

THE STATE'S DUTY TO CHILDREN IN FOSTER CARE—BEARING THE BURDEN OF PROTECTING CHILDREN

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I. INTRODUCTION

Each year, the child welfare system removes thousands of children from their homes and places them in foster care.¹ Of the nearly 500,000 children in the foster care system,² thousands suffer abuse or neglect in foster homes and receive inadequate medical or psychological treatment or other services while in the system.³

1. SUSAN GLUCK MEZBY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 21 (2000).

2. See *id.* (citing data compiled by the American Public Welfare Association indicating that 483,000 children were in substitute care—typically foster homes—in the United States in 1995).

3. See *infra* notes 20-25 and accompanying text.

The standard of care owed by the State to children in foster care is unclear and has not been addressed by the Supreme Court to date. Currently, jurisdictions apply either the standard of "deliberate indifference" or that of "professional judgment" to claims of State liability brought by or on behalf of foster children.⁴ The Supreme Court promulgated these standards in the context of determining the State's duty to prison inmates and institutionalized adults with mental retardation.⁵ Because these standards were articulated in contexts that are arguably vastly different than that of foster care, the use of these standards is questionable in cases of abused and neglected children in foster care.⁶ In a

4. See discussion *infra* Part V.C.

5. See discussion *infra* Part III. This Note uses the term "mentally retarded" because that is the term used by the Court in *Youngberg v. Romeo* to describe the condition of persons to whom the articulated standard applies. See *Youngberg v. Romeo*, 457 U.S. 307, 309 (1982) ("Respondent . . . is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I.Q. of 8 to 10. He cannot talk and lacks the most basic self-care skills."). According to the Arc of the United States, an organization that "works to include all children and adults with cognitive, intellectual, and developmental disabilities in every community," the term "mental retardation" refers to the substantial limitation of present functioning. See The Arc Home Page, at <http://www.thearc.org> (last visited Apr. 2, 2003). Specifically, mental retardation is "characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Mental Retardation v. Developmental Disabilities: Should the Arc Change Its Focus from Serving People With Mental Retardation to Serving People with All Developmental Disabilities?*, at <http://www.thearc.org/ga/mrdd.html> (last visited Apr. 2, 2003). Although this Note uses the term "mental retardation" consistent with the Court's opinion in *Youngberg*, the author recognizes that there is a stigma associated with the term. See *id.* (discussing the appropriateness of the use of the term "mental retardation").

6. While this Note exclusively addresses the State's duty to children in foster care, that is, children in the State's physical custody, it should be noted that the implementation and enforcement of such a duty might be unworkable considering the Supreme Court's holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, the Court decided that the State has no duty to protect children who are not in its physical custody. *Id.* at 201. The recognition of a duty in only the former instance could create a disincentive for the State to remove children from homes in which they are abused or neglected in the first place. It should also be said that many of the arguments supporting the State's duty toward children in foster care could be extended to the creation of a duty to children not in the State's physical custody. Perhaps with the recognition and development of the State's duty to children in foster care, which the lower federal courts have firmly established, see, e.g., *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992), that duty will be gradually extended to the right of all children to state protection from abuse, and *DeShaney* will be reconsidered. As one author commented: "If courts can see fit to establish liability for the failure of a child protection agency to adequately protect a child in the foster home environment, certainly the same should be true for any dangerous home environment." Margaret J. Ryan, Comment, *The Status of Civil Liability When Child Protection Workers Fail to Do Their Jobs*, 14 S. ILL. U. L.J. 573, 588 (1990).

system riddled with institutional and professional abuses in which thousands of children suffer from physical abuse and neglect, courts must work to find a suitable standard with which to judge the performance of the child welfare system, for they will be faced with this question more frequently in the years to come.⁷

This Note will discuss the background of the child welfare system and examine the problems of abuse and neglect suffered by children in state foster care programs. The Note will then go on to explain the constitutional right to safety, to which persons involuntarily held in State custody are entitled. To contrast this right of persons involuntarily held in State custody, this Note will also discuss the Supreme Court's rejection of such a right in cases in which children are not in the custody of the State.⁸ Next, the Note will discuss the right to safety of foster children as it currently exists, including the "deliberate indifference" and the "professional judgment" standards of care as they are applied to children in foster care in federal civil rights claims and tort claims brought under state common law. Finally, this Note will explain why the standards of "deliberate indifference" and "professional judgment" are inappropriate standards of care as applied to foster children and will argue that the articulation of a new standard is imperative.

II. THE FOSTER CARE SYSTEM⁹

Upon receiving a report of suspected child abuse, a social service agency initiates an investigation to determine whether the alleged abuse actually occurred.¹⁰ If a finding of abuse is made, and depending upon the severity of the abuse, the agency may obtain a court order removing the abused child from his or her home.¹¹ When it is determined that a child cannot remain in the home, the child is placed in the custody of the State, or of the social service agency, and into the foster care system.¹²

7. See *infra* note 33 and accompanying text.

8. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 201 (holding that "the State had no constitutional duty to protect" the child while in his father's custody).

9. This Note, when referring to "foster care," refers exclusively to foster family care, rather than to institutional foster care. Foster family care can be distinguished from institutional foster care by the former's goal to provide temporary child care in a family setting. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 200 n.6 (1988).

10. Michele Miller, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, 11 HASTINGS WOMEN'S L.J. 243, 246-47 (2000).

11. *Id.* at 247.

12. Mushlin, *supra* note 9, at 200 n.6.

The foster care system is organized under state law.¹³ State foster care statutes allow for the placement of abandoned, abused, or neglected children¹⁴ in the homes of adults selected and licensed by the social service agency to serve as foster parents.¹⁵ The eligibility of adults to serve as foster parents is typically limited by certain statutory criteria, such as satisfaction of a background check or meeting a minimum age requirement.¹⁶ Individuals who are selected to provide foster care often enter into a contract with the State.¹⁷ Under the contract, the foster parents receive compensation to provide care for the child under the direction and supervision of the agency.¹⁸

The purpose of the foster care system is to provide "a temporary, safe haven for children whose parents are unable to care for them."¹⁹ The idealistic "safe haven" envisioned for the rescued child, however, is often not the reality experienced by foster children. Many foster children suffer abuse and neglect in foster homes, in some cases much more severe than any they may have experienced in their own homes.²⁰ Studies conducted in 1986 and 1990 by the National Foster Care Education Project found rates of abuse and neglect of children in foster family care, at the highest levels, to be ten times higher than the

13. Naeli Jeon, *Foster Parenting and Adoption*, 1 GEO. J. GENDER & L., Spring 2000, at 401.

14. *Id.* at 402.

