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PROTECTING THOSE WHO CANNOT PROTECT THEMSELVES: STATE LIABILITY FOR VIOLATION OF FOSTER CHILDREN'S RIGHT TO SAFETY

*Christine M. Dine**

I. INTRODUCTION

Four-year-old foster child, John Smith, described as a "bright and fun-loving child," was killed by his foster parents after months of abuse.¹ Although social workers visited the home twenty times in the six months preceding and saw a "catalogue of wounds," including burns on his face and a cut on his penis, they did nothing to protect John.² Instead they accepted the foster parents' assertions that the wounds were all self-inflicted.³ John died from "severe head injuries."⁴ Furthermore, an autopsy showed *fifty-four* "separate external injuries, including bruising to the face, head, arms, legs and back, as well as four human bite marks."⁵ John's foster parents were sentenced to prison for eight years for child cruelty.⁶ Neither foster parent was charged with murder or manslaughter because investigators were unable to determine who struck the fatal blow.⁷

John is not alone. Another child in foster care was physically assaulted, and the state knew of the assault and did nothing.⁸ A short time later, in the same home, the foster father sexually abused the child.⁹ A little boy placed in a foster home had a bedwetting problem.¹⁰ Although the foster mother asked the state for help, the state did nothing, and one night the situation got so bad that the foster mother forced the child to drink his own urine.¹¹ Another fos-

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1. Geoff Maynard, *Jailed, Foster Parents Who Killed Boy*, DAILY EXPRESS, Oct. 23, 2001, available at 2001 WL 29598476.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. 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 (1988).

9. *Id.*

10. *Id.*

11. *Id.*

ter mother whipped a four-year-old girl and forced her to stand with her hands over her head for thirty minutes as a punishment for being dirty.¹² A caseworker knew the child had been beaten and reported the observation to her superiors, however the child was returned to the home.¹³

To stop these atrocities from perpetuating, children need to be able to vindicate their rights that are violated. Allowing them to do so would influence the state to increase efforts to provide a safe environment for the children because the state, through the child welfare agency, removes the children from their homes and places them in foster care. In order to prevail in an action against the state agency for violation of the constitutional right to safety, the child is faced with several burdens. One burden is that the child must live within a circuit allowing a cause of action by a foster child against the state for violation of his or her constitutional right to safety. In fact, one author refers to foster children as the "most powerless political group in this country."¹⁴ No single uniform standard resolves the issue of a foster child's constitutional right to safety, and, to date, the Supreme Court has not addressed the issue.

First this paper briefly reviews the known rates of abuse of children in foster care. Next, the development of the Constitutional right to safety is reviewed. Third, this paper reviews the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*¹⁵ and its effect on the issue, followed by a review of conflicting decisions by Circuit courts in recognizing a constitutional right to safety and a cause of action under 42 U.S.C. § 1983 for violation of that right. Fourth, different standards used by the circuits that recognize a constitutional cause of action are presented. Next, the need for the Supreme Court to address and clarify the constitutional issue is discussed. A proposition is asserted that there should be a rebuttable presumption of state agency liability for violation of the Fourteenth Amendment to the United States Constitution substantive due process right to safety when a foster child sustains injuries as a result of abuse by his or her foster parents. Specifically discussed are the distinction between voluntary and involuntary placement, a cause of action under 42 U.S.C. § 1983 for violation of the constitutional right to safety, the issue of foster parents as state actors, whether foster care constitutes state custody, and the standard to be used in determining if a violation of the foster child's constitutional right to safety occurred. Finally the paper closes with a challenge to the Supreme Court to take the responsibility and initiative to protect foster children from the perpetuation of abuse by establishing a rebuttable presumption that the

12. *Id.*

13. *Id.*

14. Cristina Chi-Young Chou, *Special Project: Renewing the Good Intention of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 687 (1993).

15. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

state did not exercise professional judgment when the foster child's right to safety was violated while in a foster home.

II. THE STATE OF ABUSE OF CHILDREN IN FOSTER CARE

Children in foster care are left in extremely vulnerable positions.¹⁶ They are under the control of and often subject to abuse by their foster parents.¹⁷ Usually the state agency removed the children from the custody of their parents due to abuse or neglect.¹⁸ The rationale behind removing children from their homes is that such a move is necessary to protect the children.¹⁹ The state receives authority to remove children from their abusive or neglecting homes under the doctrine of *parens patriae* and doing so serves the societal interest of protecting children.²⁰ Given that the state exercises its authority to establish a child welfare system and removes children from their homes, it follows that the state should assume the responsibility of ensuring that the child welfare system is competently administered.²¹ Placement in an abusive foster home may subject children to abuse similar to that for which they were originally removed; this risk is clearly counter-productive to the goal of protecting children.²²

The number of children at risk for abuse due to their placement in the foster care system is alarming. In March 1999, 547,000 children were reported to be in foster care, representing a thirty-five percent increase from 1990.²³ The rates of abuse and neglect of children in foster care is unknown, but "the problem is more widespread than is currently acknowledged."²⁴ In New York City a study reported that children in foster care were one and one-half times more likely to suffer abuse and neglect than children in the general population.²⁵ A 1986 national survey of foster family abuse and neglect exposed rates of abuse of foster children that were up to ten times that of children in the general population.²⁶ After accounting for unreported or

16. Mushlin, *supra* note 8, at 214.

17. *Id.*

18. Brendan P. Kears, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 385 (1996).

19. *Id.* at 407.

