's major bar association, the American Bar Association, has declared its support for the right and circulated its views to all fifty state welfare departments.[66] It is unlikely that welfare administrators' or supervisors' claims that they had no notice that foster care custody, at least via involuntary placement, generates affirmative state duties to protect wards and meet their basic needs would be a successful defense. The new battles will be fought, no doubt, on questions concerning the character of welfare worker misfeasance in specific cases of agency and managerial level responsibility for violations by subordinate staff, and for preparation of line workers to understand and comply with state foster care obligations.

Beyond questions of establishment, notice, and proof of foster care due process rights, another significant concern remains. This involves whether and to what extent child welfare workers should be immune from liability for official action which violates constitutional rights of safe foster care. That issue will undoubtedly be addressed by litigation in the years ahead — and properly so. It is exemplified by the Ninth Circuit's apparent position that virtually all child welfare worker activities undertaken in connection with court neglect and dependency proceedings, and the execution and monitoring of dispositional orders emanating from them, are entitled to absolute immunity, whether styled as "judicial," "quasi-judicial," or "prosecutorial."[67] This, of course, extends beyond foster care treatment issues, but could significantly restrict welfare system accountability under any constitutional right of safe foster care.

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64. *See, e.g.*, Davis v. Holly, 835 F.2d 1175, 1182 (6th Cir. 1987) (novel decision from another circuit not sufficient to clearly establish a constitutional right); Lojuk v. Johnson, 770 F.2d 619, 631 (7th Cir. 1985) (single supporting circuit and district court case insufficient to clearly establish a constitutional right), *cert. denied*, 474 U.S. 1067 (1988).

65. *See* Kitt v. Morgan, 914 F.2d 846 (7th Cir. 1990); Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1985); Doe v. New York City Dep't. of Social Servs. 649 F.2d 134 (2nd Cir. 1981).

66. *See* AMERICAN BAR ASS'N., POLICY AND PROCEDURES HANDBOOK, 1989-1990, at 189 (summarizing 1990 policy resolution of the Association supporting legal responsibility and liability of state and local governments for injury or abuse to children in foster care custody in disregard of information as to ongoing or imminent harm).

67. Babcock v. Tyler, 884 F.2d 497, 503 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990).

Thus, in *Babcock v. Tyler*,[68] a post-*DeShaney* opinion, the court expanded upon established circuit precedent extending absolute immunity to social service case workers where they initiate and pursue child dependency proceedings and obtain and execute court orders for seizure and placement of children. The *Babcock* court ruled that such immunity extended to misfeasance in all phases of post-judiciation monitoring, execution, and supervision of court neglect and dependency orders.[69] Hence, misfeasance or nonfeasance in the face of reports of dangerous and harmful conduct toward children by foster parents named in court orders appears to have been brought under a shield of absolute immunity.[70] As the court explained:

> In Washington, the dependency process does not end until six months after the dependent child returns home. . . . Throughout this process, caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties . . . . There is little sense in granting immunity up through adjudication of dependency, and then exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders. These post-adjudication actions by social caseworkers may or may not be prosecutorial in nature.[71]

This was a complicated case, involving neglect proceedings and transactions in several states, which revealed serious social worker dereliction in the placement of the four girls with a foster father who raped and sexually assaulted all of them. There exists a split among the circuits about the extent and character of the immunity available to social service workers connected with or involved in court proceedings or court-mandated supervision. Absolute immunity for bringing and participating in neglect and abuse proceedings is recognized in some circuits, generally as a necessary element for protection of the integrity of such proceedings.[72] Only qualified immunity is afforded in others.[73]

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68. *Id.*
69. *Id.*
70. *Id.* at 503.
71. *Id.*
72. *See* Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154 (9th Cir. 1987); Coverdell v. Dep't of Soc. and Health Ser., 834 F.2d 758 (9th Cir. 1987); Malachowski v. City of Keene, 787 F.2d 704, 712 (1st Cir. 1986) (absolute immunity for juvenile officer who filed allegedly false delinquency petition), *cert. denied*, 479 U.S. 828 (1986); Kurzawa v. Mueller, 732 F.2d 1456, 1457-58 (6th Cir. 1984) (absolute immunity for state social services employees responsible for prosecuting child neglect and delinquency petitions).
73. *See* Hodoroski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988); Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987); Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983), *cert. denied*, 466 U.S. 949 (1984); Robison v. Via, 821 F.2d 913, 920 (2d Cir. 1987) (declined to grant absolute prosecutorial immunity to state trooper and assistant state's attorney for conduct in undertaking preliminary child abuse report investigation).