15. Mushlin, *supra* note 9, at 200 n.6 (citing ROBERT HOROWITZ & HOWARD DAVIDSON, LEGAL RIGHTS OF CHILDREN 361-65 (1984)).

16. Jeon, *supra* note 13, at 402.

17. Mushlin, *supra* note 9, at 200 n.6 (citing HOROWITZ & DAVIDSON, *supra* note 15, at 358).

18. *Id.*

19. *Id.* at 204 n.17 (citing CHILD WELFARE LEAGUE OF AM., STANDARDS FOR FOSTER FAMILY SERVS. 8 (1975)).

20. Miller, *supra* note 10, at 248 (citing Mushlin, *supra* note 9, at 204; Andy Newman, *Mother and Daughter Sentenced in Death of a Young Foster Child*, N.Y. TIMES, Mar. 10, 1999, at B7); *see also* Mushlin, *supra* note 9, at 205 nn.21 (citing Vera Institute of Justice, Foster Home Child Protection 8-9 (Feb. 1981) (unpublished report) (reporting foster parents' use of belts, switches, electric cords, dog leashes, bread boards, and broomsticks to inflict severe beatings upon foster children)), 22 (citing three cases in which children were killed in foster homes), 23 (citing B. Warren & G. Bardwell, G.L. v. Zurnwalt, Case Record Monitoring, Apr. 11, 1983 through June 30, 1984: Final Report 52-54 (Apr. 24, 1985) (unpublished report) (reporting various unusual or bizarre punishments inflicted on foster children in foster homes, including children forced to stand in the center of the room for up to thirteen and one-half hours at a time, made to use a tin can for a toilet, locked in a basement, and toilet-trained by being forced to stand with their pants over their heads)), 24 (citing D. Caplovitz & L. Genevie, Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by the Division of Family Services 64 (July 21, 1982) (unpublished report) (reporting incident of neglect where foster children received only two meals per day and were bitten by bedbugs); Vera Institute of Justice, *supra*, at 13-14 (reporting incident of neglect where foster children smelled of "urine and vomit" and were "continually hungry"))).

rates for children in the general population.²¹ Children in foster family care are also more vulnerable to sexual abuse, in part due to the lack of permanent kinship bonds in foster care and to the fact that many foster children were sexually abused in the past.²²

In addition to suffering abuse and neglect at the hands of foster families, many foster children have been subjected to abuse at the hands of the system—what has been dubbed “program abuse.”²³ Program abuse occurs when the foster care system fails to provide children with safe, stable home environments or with adequate services to meet the child’s medical, psychological, and emotional needs.²⁴ The widespread occurrence of program abuse has been well documented, from children who are moved through one foster home after another, to those who receive substandard medical care—or no medical care at all.²⁵

The reasons for these abuses are many. The child welfare system is severely underfunded, poorly organized, and continually fails to comply with a system of professional standards.²⁶ Child welfare agencies are understaffed, and caseworkers receive low pay and are overburdened by substantial caseloads.²⁷ Foster parents often receive inadequate training and lack the support system necessary to properly care for foster children, who are likely to experience unique developmental, behavioral, and psychological problems due to previous abuse.²⁸ State agencies fail to carefully screen and license foster parents, and to sufficiently supervise them when children are placed in their homes.²⁹ The

21. Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1999).

22. Mushlin, *supra* note 9, at 205 n.25 (citing P. RYAN, ANALYZING ABUSE IN FAMILY FOSTER CARE: FINAL REPORT 59, 60, 105 (1987)).

23. *Id.* at 207.

24. *Id.*

25. *Id.* at 208. Stays in four or more foster homes are common for a child in the foster care system. *Id.* Furthermore, a study of the medical status of foster children showed that many preschool-age foster children in the study had not received vaccinations for childhood diseases, that fourteen percent of the foster children had not received a medical examination upon admission to foster care, and that only one-fourth of those who suffered from identifiable emotional or developmental problems had been treated. *Id.* at 208-09.

26. *Id.* at 209-10, 213.

27. *Id.* at 212-13.

28. *Id.* at 210 n.55, 213; see also Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 11-12 (1995).

29. Mushlin, *supra* note 9, at 209-10.

inadequacies of this system lie in stark contrast to the burgeoning population of children in need.³⁰

Problems in the child welfare system have been recognized since its inception, yet the system retains a "remarkable immunity to reform."³¹ Despite congressional attempts at reform, the abuse and neglect of children in foster homes continues.³² Increasingly, foster children are turning to the courts for protection.³³

III. CONSTITUTIONAL RIGHT TO SAFETY OF PERSONS INVOLUNTARILY HELD IN STATE CUSTODY

In the late 1960s, courts began to consistently recognize a constitutional right to safety of prison inmates.³⁴ The Supreme Court acknowledged this right in *Estelle v. Gamble*,³⁵ by holding that the State owes a duty to those whom it has placed in its custody.³⁶ Specifically, the Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the State from being

30. See MEZEY, *supra* note 1, at 21 (citing data compiled by the American Public Welfare Association indicating that 483,000 children were in substitute care—typically foster homes—in the United States in 1995, an increase in the substitute care population of 91.6% since 1982).

31. Mushlin, *supra* note 9, at 212. *But see* Levesque, *supra* note 28, at 3 n.9 (emphasizing that despite its failures, the successes of the foster care system should not be ignored). Research demonstrates that the majority of children who are placed in permanent settings quickly after their entrance into the foster care system adjust relatively well, and suffer no long-term effects that differentiate them from non-foster care children. *Id.* (citing Douglas J. Besharov, *The Misuse of Foster Care: When the Desire to Help Outruns the Ability to Improve Parental Functioning*, 20 FAM. L.Q. 213, 218 (1986)).

32. See Anita Weinberg & Linda Katz, *Law and Social Work in Partnership for Permanency: The Adoption and Safe Families Act and the Role of Concurrent Planning*, CHILD. LEGAL RTS. J. 1, 2-4 (1998) (explaining that Congress enacted the Adoption and Safe Families Act of 1997 to remedy problems ignored and even created by its previous effort at reforming the child welfare system, the Adoption Assistance and Child Welfare Act of 1980).