20. Kristen L. Davenport, *Due Process—Claims of Abused Children Against State Protective Agencies—The State's Responsibility After DeShaney v. Winnebago County Department of Social Services*, 19 FLA. ST. U. L. REV. 243, 246-47 (1991).

21. *Id.* at 247.

22. Kears, *supra* note 18, at 385.

23. CHILDREN'S DEFENSE FUND, CHILD ABUSE AND NEGLECT, FOSTER CARE, AND ADOPTION: CHILD ABUSE AND NEGLECT FACT SHEET at http://www.childrensdefense.org/ss_child_abuse.htm (last visited Feb. 11, 2002) (citing CHILDREN'S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT, CURRENT ESTIMATES AS OF JANUARY 2000 (2000)).

24. Mushlin, *supra* note 8, at 205.

25. *Id.* at 206.

26. *Id.*

uninvestigated instances of foster care abuse and neglect, one study concluded that “forty-three percent of children studied had been placed in an unsuitable foster home, and that fifty-seven percent . . . were at serious risk of harm while in foster care.”²⁷ A Baltimore study of foster care abuse based on social services’ own records revealed that out of 149 cases, forty-two children (twenty-eight percent) had been abused while in foster care.²⁸

III. HISTORY OF THE ISSUE

The issue of state liability for violation of foster children’s right to safety is not new. The litigation dates as far back as 1981, when the Second Circuit issued a decision in *Doe v. New York City Dep’t of Social Services*.²⁹ Since then, the Supreme Court issued the decision in *DeShaney v. Winnebago County Dep’t of Social Services*,³⁰ but did not resolve the issue. Conflict has developed between the circuits over the issue of liability and in those circuits that have recognized liability, the courts have applied conflicting standards to determine liability.

A. Right To Safety

The Due Process Clause of the Fourteenth Amendment to the Constitution asserts that no state shall “deprive any person of life, liberty, or property, without due process of law. . . .”³¹ Among other things, the Due Process Clause protects an individual’s right to be free from unjustified intrusions on personal security.³² Encompassed in this protection is the right to be free from bodily restraint and punishment.³³ Although the language of the Due Process clause prohibits state action infringing upon rights, the Supreme Court has held that, in some circumstances, it imposes an affirmative duty on the state to protect rights.³⁴

27. *Id.* at 207.

28. BRENDA SCOTT, *OUT OF CONTROL: WHO’S WATCHING OUR CHILD PROTECTION AGENCIES* 112 (1994).

29. *Doe v. New York City Dep’t of Social Services*, 649 F.2d 134, 145 (2d Cir. 1981) (holding that a foster child may have a § 1983 cause of action against the state for violation of the right to safety when the state’s conduct amounted to deliberate indifference to abuse by the foster parent).

30. *DeShaney v. Winnebago County Dep’t of Social Services*, 489 U.S. 189, 198 (1989) (finding no constitutional cause of action by a child against the state for violation of the constitutional right to safety when that child is in the custody of the natural parent who caused the death or injury).

31. Specifically the text reads: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. XIV, § 1.

32. Chou, *supra* note 14, at 705.

33. *Id.*

34. *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Youngberg v. Romeo*, 429 U.S. 307 (1982)).

Legal scholars acknowledged the right to safety by as early as the seventeenth century.³⁵ Just recently, the right to safety belonging to institutionalized persons has been recognized as an enforceable constitutional right.³⁶ The enforceability of the right to safety emerged in the courts in the context of a prison setting.³⁷ While at least one court believed that the government had an affirmative duty to protect inmates from assault or injury, the “hands-off doctrine” barred enforcement of the right to safety.³⁸ Under the judicially created hands-off doctrine, federal courts were prohibited from reviewing prison matters.³⁹ However, in response to the Supreme Court’s receptivity to civil rights cases in the late 1960s and early 1970s, courts began to step away from the prohibition of judicial review of institutional conditions.⁴⁰ The Supreme Court overruled the hands-off doctrine in 1974.⁴¹ Following the repudiation of that doctrine, lower courts established an inmate’s right to safety in prison, finding that the right protects inmates from abuse by guards and from conditions where inmates may be abused by other inmates.⁴² In addition to recognizing a constitutional right to safety on the part of prison inmates,⁴³ the Court has also held that residents of state mental institutions possess the same constitutional right.⁴⁴ Specifically, in *Youngberg*, the Court held that the “state owes an ‘unquestioned duty’ to provide reasonable safety for all residents of a state institution for the mentally retarded.”⁴⁵

Although the Supreme Court has recognized the right to safety only in the context of prisons and mental institutions, lower courts have extended the principle to a variety of other situations.⁴⁶ One example is *White v. Rochford*.⁴⁷ In that case three young children were in a car driven by an uncle of two of the children when the police stopped the car and arrested the uncle

35. Mushlin, *supra* note 8, at 218 (citing T. HOBBS, *LEVIATHAN* (1651), 4 Co. Rep. 1 (K.B. 1608), and 1 W. BLACKSTONE, *COMMENTARIES* 129 (1780)).