The basic rule is that "executive officials in general are usually entitled to only qualified or good-faith immunity."[74] Despite the precept that qualified immunity from damages liability should be the norm for officials executing discretionary functions who are charged with constitutional violations, there are exceptions in which absolute immunity has been determined to be proper. One such exception protects prosecutors, and officials who perform functions analogous to prosecutors,[75] including the initiation of certain administrative and civil proceedings on behalf of the government.[76] Another exception shields officials appearing as court witnesses, a role obviously integral to the judicial process.[77]

Babcock v. Tyler, however, appears to go beyond the bounds of the classic "qualified immunity" exceptions by embracing and protecting post-adjudication behavior of child welfare workers. It would seem to extend greater protection to these state agency workers than even court attached probation officers who, although shielded absolutely in pretrial and pre-sentencing investigation functions,[78] are nevertheless accorded only a qualified immunity in post-adjudication activities relating to investigation and to initiation of revocation for offenders in probation status.[79] Child welfare workers would also have greater immunity than would prison officials who undertake post-adjudication investigations of prisoner misbehavior.[80] The rationale in those cases seems absent in situations where, after placement of a foster child, supervising workers obtain knowledge of abusive foster parent behavior or unsafe conditions. This has little to do with judicial proceedings and involves matters probably not governed or foreseen by neglect and dependency orders.[81] Moreover, the acts complained of here (typically inaction in the face of warnings or reports of abuse to

74. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

75. Imbler v. Pachtman, 424 U.S. 409 (1976).

76. Butz v. Economou, 438 U.S. 478, 515-16 (1978) (absolute immunity extended to agency attorney prosecuting suspension proceeding before administrative law judge); *Kurzawa*, 732 F.2d at 1456-58 (absolute immunity extended to attorney serving as guardian ad litem for child and involved in court proceedings for removal from parental home).

77. Briscoe v. LaHue, 460 U.S. 325 (involving a police officer's perjured testimony as a criminal trial witness and extending common law witness immunity to section 1983 claims); *cert. denied sub nom.*, Talley v. Crosson, 460 U.S. 1037 (1983).

78. *See, e.g.*, Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987) (protection of presentence report statements); Spaulding v. Nielson, 599 F.2d 728 (5th Cir. 1979) (protection of presentence report activities); Tripati v. I.N.S., 784 F.2d 345 (10th Cir. 1986) (protection of pretrial release reports), *cert. denied*, 484 U.S. 1028 (1988); Hughes v. Chesser, 731 F.2d 1489 (11th Cir. 1984) (protection of state probation officers in preparation and presentation of presentence reports); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970) (protection of probation report), *cert. denied*, 403 U.S. 908 (1971).

79. *See* Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983).

80. Cleavinger v. Saxner, 474 U.S. 193 (1985) (qualified immunity for prison disciplinary committee members).

81. Court orders generally do not specify in which foster home a child will be

wards) do not arise out of events which should ordinarily deter social services workers from taking protective action because of fear of unfounded litigation or other legal harassment. Indeed, such signals should help stimulate worker investigative or remedial action to avoid that very possibility.

V. STANDARDS OF CULPABILITY FOR MEASURING VIOLATIONS OF RIGHTS

Most "safe foster care" decisions involving constitutional rights claims have been decided on motions for summary judgment or motions to dismiss complaints. Few cases have gone to trial. Thus, the courts have had little occasion to elaborate on the specific kinds of conduct, non-feasance, or neglect which would support liability in this context.

The prevailing standard during most of the past decade has been that of "deliberate indifference" in failure to respond to threats to or violations of a child's "clearly established rights." The two appellate decisions cited by the Supreme Court in *DeShaney* footnote 9 provide a good illustration. In both *Taylor v. Ledbetter*[82] and *Doe v. New York City Department of Social Services*,[83] the courts determined liability upon a finding of "deliberate indifference"[84] as a significant causal factor in the harm resulting from a violation of constitutionally protected interests:[85]

> For a section 1983 action to arise where an official is charged with failing to exercise an affirmative duty, two requirements must be satisfied. First, the failure to act must have been a substantial factor leading to the violation of a constitutionally protected liberty or property interest . . . . Second, the official having the responsibility to act must display deliberate indifference. [86]

Other circuits have found the "professional judgment" criterion announced by the Supreme Court in its child institutionalization cases to be more applicable and have used that in lieu of a "deliberate in-

placed, but rather that custody is vested in the child welfare agency. *See* K.H. v. Morgan, 914 F.2d 846, 853 (7th Cir. 1990).