33. See MEZEY, *supra* note 1, at ix (stating that children's advocates began looking to the federal courts to vindicate children's rights and to effectuate reform in the child welfare system in the 1970s, that by 1995 child welfare cases—mostly class action suits—were pending or had been recently completed against more than thirty-one state and municipal child welfare agencies in the nation, and that by 1996, as a result of reform litigation, agencies in nearly half the states were operating under some form of court supervision). Historically, the federal courts have been the chosen fora for those seeking systemic reform. *Id.* at 1-2. Suits brought on behalf of disadvantaged groups with little political power have benefited from representation by attorneys experienced in large-scale litigation efforts and the advantages of the organizational resources and the expertise that accrues to repeat litigants. *Id.* at 2.

34. Mushlin, *supra* note 9, at 219.

35. *Estelle v. Gamble*, 429 U.S. 97 (1976).

36. *Id.* at 103.

deliberately indifferent to the health or safety of a specific prisoner.³⁷ The "deliberate indifference" standard forbids the intentional interference with or denial of medical treatment.³⁸

From the deliberate indifference standard applied to prisoners, the right to safety of persons in state custody expanded to include persons in other state institutional settings.³⁹ In *Youngberg v. Romeo*,⁴⁰ the Supreme Court held that a right to "reasonable safety" existed under the Due Process Clause of the Fourteenth Amendment for a man with mental retardation involuntarily placed in a state-run mental institution.⁴¹ The *Youngberg* Court stated, "When a person is institutionalized—and wholly dependent on the State . . . [there is] a duty to provide certain services,"⁴² and went on to articulate the "professional judgment" standard of care.⁴³ According to this standard, the level of care required by the State is determined by balancing the liberty interests of the institutionalized person against the interests of the State.⁴⁴ Furthermore, a presumption of correctness must be afforded to a decision made by an appropriate professional—"a person competent, whether by education, training or experience, to make the particular decision at issue."⁴⁵ The only determination left to the court is whether professional judgment was in fact exercised,⁴⁶ and liability may only be imposed for a "substantial departure from accepted professional judgment, practice, or standards."⁴⁷

In a separate context of the right to safety issue, the Supreme Court held in *Martinez v. California*⁴⁸ that a parolee's murder of a fifteen-year-old girl five months after being paroled was "too remote a consequence of the parole officers' action to hold them responsible."⁴⁹ Because the Court affirmed the lower court's dismissal of the claim on the ground that the death of the victim could not be attributed to State action, the Court did not answer the question of whether the

37. *Id.* at 104.

38. *Id.*

39. Mushlin, *supra* note 9, at 221.

40. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

41. *Id.* at 324-25.

42. *Id.* at 317.

43. *Id.* at 322-23.

44. *Id.* at 321. For purposes of this balancing test in the foster care context, relevant State interests may include the availability of adequate funding and staff, as well as qualified foster parents. *Winston v. Children & Youth Servs. of Del. County*, 948 F.2d 1380, 1391-92 (3d Cir. 1991); *K.H. ex rel Murphy v. Morgan*, 914 F.2d 846, 853-54 (7th Cir. 1990).

45. *Youngberg v. Romeo*, 457 U.S. at 323 n.30, 324.

46. *Id.* at 321.

47. *Id.* at 323.

48. *Martinez v. California*, 444 U.S. 277 (1980).

49. *Id.* at 285.

Due Process Clause of the Fourteenth Amendment imposed a duty upon the State to protect the victim in the circumstances of that case.⁵⁰ Subsequent cases, however, have interpreted the Court's decision in *Martinez* to impose a constitutional duty to protect an individual from harm where there is a special relationship between the State and that individual.⁵¹ This duty is created when the State becomes aware of the potential danger to the individual and expresses its willingness to offer protection.⁵²

By the time the Supreme Court decided *Youngberg*, the constitutional right to safety for persons in state custody, such as prisoners and adults with mental retardation in state institutions,⁵³ and for persons in special relationships with the State, had been well established.⁵⁴ By the mid-1980s, the circuit courts had extended this right to safety to children in state custody.⁵⁵

IV. *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*:⁵⁶ THE STATE HAS NO DUTY TO PROTECT CHILDREN IN THE CUSTODY OF THEIR PARENTS

When the circuits began to recognize a child's right to safety while in state custody, controversy arose over the parameters of state liability when some courts proceeded to identify a special relationship "between the state and children who were *not* in state custody at the time of their injuries or deaths."⁵⁷ The Supreme Court granted certiorari in *DeShaney v. Winnebago County Department of Social Services* in order to resolve this conflict and settle the role of custody in determining the limits of the State's constitutional obligation to protect a child from abuse.⁵⁸

In *DeShaney*, a four-year-old boy, in his father's custody since the age of one, was rendered "permanently brain-damaged and profoundly retarded" as a result of a series of severe beatings inflicted on him by his father.⁵⁹ Joshua had been hospitalized several times during the preceding fifteen months for injuries

50. MEZEY, *supra* note 1, at 68.

51. *Id.*

52. *Id.*

53. Mushlin, *supra* note 9, at 227.

54. See MEZEY, *supra* note 1, at 68 (referring to cases in which lower federal courts applied the special relationship standard to claims of state liability).

55. See *id.* at 72 (stating that the circuits largely agreed that the states may be held liable under the Constitution for harm inflicted on children in state care).

56. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

57. MEZEY, *supra* note 1, at 72 (emphasis added).

58. *Id.* at 78 (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 189).

59. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 193.

suffered at the hands of his father.⁶⁰ During that time, the hospital reported its suspicions of abuse to the Department of Social Services (DSS) each time Joshua was hospitalized.⁶¹ The DSS investigated the reports on many occasions and sent a caseworker to Joshua's home for monthly visits, wherein his injuries were dutifully recorded.⁶² The DSS even placed Joshua in the hospital's temporary custody for a brief period of time in January 1983.⁶³ Despite all this, Joshua remained in his father's home for thirteen additional months, until suffering the injuries that would require his institutionalization for the remainder of his life.⁶⁴

The Supreme Court, while acknowledging the "undeniably tragic" facts of the case,⁶⁵ held that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative duty on the State to act to preserve the due process interests of individuals from harm.⁶⁶ After disposing of the due process claim, the Court proceeded to address the argument that the State had a duty to protect Joshua from the harm inflicted by his father due to a special relationship between Joshua and the State that arose when the State became aware of his father's abuse and stated its intention to protect him.⁶⁷ Because Joshua was in the custody of his father at the time he was injured, rather than in the custody of the State, the Court explained, the State's affirmative duty to protect him did not arise.⁶⁸ Only when the State acts to restrain an individual's freedom through such means as incarceration or institutionalization is there a "deprivation of liberty" triggering the protections of the Due Process Clause.⁶⁹ The Court emphasized that Joshua's father was responsible for hurting him, and that the State had played no role in creating the danger to Joshua.⁷⁰

In its decision, the Court cited *Estelle*⁷¹ and *Youngberg*⁷² to support its proposition that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to

60. *Id.* at 192-93.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 191.