36. Mushlin, *supra* note 8, at 219 (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), and *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973)).

37. Mushlin, *supra* note 8, at 219.

38. *Id.* (citing *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944)).

39. Mushlin, *supra* note 8, at 219 (citing *Ex parte Pickens*, 101 F. Supp. 285, 287, 290 (D. Alaska 1951) and *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105 (7th Cir. 1953)).

40. Mushlin, *supra* note 8, at 219 (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), and *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973)).

41. Mushlin, *supra* note 8, at 220 (citing *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1973)).

42. Mushlin, *supra* note 8, at 220 (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982), and *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977)).

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

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

45. Mushlin, *supra* note 8, at 217-18.

46. *Id.* at 226.

47. 592 F.2d 381 (7th Cir. 1979).

for drag racing.⁴⁸ Disregarding the uncle's pleas that the children be taken to the police station or a phone booth, the police left the children alone in the car on the side of a busy, limited-access highway.⁴⁹ The children were forced to cross eight lanes of traffic and walk along the freeway at night to call their mother.⁵⁰ The mother, having no vehicle available to look for and pick up the children, called the police who again refused to help.⁵¹ The Seventh Circuit found that leaving the children in such a position of danger was a violation of the children's right to safety.⁵² However the Supreme Court has not addressed the issue of a child's right to safety in foster care.

B. *DeShaney v. Winnebago County Department of Social Services*⁵³

In 1989, the United States Supreme Court issued the ruling of *DeShaney v. Winnebago County Department of Social Services*,⁵⁴ holding that the state had no constitutional duty to protect a child from abuse by his father, even if the state had received reports of possible abuse and had subsequently investigated.⁵⁵ In *DeShaney*, the Department of Social Services received allegations of abuse of plaintiff Joshua DeShaney by his father beginning when the child was approximately two years old.⁵⁶ For the next two years the Department of Social Services investigated and substantiated the allegations, going so far as to remove Joshua from his father's home for a short time.⁵⁷ Although there was substantial evidence of the abuse continuing after Joshua was returned to his father's home, the Department of Social Services took no action other than monthly visits to the home.⁵⁸ When Joshua was four, his father beat him severely, causing substantial brain damage.⁵⁹ As a result, Joshua is expected to remain in an institution for the profoundly retarded for the remainder of his life.⁶⁰

Joshua and his mother brought an action against the Department of Social Services under 42 U.S.C. § 1983, alleging the Department's failure to act deprived Joshua of liberty, in violation of the Due Process Clause of the Fourteenth Amendment.⁶¹ The Supreme Court found no violation, reasoning that Joshua was in his father's custody, his father inflicted the abuse and the

48. *Id.* at 382.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 383-86.

53. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

54. *Id.*

55. *Id.* at 191.

56. *Id.* at 192.

57. *Id.* at 192-93.

58. *Id.*

59. *Id.* at 193.

60. *Id.*

61. *Id.*

father's acts did not constitute state action.⁶² Accordingly, the Court found that the state had in no way limited Joshua's ability to act on his own behalf, and only such an affirmative limitation would trigger the protection of the Due Process Clause.⁶³ The opinion did not state whether foster care would constitute such a limitation. However, the Court addressed the issue in a footnote:

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. Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.⁶⁴

This comment by the Court has spurred a great deal of legal debate over the issue of state liability under the Due Process Clause of the Constitution for failure to protect foster children from abuse by foster parents.

C. Conflict of Circuits

The decisions as to this issue have varied between circuits based on differing rationales. The Second, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits recognize a constitutional right to safe foster care placement and allow a cause of action against the state.⁶⁵ Specifically, the Sixth Circuit held that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."⁶⁶ The Seventh Circuit clarifies the existence of a constitutional "prima facie right not to be placed with a foster parent who the state's caseworkers and supervisors *know or suspect* is likely to abuse or neglect the foster child."⁶⁷ The Tenth Circuit held that foster children in the state's legal custody placed in a foster home or institution were victims of violence under state control, and found a

62. *Id.* at 201.

63. *Id.* at 200.

64. *Id.* at 201, n.9 (citations omitted). The court cites cases from two circuits finding that the state may be held liable for failure to protect children: *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782, and *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). *DeShaney*, 489 U.S. at 201, n.9.

65. *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981); *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d 289 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Services*, 959 F.2d 883 (10th Cir. 1992); and *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

66. *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990), *quoted in* *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994).

67. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990) (emphasis added).

sufficient special relationship that may confer state liability.⁶⁸ Furthermore, the Eighth Circuit found that the state had a duty to provide for the safety of a child in a foster home.⁶⁹

Conversely, the First, Fourth, and Ninth Circuits addressed the issue differently. In *Milburn v. Anne Arundel County Dep't of Social Services*, the Fourth Circuit held that children voluntarily placed in state custody do not have a constitutional cause of action against the state for violation of a right to safety because the state had not affirmatively exercised power to restrain the child's liberty.⁷⁰ The court also found that the foster parents were not considered state actors.⁷¹ Furthermore, in 1997, the Fourth Circuit clarified that the *Milburn* holding, finding no constitutional cause of action, was not limited to voluntary placement.⁷² The Ninth Circuit addressed the issue in *Babcock v. Tyler*, finding that state workers, including the child welfare agency, are entitled to absolute immunity from liability for placement in an abusive foster home.⁷³

Among decisions recognizing a cause of action for violation of the constitutional right to safety emerge two different standards courts use to determine liability: deliberate indifference and professional judgment. The Second and Eleventh Circuit adopted the deliberate indifference standard applied by the Supreme Court in *Estelle v. Gamble*.⁷⁴ To find deliberate indifference, the action that is being challenged should "offend 'evolving standards of decency'" and should be "repugnant to the conscience of mankind."⁷⁵ In *Doe v. New York City Dep't of Social Services*, the Second Circuit found the custodial situation of children in foster care sufficiently similar to that of the prisoners in *Estelle*.⁷⁶ The Court held the inaction of the state to abuse it knew of, or should have known of, which reaches the level of deliberate indifference, similarly gives rise to a cause of action under § 1983.⁷⁷ The Eleventh Circuit analogized the situation of children in foster care to the

68. *T.M. v. Carson*, 93 F. Supp. 2d 1179, 1184 (D. Wyo. 2000) (citing *Yvonne L. v. New Mexico Dep't of Human Services*, 959 F.2d 883, 893 (10th Cir. 1992)).

69. Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 *LOY. L.A. L. REV.* 435, 440 (1994) citing *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d at 293 (8th Cir. 1993).

70. *Milburn v. Anne Arundel County Dep't of Social Services*, 871 F.2d 474, 476 (4th Cir. 1989).

71. *Id.* at 478.

72. *White v. Chambliss*, 112 F.3d 731, 737-38 (4th Cir. 1997).

73. *Babcock v. Tyler*, 884 F.2d 497, 503-04 (9th Cir. 1989), cited in Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 *PEPP. L. REV.* 353, 360 (1991).

74. 429 U.S. 97, 104-06 (1976) (finding that deliberate indifference to serious medical needs of prisoners may give rise to a constitutional cause of action under 42 U.S.C. § 1983).

75. *Id.* at 105-06.

76. *Doe v. New York City Dep't of Social Services*, 649 F.2d 134, 143 (1981).

77. *Id.*

situation of prisoners in *Estelle* and concurred with the deliberate indifference standard set forth by the Second Circuit.⁷⁸

Conversely, other courts, including the Seventh and Tenth Circuits, have followed the professional judgment standard set forth in *Youngberg v. Romeo*.⁷⁹ The professional judgment standard inquires as to “whether the defendants’ conduct was ‘such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment.’”⁸⁰ The Seventh Circuit found that proper exercise of professional judgment in the placement of children in foster homes may protect child welfare workers and their supervisors from liability.⁸¹ The Tenth Circuit questions the existence of a difference between the two standards, but chooses to follow the professional judgment standard and interprets it to imply “abdication of the duty to act professionally in making the placements.”⁸²

Since the *DeShaney* decision in 1989, the Supreme Court has denied certiorari in cases brought by foster children to enforce constitutional rights.⁸³ The continued conflict between the circuits, and the perpetuation of legal discourse addressing the issue of state agency liability for violation of foster children’s constitutional right to safety, advance the need for resolution by the Supreme Court. Moreover, legal scholars advocated for such a right even prior to the decision in *DeShaney*.⁸⁴

IV. PROPOSED SOLUTION

In response to the persisting conflict between the circuits concerning the issue of a right to safe foster care, coupled with the continued incidence of abuse of foster children at the hands of foster parents, the Supreme Court should grant certiorari for a case presenting this issue. The Court should establish a universal standard. The solution proposed here is as follows:

78. Taylor v. Ledbetter, 818 F.2d 791, 796-97 (1987).

79. 457 U.S. 307, 321-22 (1982).

80. *Id.* at 314 (citing *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980)).

81. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 854 (7th Cir. 1990).

82. Yvonne L. v. New Mexico Dep’t of Human Services, 959 F.2d 883, 894 (10th Cir. 1992).

83. Arlene E. Fried, *The Foster Child’s Avenues of Redress: Questions Left Unanswered*, 26 COLUM. J.L. & SOC. PROBS. 465, 479 (1993) (citing *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990); *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990); *Milburn v. Anne Arundel County Dep’t of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); and *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *on remand*, 699 F. Supp. 508 (D. Md. 1988), *cert. denied*, 488 U.S. 1018 (1989)).