82. 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

83. 649 F.2d 134 (2nd Cir. 1981), *cert. denied sub nom.*, Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

84. *See* Estelle v. Gamble, 429 U.S. 97, 105 (1976), *cert. denied*, 434 U.S. 974 (1977).

85. *Taylor*, 818 F.2d at 794; Doe v. New York City Dep't of Social Servs., 649 F.2d 141.

86. *Taylor*, 818 F.2d at 794.

difference" test. Here, once the constitutionally protected interest has been violated, official liability turns on whether the officers in question adhered to accepted professional standards and practices in making their decisions to place or maintain children in situations of known risk.[87]

Both the "deliberate indifference" and "departure from professional standards" tests are broad. Part of the Supreme Court's unfinished agenda in foster care custody rights will be to lend some particularity to those standards in the foster care context. Even in the limited adjudication on the question thus far, appellate courts have sought to furnish such guidance. In *Doe v. New York City Department of Social Services*, the Second Circuit was quick to recognize that the "deliberate indifference" test, as previously applied to "the supervision of wardens, police chiefs, and hospital administrators," involved different considerations when applied to foster care agencies' supervision of the families it licensed.[88] It found a firmer line of authority and greater ease of monitoring in the institutional setting than existed in foster home custody where only occasional supervisory visits could be made and less exercise of hierarchical authority was desirable.[89] This was so because good foster care attempts to approximate a normal family environment, where few intrusions and respect for foster family autonomy and integrity are deemed necessary for a successful placement.[90] These differences led the Second Circuit to conclude that "deliberate indifference ought not to be inferred from a failure to act as readily as might be done in the prison context, since in the foster care situation, there are obvious alternative explanations for a family being given the benefit of the doubt."[91]

Similar caution has been exercised by courts which have embraced the "professional judgment" standard. In *K.H. v. Morgan*,[92] the Seventh Circuit acknowledged a constitutionally protected right to safe foster care — what it called a "rudimentary duty of safekeeping."[93] The court took a restrictive view of agency and worker responsibility, building into the "professional judgement" test a defense for lack of

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87. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 323 (1982):

> [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id.

88. *New York City Dep't of Social Servs.*, 649 F.2d at 141-42.
89. *Id.* at 142.
90. *Id.*
91. *Id.*
92. 914 F.2d 846 (7th Cir. 1990).
93. *Id.* at 849.

resources so that no liability would attach, even for placements involving known risks of abuse, if the responsible agency and workers did not have resources to assure a proper placement.[94]

K.H. v. Morgan involved a young girl taken from her parents by the Juvenile Court of Cook County and subjected to nine foster placements in three and one half years, some which involved beatings and sexual assault. In its detailed exploration of the "professional judgment" test as applied to foster care cases, the court emphasized a narrow approach to agency and worker liability even in the face of known risks to the child. It stressed the law's antipathy to damage suits in these situations, the national crisis in securing adequate foster care facilities, and the minimal nature of the state's *parens patriae* obligations in caring for children removed from natural parents and placed under state custody.[95] Nevertheless, the opinion seemed to raise more questions than it answered. Would mild signals of danger of abuse followed by no investigation whatever produce the requisite failure to follow professional judgment? Where reports or a history of abuse by particular foster parents were unmistakable, would agency personnel really be protected in making or tolerating a "risky" placement on grounds that there were no other foster homes or institutional placements available?

All courts now seem to agree, following Supreme Court precedents in other areas,[96] that negligence or even gross negligence in placing or leaving foster children in harm's way is not enough to trigger liability. There must be some element of knowledge of potential danger or risk to the child's safety.[97] How case specific and how strong such knowledge must be under a given set of circumstances remains to be clarified.