66. *Id.* at 195-96.

67. *Id.* at 192.

68. *Id.* at 201-02.

69. *Id.* at 200.

70. *Id.* at 201-202.

71. *See supra* text accompanying notes 35-38.

72. *See supra* text accompanying notes 40-47.

assume some responsibility for his safety and general well-being.⁷³ The Court further suggested that Joshua's case might have been different had he been in foster care when he received his injuries,⁷⁴ but it did not state definitively that foster care is state custody,⁷⁵ and declined to comment on the validity of applying *Youngberg* and *Estelle* to cases of children in foster care.⁷⁶ Thus, the Court seemed to at least tacitly approve the circuit courts' growing trend of applying a right to safety to children in foster care under the standards articulated in *Youngberg* and *Estelle*.⁷⁷

V. FOSTER CHILDREN'S RIGHT TO SAFETY

A. *State As Parens Patriae*

Children have traditionally been deemed as not having the capacity to care for themselves.⁷⁸ Due to their incapacity, they are subject to parental control, or if that fails, to the control of the State through its role as *parens patriae*.⁷⁹ *Parens patriae* is a legal doctrine describing the State's authority over and responsibility for the care and protection of children.⁸⁰ The State's *parens patriae* interest is that of "preserving and promoting the welfare of the child."⁸¹ This role, which has historically been recognized by the State,⁸² places the State in a unique position with respect to the welfare of children.

B. *Foster Care Is State Custody*

The State has responded to its obligations for the welfare of children by creating a system in which foster care is the preferred setting for children whose

73. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 199-200; *see also* Brandon P. Kearse, *Abuse Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 396 (1996).

74. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 201 n.9; *see also* MEZEY, *supra* note 1, at 79-80.

75. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 201 n.9; *see also* Kearse, *supra* note 73, at 389-90.

76. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 201 n.9; *see also* MEZEY, *supra* note 1, at 79.

77. MEZEY, *supra* note 1, at 80.

78. *In re Smith*, 753 N.E.2d 930, 933 (Ohio Ct. App. 2001).

79. *Id.* at 934.

80. Ernestine Steward Gray, *On Behalf of Our Children: The Adoption and Safe Families Act of 1997: Confronting an American Tragedy*, 46 LA. B.J. 476, 477 n.1 (1999).

81. *Stankosky v. Kramer*, 455 U.S. 745, 766 (1982) (adding that the State also has a fiscal and administrative interest in reducing the cost and burden of parental rights termination proceedings).

82. Gray, *supra* note 80, at 477 (stating that up until twenty years ago, the foster care system remained the exclusive domain of state child welfare agencies).

parents are unable to care for them.⁸³ According to the standards set forth in *DeShaney*, foster care is a form of state custody because children are involuntarily removed from their homes by an affirmative act of the State and confined to a state system of foster care.⁸⁴ The lower federal courts that have decided the issue have all held that involuntary foster care placement constitutes state custody.⁸⁵ The Supreme Court even conceded that foster care is "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative [State] duty to protect,"⁸⁶ further supporting the circuit courts' consensus that foster care is state custody. Therefore, because foster care is state custody, children within the foster care system are entitled to a constitutionally protected right to safety.⁸⁷

C. Substantive Due Process Claims—the Conflicting Standards of "Deliberate Indifference" and "Professional Judgment"

Most cases seeking state liability for harm suffered by children in foster care involve claims brought under 42 U.S.C. § 1983.⁸⁸ This section provides for liability of persons acting under color of state law for the deprivation of any right under the Constitution.⁸⁹ One commentator noted that "[t]he last few decades

83. *Id.*; see also discussion *supra* Part II (examining the foster care system).

84. See Kears, *supra* note 73, at 389-91 (according to *DeShaney*, the State has a corresponding duty to assume some responsibility for a child's safety and general well-being).

85. *Id.* at 390; see, e.g., *Walton v. Alexander*, 20 F.3d 1350 (5th Cir. 1994); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993). Some jurisdictions have distinguished cases in which parents consent to the release of custody of their children as *voluntary* foster care placement, and as such, not subject to the right to safety. Kears, *supra* note 73, at 390 n.18. Because children are dependent on the adults around them for care and support, and because they often have little, if any, meaningful control over their living situations, the inappropriateness of the voluntary/involuntary distinction is seemingly obvious, but will not be explored here.

86. Kears, *supra* note 73, at 392 (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989)).

87. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. at 199-200 (holding that the Constitution imposes a duty on the State to protect persons who have been involuntarily placed in its custody).

88. 42 U.S.C. § 1983 (2000). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . 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.

Id.

89. See *id.*; see, e.g., *Jordan v. Jackson*, 15 F.3d 333, 337 (4th Cir. 1994) (claiming violation of procedural due process under § 1983 for delays allowed before judicial review of emergency removal of a child); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d at 289 (claiming violation of substantive due process under § 1983 for deprivation of life as a result of indifference

have seen the emergence of 42 U.S.C. § 1983 as 'the primary vehicle for litigation requiring state officials to obey the commands of federal constitutional or statutory law.'"⁹⁰ In these § 1983 claims, foster children most often complain that the State has deprived them of their Fourteenth Amendment substantive due process rights.⁹¹ Generally, the Supreme Court views the Constitution, and specifically the Fourteenth Amendment, as granting negative rather than positive rights—meaning that the rights require the government to refrain from certain conduct, but do not impose affirmative duties upon it.⁹² Furthermore, the Court has expressed its "steadfast refusal to allow [§] 1983 to turn the Fourteenth Amendment into a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'"⁹³ It is within this formidable framework that courts apply the "deliberate indifference" or "professional judgment" standards.⁹⁴

When the Supreme Court expressed its tacit approval of application of the right to safety to children in foster care, it left to conjecture the question of whether either the "deliberate indifference" standard articulated in *Estelle*,⁹⁵ or the "professional judgment" standard articulated in *Youngberg*,⁹⁶ is the correct

to medical needs of foster child); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 885 (10th Cir. 1992) (claiming violation of substantive due process under § 1983 for failure to protect child from bodily harm when placed by state in private crisis shelter group home); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 847-48 (7th Cir. 1990) (claiming violation of substantive due process under § 1983 for neglect while in foster care); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990) (claiming violation of procedural and substantive due process under § 1983 for sexual abuse of children while under the state's care); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987) (claiming violation of substantive due process under § 1983 for severe and permanent injuries suffered by child while in foster care); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 136-37 (2d Cir. 1981) (claiming violation of substantive due process under § 1983 for injuries suffered through rape, beatings, and other forms of child abuse while in foster care).