84. Douglas D. Selph, Taylor v. Ledbetter: *Vindicating the Constitutional Rights of Foster Children to Adequate Care and Protection*, 22 GA. L. REV. 1187, 1194 (Summer 1988).

1. The standard that should be applied in determining whether the foster child's constitutional right to safety was violated is the professional judgment standard, as opposed to the deliberate indifference standard; and
2. When a foster child is abused or neglected by a foster parent, a rebuttable presumption that the state did not exercise professional judgment should exist in an action by the foster child for state liability under 42 U.S.C. §1983 for violation of the child's constitutional right to safety.⁸⁵

A. *Voluntary Versus Involuntary Placement*

Different standards have been used in determining state liability for violation of a constitutional right to safety. One of the issues that affect standards is whether the placement of the child in foster care was voluntary or involuntary. A rationale for this distinction is present in *Milburn*, questioning whether the state, through an affirmative exercise of power, restrained the child's liberty.⁸⁶ Voluntary placement does not require an affirmative exercise of state power.⁸⁷ A "large segment" of foster children are voluntarily placed.⁸⁸ Voluntary placement is based on the parent's consent to placement and not on the child's.

A voluntary placement occurs when the parents have consented to a placement by the state.⁸⁹ Consent occurs "when physical or mental illness, economic problems or other family crises make it impossible for parents . . . to provide a stable home life for their children."⁹⁰ The placement may follow a state investigation into the home or a parent may seek government assistance.⁹¹ The distinction between voluntary and involuntary placement is significant as a result of the Court's holding in *Youngberg*, which limited a constitutional cause of action to those individuals who had been involuntarily institutionalized.⁹² This distinction should not control, however, because foster care placement is not voluntary for the child even if the parent consented. Moreover, it has been asserted that the "children themselves have no more choice about placement than an involuntarily committed prisoner or mental

85. For purposes of this Comment, the liability discussion concerns liability of the state through liability of the state child welfare agency. Therefore, for purposes of this Comment, reference to "the state" includes both the state as a sovereign entity and the state child welfare agency as a direct branch of the state.

86. *Milburn*, 871 F.2d at 476.

87. Fried, *supra* note 83, at 487 (citing 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, 237 (1988)).

88. See Fried, *supra* note 83, at 487.

89. Mushlin, *supra* note 8, at 237-38.

90. *Id.* at 238 (citing *Smith v. OFFER*, 431 U.S. 816, 824 (1977)).

91. *Id.*

92. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

patient.”⁹³ When a foster child is abused or neglected by foster parents, it is the child’s rights that are being violated, not the rights of the parents. Accordingly, the issue of consent to placement by the parents should not condition the implication of the child’s rights.

One author asserts that voluntarily placed children should be afforded the same constitutional right to safety as involuntarily placed children.⁹⁴ The author questions the extent to which “voluntary placement” is actually voluntary.⁹⁵ Parents who voluntarily relinquish their child to the state may feel that there is no other alternative and may believe that they are acting in the best interests of their child. This may occur because the parents, although exemplary in every other respect, may not be financially able to attend to the child’s needs.⁹⁶ Low-income parents are also less able than middle class families to arrange for alternative care for their children outside of state assistance.⁹⁷ Another possible scenario affecting the parents’ consent may occur when the investigating social worker “threaten[s] the parent with the permanent loss of the child unless there [is] ‘consent’ to temporary placement.”⁹⁸ If the parent fails to consent to placement and instead loses custody in a child protection proceeding, the possibility of retaining parental rights is “significantly diminished.”⁹⁹ These factors make the distinction between “free choice” in placing their child and “unacceptable coercion” in placing their child unclear.¹⁰⁰ Furthermore, in voluntarily placing their child, most parents would not expect to be placing their child into unsafe conditions.¹⁰¹

Additionally, the rights affected here are not the rights of the parent who placed the child either voluntarily or involuntarily. Rather, the rights affected are the constitutional rights of the child. These rights should not diminish based on their parents’ choice, or lack thereof, in placing the child. Children placed voluntarily and involuntarily are in the exact same situation once placed in a foster home in state custody.¹⁰² Just as children placed involuntarily, children voluntarily placed in foster care may be completely dependant on the state child welfare agency and yet receive less protection from that agency.¹⁰³ This distinction has a negative impact on the voluntarily placed children by reducing their right to safe foster care placement. Conceivably, no matter how severe abuse of the voluntarily placed foster child by his or her foster parent is, with the state having full knowledge of the amount and

93. Mushlin, *supra* note 8, at 239.

94. Chou, *supra* note 14, at 708. See Laura Oren, *DeShaney’s Unfinished Business: The Foster Child’s Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990).

95. Chou, *supra* note 14, at 708-09.

96. Mushlin, *supra* note 8, at 239-40.

97. *Id.*

98. *Id.* at 240.