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94. *Id.* at 867-68. This position was derived from the Supreme Court's guidance in *Youngberg*, in which the Court stated, "[i]n an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints in such a situation, good-faith immunity would bar liability." *Id.* at 867 n.18 (Coffey, J., concurring in part, dissenting in part) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

95. *Id.* at 853.

96. Daniels v. Williams, 474 U.S 327 (1986) (mere negligence of a state employee does not constitute deprivation under fourteenth amendment's due process clause); City of Canton v. Harris, 489 U.S. 378 (1989) (gross negligence rejected as standard for municipal official supervisory liability for failure to train).

97. *See, e.g., Morgan*, 914 F.2d at 852 (neither negligence nor gross negligence alone can support required elements of knowledge and deliberate action for rights violations); *New York City Dep't of Social Servs.*, 649 F.2d at 143 (gross negligence is not "deliberate indifference" but can create a presumption of the latter).

VI. LIABILITY BASED ON FEDERAL STATUTORY VIOLATIONS

There are two additional avenues which can be used to vindicate children's rights to safe foster care conditions in state operated systems. One avenue has been through civil rights suits under section 1983.[98] Plaintiffs may assert a section 1983 claim for a state actor's violation of federal statutory duties,[99] specifically those duties under the Adoption Assistance and Child Welfare Act of 1980.[100] Another possibility involves procedural due process claims based on a wrongful deprivation of rights and benefits applicable to foster care custody created under state law and regulation.[101]

It has not been uncommon for plaintiffs who allege the deprivation of constitutional rights to safe foster care to include alternate claims based on violations of the Adoption Assistance Act.[102] These contentions have been quite successful. Most circuits called upon to address the issue have found that the Act's mandates give rise to "enforceable rights, privileges and immunities" under section 1983 of the Civil Rights Act, and to an implied right of private action under the Adoption Assistance Act itself. The Act is the federal government's basic regulatory and funding legislation for adoption, foster care, and child neglect and abuse services provided by state and local governments. It originated as a section of the Aid to Families with Dependent Children program and was then converted, by virtue of the Adoption Assistance Act, into separate subtitles of the Social Security Code.

The Adoption Assistance Act provides for payment to states for foster care and adoption services on behalf of eligible children. In addition, it mandates the development of state plans as a condition of funding eligibility, and recites a number of service obligations (or, correlatively, service rights) which must be included and implemented in the state plans. Several of these entitlements have been explicitly held in federal court litigation to be enforceable under Section 1983 and through private suits under the Act.[103]

Thus, Adoption Assistance Act complaints have sought redress for

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98. 42 U.S.C. § 1983 (1979).

99. Section 1983 provides for liability to injured parties for deprivation of rights secured not only by the Constitution but also by federal laws.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1979).

100. Pub. L. No. 96-272, 99 Stat. 500 (1980) (codified, as amended, at 42 U.S.C. §§ 620-625, 670-679 (1988)).

101. *See* Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972).

102. The Adoption Assistance Act is now codified in Titles IV-B and IV-E of the Social Security Act. *See* 42 U.S.C. §§ 620-25 (1988); 42 U.S.C. §§ 670-79 (1988).

103. *See* cases cited *infra* notes 113-116.

violation of statutory mandates that agencies (i) "make reasonable efforts" to prevent the removal of children from their homes or to return recently removed children to their families; (ii) notify appropriate agencies when children are being mistreated in foster care placements; (iii) develop and review case plans to assure that proper services are provided to children in foster care; (iv) maintain standards for foster family homes and child care institutions which are in accord with recommended standards of national organizations, including those relating to admission policies, safety, sanitation, and protection of civil rights; (v) operate a case review system for each child receiving foster care supervision; and (vi) develop permanent plans for placement of neglected and dependent children. Some courts have upheld claims for both money damages and equitable relief,[104] although others, while not foreclosing injunctive relief, have read the act to preclude money damages.[105] The Supreme Court has not yet dealt with the section 1983 and implied cause of action remedies in the foster care context, but will inevitably be called upon to do so.