90. Bryan R. Berry, *Crime of Dispassion: Eighth Circuit (Mis)Applies DeShaney in Failing to Hold State Employees Accountable to the Children They Protect*, 66 MO. L. REV. 881, 885 (2001) (quoting WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1149 (10th ed. 1997)).

91. See, e.g., *Winston v. Children & Youth Servs. of Del. County*, 948 F.2d 1380, 1381-82 (3d Cir. 1991) (claiming violation of substantive due process as a result of visitation restrictions placed on parents of child under state care); see also *supra* note 85 (providing additional examples of cases involving claims of substantive due process rights violations).

92. Berry, *supra* note 90, at 887.

93. *Id.* at 886 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

94. See *infra* notes 95-115 and accompanying text.

95. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that facts or omissions that offend "evolving standard of decency" in violation of the Eighth Amendment constitute deliberate indifference).

96. See *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (explaining that when a decision is made by a professional, it is presumptively valid and liability may only be imposed

standard to be applied to foster children.⁹⁷ While the circuits have had little difficulty in deciding that foster care is state custody and that children in foster care have a right to safety, they have struggled to determine the suitable standard to apply to this right.⁹⁸ This has resulted in a circuit split,⁹⁹ in which some circuits apply the "deliberate indifference" standard to the right to safety of children in foster care,¹⁰⁰ and others apply the "professional judgment" standard.¹⁰¹

"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").

97. Kearsse, *supra* note 73, at 391.

98. *Id.* at 392.

99. *See id.* at 392 n.26.

100. Deliberate indifference is the standard of liability applied in the Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. *See Roska v. Peterson*, 304 F.3d 982, 994 (10th Cir. 2002) (applying the deliberate indifference standard in a case involving a child in foster care—following an earlier Tenth Circuit decision involving the standard of care owed to a prisoner, despite the fact that the Tenth Circuit had applied the professional judgment standard in a subsequent case involving abuse of a child in foster care); *Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000) (determining deliberate indifference to be the correct standard by which to judge actions of a state agency and caseworker in the case of a child abused while in foster care, although the Third Circuit previously adopted the professional judgment standard in a case involving a challenge to the state agency's visitation policy by parents of a child in state custody); *Kodman v. County of Merced*, 95 F.3d 1157 (9th Cir. 1996) (using the deliberate indifference standard in a case involving a parental challenge of the State's removal of a child from the home); *Jordan v. Jackson*, 15 F.3d 333, 341 (4th Cir. 1994) (using the deliberate indifference standard in a case involving a challenge by parents of the State's removal of their child from their home); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (using the deliberate indifference standard in a case claiming liability of a state agency and officials for a child's death as a result of not receiving medical attention for asthma while in temporary foster care); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (using the deliberate indifference standard in a case involving children sexually abused while in foster care); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987) (using the deliberate indifference standard in a case involving a child left comatose after abuse by foster mother); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 137 (2d Cir. 1981) (using the deliberate indifference standard in a case involving physical and sexual abuse of a child in foster care).

101. Professional judgment is the standard of liability applied in the Seventh Circuit. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) (using professional judgment standard in a case involving abuse of a child in two different foster homes). *But see Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002) (purporting to apply the *K.H. ex rel. Murphy v. Morgan* professional judgment standard, but then likening the applied standard to that of the Eighth Circuit, which applies the deliberate indifference standard, and citing other cases that apply the deliberate indifference standard). *See also Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (applying the professional judgment standard in a case involving a child sexually assaulted by another minor in an unsupervised area of a foster care group home); *Winston v. Children & Youth Servs. of Del. County*, 948 F.2d 1380, 1390 (3d Cir. 1991) (applying the professional judgment standard in a case of a challenge by natural parents to the policy granting visitation rights to their children in foster care); *cf. Wilder v. New York City*, 568 F. Supp. 1132,

In *Doe v. New York City Department of Social Services*,¹⁰² the Second Circuit applied the deliberate indifference standard to a case concerning the physical and sexual abuse of a child by her foster father.¹⁰³ The court held that state agency officials with legal custody of the child must have displayed deliberate indifference in their supervision of the foster home to be held liable for the child's abuse and resulting emotional injury.¹⁰⁴ The court explained that the standard of deliberate indifference requires more than ordinary negligence, but that gross negligence or repeated acts of negligence could be evidence of deliberate indifference.¹⁰⁵ Actual knowledge of a specific harm is not required; according to the court, agency officials must have exhibited deliberate indifference to a known injury or risk or have engaged in a pattern of omissions exhibiting a deliberate inattention to specific duties imposed on them to protect the child from abuse.¹⁰⁶

In *K.H. ex rel. Murphy v. Morgan*,¹⁰⁷ the Seventh Circuit applied the professional judgment standard to determine the liability of the State in a case involving a child who had suffered physical and sexual abuse while in two of a series of several foster homes through which she had been "shuttled."¹⁰⁸ There, the court found that the child had a right not to be placed with a foster parent "who is know[n] or suspect[ed to be] likely to abuse or neglect the foster child."¹⁰⁹ However, the court went on to state, "Only if without justification based either on financial constraints or on considerations of professional judgment [child welfare workers and their supervisors] place the child in hands they *know* to be dangerous or otherwise unfit do they expose themselves to liability in damages."¹¹⁰

1137 (E.D.N.Y. 1983) (adopting the professional judgment standard in a case involving a child who, as a ward of the State, had been placed in both foster care and an institution for the emotionally and mentally disabled). The fact pattern in *Wilder v. New York City* confuses the issue because it involves a foster child who can also be characterized as an emotionally/mentally disabled person in state custody, and because the Second Circuit had adopted the deliberate indifference standard prior to this case. Kears, *supra* note 73, at 392-93 n.26. It should be noted that although some cases cited in this footnote and the previous footnote do not involve claims of state liability for abuse suffered in foster family care, they are nonetheless relevant to this Note because they represent the initial adoption of either the deliberate indifference or the professional judgment standard by their respective circuits in cases dealing with liability of state child welfare agencies and employees.

102. *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 137 (2d Cir. 1981).

103. *Id.* at 141.

104. *Id.*

105. *Id.* at 142-43.

106. *Id.* at 145.

107. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990).

108. *Id.* at 849-53.

109. *Id.* at 853.

110. *Id.* at 854 (emphasis added).