99. *Id.*

100. *Id.*

101. *Id.*

102. Chou, *supra* note 14, at 708.

103. Fried, *supra* note 83, at 487.

severity of the abuse, the child may have no remedy to stop the abuse. As a result of differences between the rights of foster children placed voluntarily and those placed involuntarily, an incentive exists for "a child to remain in a parent's inadequate charge until the situation has deteriorated to the point where the state will forcibly remove the child into its own custody," only then implicating the child's constitutional right to safe foster care.¹⁰⁴ Accordingly, the time has come for the Supreme Court to grant certiorari in a case by a foster child against the state for violation of his or her constitutional right to safety in the foster home setting, and to eliminate the voluntary and involuntary distinction.

B. 42 U.S.C. § 1983 Action

42 U.S.C. § 1983 allows civil action for deprivation of rights. Specifically, § 1983 sets forth that "every person who, under color of [law] . . . 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. . . ."¹⁰⁵ Because § 1983 confers a statutory cause of action that may only be asserted against agencies or individuals acting under authority of state law, the party against whom the action is being brought must be a state actor. The Supreme Court, in both *Youngberg* and *Estelle*, recognized a constitutional cause of action under § 1983 by prisoners and by patients in mental institutions, and as presented above, several circuits have specifically recognized such a cause of action by foster children placed in abusive foster homes.¹⁰⁶ The right at issue is the right to safety conferred by the Fourteenth Amendment to the U.S. Constitution.¹⁰⁷

As stated previously, the Constitutional right to safety has been recognized by the Supreme Court in the contexts of mental institutions¹⁰⁸ and prisons.¹⁰⁹ Furthermore, the Supreme Court has promoted protection of children by recognizing that children's safety and well being take precedence over First Amendment rights of free speech¹¹⁰ and freedom of religion.¹¹¹ The Su-

104. *Id.* at 488.

105. 42 U.S.C. § 1983 (2001).

106. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982). See *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000), *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990), *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d 289 (8th Cir. 1993), *Yvonne L. v. New Mexico Dep't of Human Services*, 959 F.2d 883 (10th Cir. 1992), and *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

107. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

108. See *Youngberg*, 457 U.S. at 315-16. See also *Mushlin*, *supra* note 8, at 218-22.

109. See *Hutto v. Finney*, 437 U.S. 678, 687 (1978). See also *Mushlin*, *supra* note 8, at 218-22.

110. *Davenport*, *supra* note 20, at 248 (citing *Ginsberg v. New York*, 390 U.S. 629

preme Court has not directly decided the issue of a constitutional right to safety in the foster home setting, but arguments exist in support of such a right. The Supreme Court, in *Youngberg*, rationalized that “if it is . . . [unconstitutional] to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.”¹¹² Surely a foster child’s right to safety should be no less than prisoners’ or mental patients’. A child is not placed in a foster home as punishment or because the child needs constant medical treatment. The child needs a safe environment in which the child can grow and develop.

Because the state, through removal of the child from the home and placement of the child in the abusive or neglecting foster home, is responsible for placing the child in the environment where he or she is subjected to abuse by foster parents, the state is the appropriate party against whom the action should be brought. The state exercised its authority in taking the child out of the home and placing him or her in the foster home. The blame, therefore, should lie at the feet of the state.

C. Foster Parents as State Actors and State Custody

Although it may seem rational to assume that children in foster care are considered to be in state custody, such an assumption would be erroneous. In *Milburn*, the Fourth Circuit found that the abusive foster parents were not state actors because the alleged abuse was not coerced or encouraged by the state.¹¹³ Furthermore, the court found “[t]he care of foster children is not traditionally the exclusive prerogative of the State.”¹¹⁴ The previous statement is not adequately supported with reasoning in the opinion. The court did not say why the care of foster children is not the exclusive prerogative of the state, but implied that because foster parents care for the children, the responsibility is removed from the state.¹¹⁵ However, the responsibility remains with the state. The state merely contracts with foster parents who then perform the state’s responsibility of caring for the children.

Along a similar line, there is Supreme Court precedent regarding custody of foster children with habeas corpus claims. In *Lehman v. Lycoming County Children’s Service Agency*, the Supreme Court held that “foster children are not in state custody for the purpose of obtaining a writ of habeas

(1968)).

111. Davenport, *supra* note 20, at 248 (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

112. *Youngberg*, 457 U.S. at 315-16.

113. *Milburn v. Anne Arundel County Dep’t of Social Services*, 871 F.2d 474, 479 (4th Cir. 1989).