Some of the strictures of the Adoption Assistance Act go beyond the basic care and safety of foster children (the major focus of this article). Others relate quite directly to foster care safety, i.e., the obligation of the state to take action when it has reason to believe a home is "unsuitable . . . because of . . . neglect, abuse or exploitation."[106] Thus, in *L.J. v. Massinga*,[107] the Fourth Circuit affirmed a district court ruling that present and former foster children supervised by the Baltimore City Department of Social Services were entitled to injunctive relief and money damages to redress physical, sexual, and medical neglect[108] that had resulted from improper administration of the city's federally funded program activities. In *Lynch v. Dukakis*,[109] the First Circuit, in a class action on behalf of children under the jurisdiction of the Massachusetts foster family home care system, upheld private action rights and the issuance of preliminary injunctive relief to enforce the state's case plan and case review obligations under the Adoption Assistance Act, including a

104. L.J. v. Massinga, 838 F.2d 118 (4th Cir. 1988); Joseph A. v. New Mexico Dep't of Human Servs., 575 F. Supp. 346 (D.N.M. 1983).

105. Lesher v. Lavrich, 784 F.2d 193, 198 (6th Cir. 1986).

106. 42 U.S.C.A. § 671(a)(9) (West Supp. 1990).

107. *Massinga*, 838 F.2d at 124.

108. *Id.* at 118.

109. 719 F.2d 504 (1st Cir. 1983).

worker caseload limit.[110] Finally, in one of the most recent and detailed analyses of section 1983 and implied action rights in this area, the Seventh Circuit, in *Artist M. v. Johnson*,[111] determined that the Act's obligations (case plan development, notification of mistreatment, and "reasonable efforts" with respect to prevention of removal and reunification of foster children) were enforceable under section 1983 or under the Act itself.[112] The court undertook a careful analysis of the situation of the plaintiff class against current Supreme Court standards for section 1983 claims[113] and implied private actions[114] and, in both cases, the Adoption Assistance Act claims emerged as actionable.

In a few instances in which federal appellate courts have denied private relief under federal foster care legislative guaranties, the plaintiff groups were essentially asserting parental interests[115] or interests of parents and children who were no longer in foster custody, but rather were in natural or adoptive parental homes.[116]

However, two federal circuits have found a right of access to federal protection based on state foster care legislative schemes. In *Taylor v. Ledbetter*,[117] the court found sufficient protective responsibilities, based on a number of duties articulated in the Georgia child care statutory scheme, to give rise to procedural due process obligations of the state to follow such mandates. The court was thus able to support an independent ground of affirmative obligation distinct from the substantive due process contentions that it also upheld[118] and which the Supreme Court cited in the *DeShaney* footnote 9 speculation on "safe foster care" rights.

The Sixth Circuit took a comparable position in a more recent case, *Meador v. Cabinet for Human Resources*.[119] Here, in addition to its articulation of substantive due process rights to freedom from infliction of unnecessary harm while in foster care,[120] the court, citing

110. *Id.* at 508.

111. 917 F.2d 980 (7th Cir. 1990).

112. *Id.* at 988-89.

113. Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2524-25 (1990).

114. Cort v. Ash, 422 U.S. 66, 78 (1975).

115. Lesher v. Lavrich 784 F.2d 193, 197-98 (6th Cir. 1986) (affirming summary judgment against parents in a section 1983 suit in which the parents seek custody of their children. The court declined, however, to hold that the Adoption Assistance Act permits no private enforcement, especially in actions, unlike this one, to force state officials to revise procedures and comply with statutory obligations).

116. Griffith v. Johnston, 899 F.2d 1427 (5th Cir. 1990).

117. 818 F.2d 791 (11th Cir. 1987) (state statutory mandates for thorough investigation and evaluation of foster care homes, regular inspection of licensing agencies and foster homes, and regular home visits relied upon as basis for procedural due process claim to foster child protection).

118. *Id.* at 795.

119. 902 F.2d 474 (7th Cir. 1990).

120. *Id.* at 476.

Taylor, acknowledged that Kentucky had a legislative obligation to provide foster children with "a program of care, treatment and rehabilitation"[121] and to "be responsible for the operation, management and development of the existing state facilities for the custodial care and rehabilitation of children."[122] The court found this to support a procedural due process claim for proper discharge of such responsibilities on the part of Kentucky officials.[123] It should be stressed that in virtually all of the foregoing determinations, the courts were speaking of potential liability in summary dispositions and thus were without occasion to pass on questions such as the adequacy of evidentiary showings to establish statutory violations, the relationship of such violations to claimed harm, and compensable damages flowing from the defaults.