These particular cases illustrate the ambiguities of the "deliberate indifference" and the "professional judgment" standards as expressed by the circuit courts. Not only have the circuits articulated these standards with vague and varying language, uncertainty also exists in determining what, if any, meaningful distinction can be made between the two standards.¹¹¹ Nonetheless, the choice of the standard used to determine the right to safety of children in foster care should be of paramount importance for two reasons. First, the Supreme Court's expression of two different standards suggests that there are indeed distinctions to be made, and second, the particular standard used determines the nature and scope of the right.¹¹² For instance, the deliberate indifference standard is extremely difficult to meet because it requires proof of intent.¹¹³ In contrast, the professional judgment standard is less stringent from the plaintiff foster child's perspective, yet is difficult to meet due to the deference it grants state decisions.¹¹⁴ Both standards, however, place a substantial burden on the plaintiff foster child, which prompts concern that it may be futile to establish the right to safety of children in foster care if the standards for state liability are impossible for plaintiffs to meet.¹¹⁵

D. *State Common Law Tort Claims*

Under the common law, a bystander generally has no duty to rescue a person in distress.¹¹⁶ If, however, the bystander takes affirmative steps to rescue that person, the bystander has assumed at least a limited duty for the person's safety.¹¹⁷ In other words, "the absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued."¹¹⁸ Thus, although the State

111. See *Kearse*, *supra* note 73, at 401-04 (noting that the circuit courts have blurred the two standards by failing to define the standard of conduct required for each). Some circuit courts began applying one or the other of these standards to determine State liability to foster children without explaining the reasoning for their choices or even acknowledging that more than one standard exists in cases of persons involuntarily held in state custody. *Id.*

112. *Id.* at 392-93 (noting the difference between the Court's analysis of Eighth Amendment issues in *Estelle v. Gamble*, 429 U.S. 97 (1976), and the Fourteenth Amendment issues in *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

113. *Id.* at 395; see also *supra* notes 34-38 and accompanying text (defining the deliberate indifference standard).

114. See *supra* notes 39-45 and accompanying text for a definition of the professional judgment standard. If the State is determined to have made a "professional judgment," there is no further inquiry into the decision. *Youngberg v. Romeo*, 457 U.S. at 323.

115. *Kearse*, *supra* note 73, at 393.

116. See, e.g., *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) (stating there is no duty to rescue a person in distress, but once a person is rescued there is no assumption of responsibility for future welfare, nor does the duty entitle the rescuer to harm the person rescued).

117. *Id.*

118. *Id.*

has no duty to protect abused or neglected children from the danger posed by their parents,¹¹⁹ the State arguably assumes at least a limited responsibility for the safety of the children that it removes from the custody of their parents.¹²⁰

Common law negligence claims may prove to be more useful to children harmed in foster care, considering the difficulties plaintiffs have encountered in asserting their claims under 42 U.S.C. § 1983¹²¹ due to the fact that ordinary negligence is not sufficient to establish liability under § 1983.¹²² The problems with common law tort claims involve overcoming the defense of governmental immunity,¹²³ and the ability to successfully impute tort liability from the foster parent to the state agency.¹²⁴

In *Mark G. v. Sabol*,¹²⁵ various claims were brought on behalf of a class of children who had suffered abuse in foster care.¹²⁶ The New York Court of Appeals dismissed the plaintiffs' common law tort claims.¹²⁷ The court found that the plaintiffs failed to sufficiently identify any common law duties owed by the State to the plaintiffs, as distinguished from the alleged breach of statutory responsibilities to furnish protective and preventive services.¹²⁸ This decision provides hope for other plaintiffs because the court stated that it was not ruling

119. See *supra* Part IV (discussing *DeShaney v. Winnebago Department of Social Services*, 489 U.S. 189 (1989), which established that the State has no duty to protect children in the custody of their parents).

120. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d at 849.

121. See *Kearse, supra* note 73, at 393 (discussing the problems of proof for plaintiffs under the "professional judgment" and "deliberate indifference" standards).

122. See *K.H. ex rel. Murphy v. Morgan*, 914 F.2d at 852 ("[M]erely negligent . . . misconduct by state officers is not actionable under section 1983.") (citing *Daniels v. Williams*, 474 U.S. 327 (1986)).

123. See, e.g., *id.* at 850 (discussing application of governmental immunity); *Kara B. ex rel. Albert v. Dane County*, 542 N.W.2d 777, 792 (Wis. Ct. App. 1995) (holding that a state agency and its agents administering state foster care programs were entitled to discretionary act immunity from state law claims brought on behalf of a child who suffered sexual abuse in foster care).

124. See, e.g., *Mitzner ex rel. Bishop v. State*, 891 P.2d 435, 440 (Kan. 1995) (holding that foster parents were independent contractors rather than employees of state agency, and thus the agency was not vicariously liable for the negligence of the foster parents); *Stanley ex rel. Stanley v. State Indus., Inc.*, 630 A.2d 1188, 1191 (N.J. Super. Ct. Law Div. 1993) (holding that State lacked sufficient control over foster parents to render them agents, servants, or employees of the state agency, and thus the State could not be held liable for their negligence). *But see* *Hunte v. Blumenthal*, 680 A.2d 1231, 1243 (Conn. 1996) (holding that due to the State's right to control the work of foster parents, they were state employees for purposes of indemnification by the State for tort liability).

125. *Mark G. v. Sabol*, 717 N.E.2d 1067 (N.Y. 1999).

126. *Id.* at 1075.

127. *Id.*

128. *Id.*

out the possibility of such common law claims as a matter of law, and granted the plaintiffs leave to replead.¹²⁹

VI. AN ACCEPTABLE STANDARD FOR FOSTER CHILDREN'S RIGHT TO SAFETY

A. *Inadequacies of the Current Standards of Deliberate Indifference and Professional Judgment*

As discussed above, the deliberate indifference and professional judgment standards articulated and applied by the circuit courts are ambiguous and inconsistent—sometimes conflicting and sometimes overlapping—and thus extremely cumbersome to apply in a way that is meaningful to either lower courts or state agencies.¹³⁰ Moreover, the insurmountable burdens placed upon plaintiffs by these standards serve to deny any real remedy to children abused in foster care.¹³¹ In addition to these problems is the fact that these standards were constructed in two separate contexts, each of which is distinct from that of children in foster care.¹³² “Deliberate indifference” was articulated as the standard of care owed by the State to prisoners, while “professional judgment” was articulated as the standard of care owed by the State to adults with mental retardation involuntarily held in state-run institutions.¹³³