114. *Id.*

115. *Id.* at 476-79.

corpus.”¹¹⁶ That holding, however, is limited to habeas corpus cases and does not preclude the possibility that foster children may be in state custody to assert other constitutional rights.¹¹⁷ This conclusion is based on an analysis of *Lehman*.¹¹⁸ First, the Court stated, “[t]he ‘custody’ of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas.”¹¹⁹ Furthermore, the Court limited the non-custodial determination specifically to federal habeas cases, stating that “although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the ‘custody’ of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus.”¹²⁰

Although the Court has not addressed foster care as a form of state custody with respect to the constitutional right to safety, two decisions reflect what requirements may be imposed to establish state custody. In *DeShaney*, the Court discusses the state’s affirmative control over the individual and the resulting inability of the individual to care for himself or herself.¹²¹ Additionally, in *Youngberg*, the Court discusses dependency of the individual on the state for care and protection.¹²²

When a child is taken into protective custody, it is the responsibility of the state agency that removes the child to find a place where care can be provided to that child. The state may contract this responsibility to a private company, but ultimately the child is removed from the home by the state under state authority and placed in a foster home.¹²³ In an Illinois lawsuit filed against the state for abuse of children in foster care, the state argued that “after removing the children from their own families where abuse was suspected, the Department of Children and Family Services has no legal responsibility whatsoever for their mental well-being.”¹²⁴ This argument is incongruous in that it fails to acknowledge the same responsibility the state claims it has in initially removing the children from their homes. Additionally, the state (Illinois) “only accepted responsibility for the physical welfare of children placed in state institutions” leaving children in foster care “at their own peril.”¹²⁵ This argument is also unfounded because the state con-

116. Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271, 293 (1993) (citing *Lehman v. Lycoming County Children’s Service Agency*, 458 U.S. 502, 502 (1982)).

117. Ryan, *supra* note 115, at 295.

118. *Id.* at 294-95.

119. *Lehman*, 458 U.S. at 511 (cited in Ryan, *supra* note 115, at 294-95).

120. Ryan, *supra* note 115, at 295 (citing *Lehman*, 458 U.S. at 510).

121. *DeShaney v. Winnebago County Dep’t of Social Services*, 489 U.S. 189, 199 (1989).

122. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

123. *See, e.g., Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 826 (1977).

124. SCOTT, *supra* note 28, at 111-12.

125. *Id.* at 112 (citing RICHARD WEXLER, *WOUNDED INNOCENCE* 193 (1990)).

tinues to provide for the physical welfare of children in foster homes through monthly support payments, continued monitoring of the home by a social worker, the provision of services such as counseling, and control of the child's present and future placement. Furthermore, the *Milburn* opinion asserts that the only relationship alleged between the state and the foster parents arises from the contract the foster parents signed with the state child welfare agency, the agency home approval of the foster parents, and child abuse reporting statutes.¹²⁶ The court finds that such evidence does not so insinuate the state "into a position of interdependence with the charged party that it must be recognized as a joint participant in the challenged activity."¹²⁷

The Fourth Circuit fails to recognize that the charged party in the case is not the foster parents, but rather the state itself. The child is not filing a cause of action simply because he or she was abused by his or her foster parents, but because the state, who placed the child in protective custody, continued placement of the child in the face of repeated suspicions of child abuse by the foster parents.¹²⁸ The court focuses on whether the foster parents were state actors in their perpetuation of abuse, rather than focusing on the real issue of whether the state was remiss in its duty to monitor the placement and continue placement of the child in that home in the face of suspicions of abuse by the foster parents. Courts must avoid the web of confusion in deciding whether foster parents are state actors, and should focus instead on whether the state failed to protect the child entrusted in its custody.

The limited rights that foster parents possess with respect to control over the foster child also gives support to the proposition that the state's responsibility for the safety of the child continues after the child is placed in foster care. Foster parents' rights with respect to foster children are limited.¹²⁹ Foster parents are not given parental rights over the child. They are unable to choose where the child lives. The state may remove the child from the foster home regardless of the foster parents' wishes. The power the state retains over the child and the ability of the state to regulate the foster family's interaction with that child supports the proposition that children in foster care, for legal purposes, remain in state custody. Moreover, it is the inaction of the state which gives rise to the cause of action, not simply the action of the foster parents in abusing the child. Placements of foster children should be monitored to evaluate the placement and determine if the care being provided is adequate. If the care is not adequate, steps must be taken to locate a placement that will provide sufficient care. For the foster child to retain a cause of action against the state, the abuse or neglect of the child by the foster parents must be coupled with the state's inaction in response to known or

126. *Milburn v. Anne Arundel County Dep't of Social Services*, 871 F.2d 474, 477 (4th Cir. 1989).

127. *Id.*

128. *Id.* at 475-76.

129. *See, e.g., Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 846 (1977).

suspected abuse. Accordingly, the state should be liable because its inaction or inadequate action caused the child to be subjected to abuse by the foster parents.

D. Professional Judgment Standard

Professional judgment is the standard that should be applied in reviewing whether the state agency is liable for violation of the constitutional right to safety. Specifically, inquiry should be made into “whether the defendants’ conduct was ‘such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment.’”¹³⁰ It has been questioned whether the professional judgment standard is enough to provide children with the necessary protection.¹³¹ But to use the deliberate indifference standard would limit actual violations of the law to only the most serious deprivations of the right to safety.¹³² Thus, the deliberate indifference standard would provide insufficient protection to children left completely at the mercy of the state and the foster parents. Deliberate indifference, according to the Second Circuit, requires grossly negligent or reckless conduct, but is not violated by simple negligence.¹³³ Deliberate indifference, therefore, provides insufficient protection because it may be simple negligence, rather than gross negligence, that results in the perpetuation of abuse of a foster child by his or her foster parents.