It is important that the Supreme Court validate these judgments as to statutory bases for assertion of protectable rights of foster children. Claims of this kind will no doubt arise with frequency in future litigation involving the nation's hard-pressed foster care apparatus. For example, despite what appears to be a clear weight of authority for section 1983 and implied action enforcement of the Adoption Assistance Act obligations, occasional hesitation on the part of the Supreme Court to approve broad interpretations of individual rights in areas of federally supported social service delivery needs to be clarified in the foster care arena.[124]

VII. CONCLUSIONS AND SOME REMAINING DILEMMAS

Despite Supreme Court silence on the specific issue, it seems fair to conclude that a constitutional right to "safe foster care" has arrived and is now operative in the United States. The right is grounded in fourteenth amendment substantive due process liberty interests and is claimable at least by children placed by official mandate in state foster care custody. Its scope encompasses protection from intentional infliction of injury and the provision of basic essentials including food, shelter, and medical care. These rights are not, as some

121. *Id.*
122. *Id.*
123. *Id.* at 476-77.
124. *See, e.g.*, Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981) (no implied private right of action under federal-state funding program for the developmentally disabled); Blum v. Yaretsky, 457 U.S. 991 (1982) (extensive federal regulation and monetary payments to nursing home operators do not make the latter's conduct actionable as "state action" under section 1983).

commentators have speculated, dependent on constitutional "cruel and unusual punishment" guarantees or the "special relationship" doctrine that has been recognized in some cases to establish affirmative duties to individuals who are not strictly in state custody.[125] It appears to be rooted in affirmative governmental obligations which arise when the state assumes custody of an individual (whether as detainee or ward) and thereby substantially forecloses that individual's opportunities and capacity for self-protection and maintenance (or access to other options or assistance to that end).

It now seems clear that state-controlled foster care placement constitutes "custody" — indeed, the kind of "custody" for whose safety and physical adequacy the state must stand responsible and as to which "more than negligent" withholding or denial can be a constitutionally actionable deprivation. This is so regardless of whether the care is supervised by governmental welfare offices or by private contractors retained to manage foster care programs and whether the care is provided in group homes by the state or in private dwellings by private citizens licensed and supervised to perform that function.

What remains to be resolved about this constitutional right is considerable. It represents a playing field fraught with uncertainty and potential legal conflict. First, we need to know, with more certainty, what kinds of conduct are violative of the right and what the standards for measuring such violations are. We need to know what obligations are imposed on line professionals who supervise foster families, and what obligations their supervisors and government units must discharge. We need to know, further, when and whether state actors (including agents who become state actors) can properly claim immunity from liability for violation of the right, and what kinds of voluntarily requested state foster service arrangements fall outside the ambit of the right. Finally, we should have some clarification of whether and when, outside of pure custodial relationships, state foreclosure of opportunity and freedom relative to foster parent and foster child issues can form the basis for deprivation of this constitutionally protected liberty interest of safe foster care.

Here, then, is a suggested course through the foregoing thicket. Answers are necessary since the inherent conflicts in state/natural parent/foster parent/foster child relationships should increase rather than diminish in a future marked by family disrepair, increasing incidence of child abuse, and growing numbers of children who must find their way to adulthood, at least for significant periods of time, without responsible parental care. The ultimate solutions will probably

125. *See* Donnella, *Safe Foster Care: A Constitutional Mandate*, 19 FAM. L.Q. 79 (1985); Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 677-83 (1990).

depend more on state legislative and welfare system initiatives, and recourse to improved legal remedies short of constitutional and federal civil rights claims,[126] than on section 1983 jurisprudence. However, the constitutional dimensions of the problem cannot be avoided.

The following, in the author's view, suggests the contours for application of a liberty interest in safe foster care that is defined soundly and is consistent with Supreme Court pronouncements in related areas of individual rights:

(i) *Applicable Standards.* The standards of "deliberate indifference" or "failure to exercise professional judgment" in the face of known deficiencies or risks will both work as tests for official liability where rights to protection and care have been violated. However, the Supreme Court appears to have cast the die in favor of a "professional judgment" test and that needs to be made clear. An advantage of the "professional judgment" yardstick is the existence of a multiplicity of state and federal legislative prescriptions with which to define and measure this standard.[127] On the other hand, professional guidelines and standards on reporting and investigational and dispositional decisionmaking in child protection cases are less than specific, not terribly uniform, and vary with the specific stages of intervention and official action involved.[128] Thus, assessing the tolerances of "professional judgment" in a specific situation may require extended factfinding and difficult calibration of general prescriptions as to factors to be considered and the strength of evidence needed to impart knowledge or suspicion of child abuse.