The deliberate indifference standard is not an appropriate standard with which to determine state liability for the harm suffered by foster children. This standard was developed in response to prisoners' claims of cruel and unusual punishment under the Eighth Amendment.¹³⁴ While prison inmates and foster children may be similarly situated with respect to being involuntarily held in state custody, the similarities end there. Children in foster care are not criminal convicts, nor are they incarcerated—they have been placed in state custody for care and protection.¹³⁵ Furthermore, foster children, unlike prison inmates, are not in a position in which restriction or deprivation of their liberties or privileges

129. *Id.*; accord *Beltran v. State, Dep't of Soc. & Health Servs.*, 989 P.2d 604, 606 (Wash. Ct. App. 1999) (holding that because the facts involved in the negligence claim against the foster parent provided the underlying basis for a claim of failure to supervise against the state agency, and because the trial court's grant of summary judgment in favor of the foster parent was not appealed, there was no sufficient basis for finding legal causation in the claim against the state agency). The plaintiffs in *Mark G. v. Sabol* have refiled their claims. Beth A. Diebel, *Mark G. v. Sabol: Substantive Due Process Rights, A Possibility for Foster Care Children in New York*, 64 ALB. L. REV. 823, 824 (2000).

130. See discussion *supra* Part V.C.

131. See discussion *supra* Part V.C.

132. See discussion *supra* Part III.

133. See discussion *supra* Part III.

134. Kears, *supra* note 73, at 399-400.

135. Diebel, *supra* note 129, at 845; Kears, *supra* note 73, at 399-400.

is justified.¹³⁶ Thus, the deliberate indifference standard, which determines constitutionality of state action in a punishment context, is unsuitable as applied to children in foster care.¹³⁷

The professional judgment standard is likewise unsuitable in the context of children in foster care. This standard was developed to determine the level of care the State is required to give institutionalized adults with mental retardation.¹³⁸ While the situations of children in foster care more closely resemble those of institutionalized adults with mental retardation than they do prisoners' situations (thus making the professional judgment standard more desirable in this context than the deliberate indifference standard),¹³⁹ the differences are substantial enough to render the professional judgment standard inappropriate as applied to foster children. The most obvious and important difference is that those with mental retardation, to whom the professional judgment standard applies, are adults—both legally and developmentally.¹⁴⁰ Children in foster care, on the other hand, are neither legally nor developmentally adults.¹⁴¹

The differences in legal and developmental status between institutionalized adults with mental retardation and children in foster care have important implications. For example, because persons with mental retardation who have reached the age of majority are adults in the eyes of the law, they can only be involuntarily committed to an institution following a court proceeding.¹⁴² Therefore, an adult with mental retardation is at least assumed to have some autonomy and competence under the law.¹⁴³ Children, however, may be voluntarily placed in state custody by their parents, or removed from their homes by the State.¹⁴⁴ Either way, foster children in state custody have no autonomy and no authority by which to make decisions concerning their living situations.

Furthermore, besides their lack of autonomy, children have particular developmental needs that are not shared by adults with mental retardation.¹⁴⁵ Children have strong needs for emotional security, consistency, interaction, and

136. Diebel, *supra* note 129, at 845; Kears, *supra* note 73, at 399-400.

137. See Kears, *supra* note 73, at 399 (suggesting that the deliberate indifference standard is unconstitutional as applied to foster children).

138. See *supra* notes 39-47 and accompanying text.

139. Diebel, *supra* note 129, at 845; Kears, *supra* note 73, at 405.

140. Kears, *supra* note 73, at 405-06.

141. *Id.*

142. *Id.* at 405.

143. See *id.* (noting that parent must acquire power of attorney prior to institutionalizing a developmentally disabled adult).

144. *Id.*

145. *Id.* at 406.

stimulation as their personalities, minds, and bodies mature and develop.¹⁴⁶ Particularly in their early, formative years, children are at a critical stage in their development—the environmental stimuli to which they are continuously exposed (or not exposed) are likely to affect them for the remainder of their lives.¹⁴⁷ When children have also suffered previous abuse, it is even more imperative to provide them with the necessary emotional and psychological support and assistance to ensure their future health and survival.¹⁴⁸ This illustration of the developmental needs of children makes clear their vast differences from adults, and thus, the unsuitability of the professional judgment standard as applied to children in foster care.

While the Supreme Court seemed to invite a comparison between foster care and incarceration or institutionalization in *DeShaney*,¹⁴⁹ this comparison should go no further than acknowledging that people in each situation are held in state custody, and are therefore owed a certain standard of care by the State.¹⁵⁰ By articulating two distinct standards, one to be applied in Eighth Amendment challenges of cruel and unusual punishment, and one to be applied in determining the level of care required to be given by the State to institutionalized adults with mental retardation, the Court made clear its intention to distinguish between

146. See T. BERRY BRAZELTON & STANLEY I. GREENSPAN, *THE IRREDUCIBLE NEEDS OF CHILDREN 1-4* (2000) (identifying and addressing the irreducible needs of children and infants as those needs relate to: ongoing nurturing relationships; physical protection, safety, and regulation; experiences tailored to individual differences; developmentally appropriate experiences; limit-setting, structure, and expectations; and stable, supportive communities, and cultural continuity).

147. See, e.g., LAURA E. BERK, *AWAKENING CHILDREN'S MINDS: HOW PARENTS & TEACHERS CAN MAKE A DIFFERENCE 23-25* (2001) (explaining that a child's environment has a "crucial, profound impact" on the rapid brain development that occurs before the age of six); BRAZELTON & GREENSPAN, *supra* note 146, at x (stating that "[e]arly childhood is both the most critical and the most vulnerable time in any child's development," and that while early developmental deprivations can be remedied, the ability to successfully do so decreases with each passing year of a child's life).

148. Cf. DOUGLAS DAVIES, *CHILD DEVELOPMENT: A PRACTITIONER'S GUIDE 60-63* (1999) (discussing the adverse effects of child abuse trauma on development).

149. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989) (explaining that the Court would not express a view on this analogy because it was not before the Court in the present case).

150. *Id.*; see also discussion *supra* Part III (discussing the constitutional right to safety of persons involuntarily held in state custody).

those two contexts.¹⁵¹ It seems to follow that a new and distinct standard must be applied to state action in cases involving children in foster care.¹⁵²

Children occupy a unique position that demands the articulation of a higher standard of care than those currently applied.¹⁵³ Because of the ambiguities of the deliberate indifference and professional judgment standards, because they were articulated for application in two distinct contexts, and because the State's duty to children in foster care is separate and distinct from that owed to prisoners or institutionalized adults with mental retardation, a new standard must be articulated and applied to foster children.¹⁵⁴

B. *Articulation of a New Standard*

The application of a more stringent standard against the State in actions brought by children harmed in foster care would have many implications for state agencies, officials, and workers. For one, a clearly articulated standard applied universally would give administrators the clarity and consistency needed to comply with the standard and to ensure proper care and supervision of children in foster care.¹⁵⁵ However, a more rigorous standard of care would also place severe strains on an already financially strapped child welfare system. This problem can only be addressed by state legislatures; child welfare can and must be made a budgetary priority.

Furthermore, the potential application of a more stringent standard for state liability in cases of abused foster children raises concern that increasing the risk of liability may create a disincentive for state agencies to remove children from their homes in the first place. This concern is raised because removal would produce a situation in which a child might suffer harm while living in foster care, thereby creating a potential risk of state liability. However, states have made a strong commitment during the past forty years to address concerns of child abuse and neglect, and to provide abused and neglected children with safer living

151. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."); *see also* Kears, *supra* note 73, at 399-400 (explaining the Court's deliberate adoption of a different standard in the mental institution context than the one used in the prison context).

152. Kears, *supra* note 73, at 410.

153. *See id.* at 408-09 (stating that the mind and personality of a child develop at a rate foreign to that of an adult, and that a standard of liability must take into account a child's need for security).

154. *Id.* at 409-10.

155. *Id.* at 410 (noting that "both the deliberate indifference and professional judgment standards are unworkably ambiguous as they are currently being applied").

arrangements.¹⁵⁶ While reform is desperately needed, it is doubtful that the system will be abandoned altogether. Additionally, if such a standard motivates caseworkers to evaluate the need for removal of a child more carefully, then another benefit will result.

Despite the fears and potential problems that a stricter standard raises, this discussion and others like it demonstrate that action must be taken to improve the system. It is likely that additional litigation, encouraged by a stricter standard, would spur reform of the system where legislative and administrative efforts have failed.¹⁵⁷ In *Mark G. v. Sabol*, the court stated:

It is a harsh fact that despite the lofty moral and practical reasons to protect and nurture our children, resort to the sanction of monetary damages is probably the most effective means of both attempting to restore to these children some measure of what has been taken from them and forcing those entrusted with safeguarding children's lives to fulfill their duties.¹⁵⁸

In order for a new standard and resulting litigation to be effective in prompting reform, the defense of governmental immunity must be relaxed or eliminated. Public official immunity has been justified to allow officials and employees to accomplish their governmental duties without fearing that they will incur personal liability in attempting to perform those duties.¹⁵⁹ However, where the governmental entity indemnifies its officers and employees for damages incurred in defending suits involving their performance of official duties, as is increasingly common, this justification becomes less credible.¹⁶⁰ In addition to allowing plaintiffs to recover damages, the relaxing of public official immunity and the indemnification of public employees for liability incurred ideally holds the State accountable for failures in the child welfare system.¹⁶¹ Ultimately, however, indemnification of public employees depends upon the willingness of the public agency to provide such indemnification, and of the legislature to authorize and appropriate funds for the agency to do so.¹⁶²

Articulation and application of a new standard of care to foster children will require enhanced funding for state welfare programs, and the easing of

156. See MEZEY, *supra* note 1, at 22-23 (discussing the nation's initial recognition of the problem of child abuse and states' subsequent legislation addressing the issue).

157. Diebel, *supra* note 129, at 824-25; see also Levesque, *supra* note 28, at 20-22 (explaining the role courts can play in defining the rights of children in foster care and reforming the system in an area in which legislative efforts have proven unsuccessful).

158. *Mark G. v. Sabol*, 677 N.Y.S.2d 292, 309 (App. Div. 1998).

159. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 850 (7th Cir. 1990).

160. *Id.*

161. *Id.*

162. *Id.*

governmental immunity. Increased litigation and resulting court supervision of state welfare programs may also be required to spur the reform needed in the child welfare system. For any improvements to be accomplished, however, legislatures and the general public must strengthen their commitment to the safety and welfare of children.

VII. CONCLUSION

As the population of children in foster care continues to grow, so will the number of children who suffer abuse and neglect at the hands of their foster parents.¹⁶³ Because legislative efforts to reform the child welfare system have been largely ineffective, foster children are increasingly turning to the courts, seeking to hold the State and state agencies that administer foster care programs accountable.¹⁶⁴ While the right to safety of children in foster care has been firmly established,¹⁶⁵ courts have failed to reach agreement as to the appropriate standard of care to apply to § 1983 cases, in which foster children seek compensation for violation of their civil rights by state agencies and their employees.¹⁶⁶ Currently, courts apply either the deliberate indifference standard or the professional judgment standard, which the Supreme Court promulgated to measure the duty owed by the State to prisoners and institutionalized adults with mental retardation, respectively.¹⁶⁷ Because the situation of foster children is vastly different from that of either prisoners or institutionalized adults with mental retardation, neither of these standards is sufficient to address the needs of children in foster care.¹⁶⁸ A new, more stringent standard must be articulated and applied to cases of children abused and neglected in foster care. Furthermore, governmental immunity must be relaxed and courts must be willing to impute liability for the abuse and neglect of foster children to the State in order to make available to plaintiff foster children a meaningful tort remedy.¹⁶⁹ Increased litigation and court supervision of state foster care programs will help spur desperately needed reform of the child welfare system, but legislatures and the

163. See *supra* notes 20-25 and accompanying text (discussing abuse and neglect suffered by children in foster care); see also *supra* note 30 (indicating a recent substantial increase in the number of children in substitute care).

164. See *supra* notes 31-33 and accompanying text (discussing failed attempts at legislative reform of the child welfare system).

165. Kears, *supra* note 73, at 392.

166. See *supra* Part V.C (discussing § 1983 claims and the circuit court split over the standard of care to be applied).

167. See *supra* Parts III, V.C (discussing the deliberate indifference and professional judgment standards, and their application to claims brought by children abused in foster care).

168. Kears, *supra* note 73, at 408.

169. See *supra* notes 123-24, 159-60 and accompanying text (noting the problems that governmental immunity and vicarious liability pose for plaintiff foster children).

public in general must reaffirm their commitment to providing the funding, effort, and oversight required to ensure that every child in state custody enjoys a safe, happy, and healthy childhood.

*Laura A. Harper**

* B.A., University of Iowa, 1998; J.D. Candidate, Drake University Law School, 2003.