126. State negligence actions, the traditional remedy for injury and harm to abused foster children, are beset with difficult barriers, including sovereign immunity in many states, undue deference to agency judgment, difficulties of proving actionable negligence, the shifting of responsibility to judgment-proof foster parents, and foster parent enjoyment of parental immunity for negligent care. *See* Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 244-51 (1988). Comment, *Foster Child Abuse in Pennsylvania: Pursuing Actions Against the County Placement Agency*, 94 DICK. L. REV. 501, 504-08 (1990).

127. *See, e.g.*, the citation of statutory protective services obligations in Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990) and Taylor v. Ledbetter, 818 F.2d 791, 798-99 (11th Cir. 1987), to help define professional obligations of the defendant welfare agencies and workers as well as the foster services duties imposed by the Adoption Assistance and Child Welfare Act.

128. *See* Besharov, *Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decisionmaking*, 22 FAM. L.Q. 1, 9-13 (1988) (outlining different legal and professional standards to justify reporting of suspected abuse, substantiating complaints and pursuing involuntary intervention; the diversity of state and federal law on this subject; and the need for "specific operational definitions and decisionmaking criteria . . . for each stage of the child protective process").

(ii) *Conduct Violative of Standards.* Identification of actionable "professional judgment" failure is a necessity. It is suggested that failure to investigate claims of repeated harm, failure to take action and change an at-risk situation in the face of credible corroboration of claims of danger or harm, and continued utilization of foster parents with known propensities for harm-infliction or inadequate care, are all situations which, when tied to resulting injury, create a strong presumption of liability.

(iii) *Supervisory Liability.* In terms of supervisory liability, cases have hardly touched this subject in the foster care arena, but the hint of a duty to train and a duty to correct grossly inadequate resources already exists.[129] These duties are consistent with grounds of section 1983 liability involved in other public protection areas.[130] Surely, an agency leader or staff supervisor should be held accountable for the kind of direct knowledge of harm or danger that would render a line worker liable who, without significant professional justification, failed to initiate or attempt appropriate corrective action. However, agency policies which fail to require prompt and diligent action in life or health threatening situations, or in addressing training gaps on supervision of basic safety and care functions (especially when such responsibilities are defined or implied by state law), should also support municipal entity and managerial level responsibility for resulting harm.

(iv) *Official Immunity Problems.* Troublesome issues of immunity lie ahead in the enforcement of the "safe foster care" mandate. Federal courts, for example, have exhibited no consensus on whether temporary or emergency actions to take children away from parental custody are to be treated as subjects of qualified immunity[131] or absolute immunity.[132] It appears settled that formal child abuse or neglect complaints initiated by welfare agencies pursuant to their official mission and agency workers who appear as witnesses or prepare and present required reports in child dependency and abuse proceedings should be entitled to prosecutorial type immunity. Established precedent has made it clear that neither a crime needs to

129. K.H. v. Morgan, 914 F.2d 846, 854 (7th Cir. 1990) ("The officials responsible for the inadequacy of resources [for safe foster care placements] might be liable in damages").

130. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378 (1989) (validating claim of municipal liability for failure to provide necessary care while in police custody based on "grossly inadequate training" of shift commanders where lack of training policy was attributable to "deliberate indifference").

131. This is analogous to the position of policemen seeking arrest warrants for felony suspects. *See* Malley v. Briggs, 475 U.S. 335 (1986) (qualified immunity provides ample protection for police officer seeking arrest warrants with supporting affidavits).

132. The analogy here would be to prosecutorial proceedings. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor acting within scope of duties in pursuing criminal prosecution enjoys absolute immunity from civil suit for damages).

be involved nor must the initiator be a prosecutorial officer, narrowly defined, in such situations. However, given the protective biases of the "professional judgment" standard, the sphere of absolute immunity for welfare workers and their organizations should not be allowed to extend beyond these situations or otherwise stray from the general rule for executive officials that "qualified immunity represents the norm."[133]

(v) *Immunity for Post-Disposition Supervision.* A troublesome immunity issue derives from case law suggestions in one circuit that a state court proceeding and order granting foster care custody to a named foster parent cloaks subsequent casework supervision of that foster parent with absolute immunity.[134] Unforeseen post-adjudication misbehavior of a foster parent hardly seems sufficiently related or integral to initial judicial placement decisionmaking to warrant a guaranty of immunity for action or inaction in the face of such developments which threatens harm to foster children. Qualified immunity will remain available to protect essentially professional handling of post-disposition developments that affect a foster child's basic well being which were never presented to a state adjudicative body in prior removal and placement proceedings.

(vi) *Voluntary Custodial Placements.* With respect to voluntary foster care arrangements, it appears that the Supreme Court in *DeShaney* has staked its liberty interest desideratum on custody (or other affirmative action) which impairs the child's ability to protect or care for itself or obtain such help from parents or others. A "voluntarily" placed child within the state foster care system is as dependent on the adequacy of state care, discipline, and protection as the child committed pursuant to a formal court dispositional order. We know, moreover, that voluntary commitment can be the functional equivalent of a "plea bargain" negotiated to avoid the expense and trauma of a state court neglect or abuse determination. The norm for "voluntarily" committed children should thus call for the same measure of protection as that enjoyed by children placed in government foster care systems via contested court proceedings. There will no doubt be special fact patterns dictating a different result, but the weight of past federal court wisdom on this subject[135] hopefully will remain intact despite some recent suggestions to the contrary.[136]

133. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
134. *See* Babcock v. Tyler, 884 F.2d 497 (1989), *cert. denied*, 110 S. Ct. 1118 (1990).
135. *See supra* notes 36-38 and accompanying text.
136. *See supra* notes 39-40 and accompanying text.

(vii) *Private Causes of Action Under Federal Legislation.* A definitive pronouncement on section 1983 and private action enforcement of state foster care obligations under the Adoption Assistance and Child Welfare Act, as amended, should endorse the generally broad acceptance of such remedies to date. Recent decisions have scrutinized the issues with care and, it is believed, adhere faithfully to Supreme Court standards concerning when such enforcement is suitable and when it may be implied from legislative enactments.[137]

(viii) *Non-Custodial Protection.* Finally, while it appears clear that the *DeShaney* principles leave little room for a "special relationship" doctrine to trigger liberty interests outside of a custodial context, it would be unfortunate if the Supreme Court abandoned that notion entirely in foster care services. The guiding principle of *DeShaney* is that when the government, by its own action, places an individual at hazard and in a situation in which he or she is unable to protect himself or herself, affirmative duties of protection can arise. Federal courts have identified certain situations of this kind not involving government assumption of custody,[138] in which the *DeShaney* rationale seems to apply. Similar situations are not unimaginable in foster care administration, and should admit the possibility of due process protection.[139]

The agenda of constitutional protection issues for children in that peculiar form of protective custody and shelter known as foster care is a substantial one, and it demands Supreme Court clarification. Such assistance will undoubtedly be forthcoming. The Supreme Court, although at times deliberate in pace, has never shrunk from its responsibilities in the definition of children's rights. With a system under siege, the growing problems of disadvantaged children in our society, and large populations of our youth being less than optimally served by the nation's child welfare apparatus, it is hoped that

137. *See supra* notes 114-116 and accompanying text.

138. Wood v. Ostrander, 879 F.2d 583, 589 (9th Cir. 1989) (police indirectly placed standard car occupant in danger); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989) (municipality endangered municipal employee), *cert. denied*, 110 S. Ct. 1784 (1990). The Supreme Court itself acknowledged the possibility of an actionable "special relationship" obligation of protection or warning to endangered citizens by perpetrators not in state custody. *See generally* Martinez v. California, 444 U.S. 277, 285 (1980) (dictum in civil rights suit where victim's family sought damages for harm caused by released felon).

139. The "special relationship" doctrine has been given some post-*DeShaney* voice in the foster care areas. *See* Lipscomb v. Simmons, 884 F.2d 1242, 1246 (9th Cir. 1989) (in finding a substantive due process violation of family association rights in state denial of foster care support funds for child living with relatives in foster placement, the court stated "[w]hen an individual has a special relationship with the State . . . the state assumes an affirmative obligation to secure that individual's constitutional liberty").

such scrutiny will come sooner rather than later. The result cannot help but clear the air and clarify the duties of governmental service and justice systems in this important area.