Contributing to foster children’s dependency on the state for care and protection is the inability of children to communicate effectively or change the situation into which they have been placed.¹³⁴ Children in the foster care system are placed there without regard to the child’s consent. The children are removed from the home at the state’s initiative or at the request of the parents. The child must live in the homes selected by the state agency and depend upon the state for protection.¹³⁵ Such dependency on the state bolsters the argument for imposition of the professional judgment standard because the state has complete control over the child’s placement. Additionally, failure by the overburdened state agencies to exercise professional judgment is intricately connected to the harming of children because the harm could be prevented by the state’s exercise of professional judgment.¹³⁶

130. *Youngberg*, 457 U.S. at 314.

131. *Kearse*, *supra* note 18, at 387.

132. *Selph*, *supra* note 84, at 1195-96.

133. *Id.* at 1196 (citing *Doe v. New York City Dep’t of Social Services*, 649 F.2d 134, 142 (2d Cir. 1983)).

134. Beth A. Diebel, *Note: Mark G. v. Sabol: Substantive Due Process Rights: A Possibility for Foster Care Children in New York*, 64 ALB. L. REV. 823 (2000).

135. *Id.* at 1209.

136. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 11 (1995).

Although courts choose not to enunciate specific professional judgments that should be used, professional standards include screening and licensing of foster parents, training of foster parents, and continued, systematic supervision of the placement by caseworkers.¹³⁷ Mandating strict adherence to similar standards would only lessen the likelihood of placement in an abusive foster home and, consequently, would protect children from deprivation of their constitutional right to safety. Furthermore, such requirements would influence state workers to do their job correctly, and further the state's interest in promoting efficient and effective state employees.

E. Rebuttable Presumption

A rebuttable presumption that the state did not exercise professional judgment when a child was placed in an abusive or neglecting foster home should exist for a variety of reasons. First, if the child is abused or neglected while in foster care, something had to have gone wrong at some level, whether it is that the state failed to thoroughly screen and monitor the foster parents, that the foster parents were able to conceal their abusive propensity, or some other problem. Second, children do not have the resources the state has to pursue a lawsuit vindicating their rights. The state has attorneys who are well practiced in the law as it concerns foster children. Children usually do not have any form of income, the skills necessary to retain a lawyer, or knowledge of their rights and subsequent remedies for violations of those rights. They must rely on their parents for these things. However children in foster care are unable to rely on their parents to assert their rights. The situation of the children against the state can be compared to that of parents against the state. The Supreme Court acknowledged that "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability. . . ."¹³⁸ Children, who have no income of their own, cannot have a greater ability than their parents to mount a case against the state.

Moreover, imposition of a rebuttable presumption would encourage state agency workers to be more attentive in their choice of foster homes and subsequent supervision of foster care placements. This would reduce abuse suffered by foster children at the hands of their foster parents and would result in fewer lawsuits resulting from such abuse. Furthermore, if the state did comply with the professional judgment standard, required case records would reflect this and the assertion could easily be corroborated through notes reflecting adequate home visits, foster parent training attendance records, and detailed documentation of the screening process. The state is in the best position to access and maintain such records and this provides additional support for the imposition of the rebuttable presumption on the state agency. The child's interest in safety does not conflict, but rather runs con-

137. Chou, *supra* note 14, at 686.

138. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

gruent, with the state's interest in protecting children and providing them with a safe living environment.

Many policy reasons support placing the burden of proof on the state in actions by children to protect their constitutional rights, and the requirement of imposing the professional judgment standard. The Court needs to establish a unified standard, preferably professional judgment, to protect foster children. These children do not have the protection of parents and are subject to the diligence of the state child welfare agency to protect them. If the agency fails to exercise professional judgment, the results could be devastating. Accordingly, the rule should be established that when the child sustains injury or death from abuse or neglect of a foster parent, this triggers a rebuttable presumption that the state agency violated the foster child's constitutional right to safety, thereby shifting the burden of proof onto the state to prove that it did in fact exercise the appropriate professional judgment. The goal of foster care is to take children from dangerous situations and place them in *protective* custody. This proposal can only further efforts to achieve that goal and improve the plight of children in the foster care system.

V. CONCLUSION

The perpetuation of conflict between the circuits obviates the need for the Supreme Court to hear and rule on the issue of state liability for violation of foster children's constitutional right to safety. The issue has been before courts for at least twenty years and still exists. Foster children continue to be subjected to abuse by their foster parents. Cases addressing this issue are likely to increase proportionately with the annual increase of the number of foster children if progressive steps are not taken to end this violence. Further support for such a ruling may be found in *DeShaney*. The Court cited only two cases recognizing foster children's right to safety and cited no cases refuting such a right, possibly implying that the Court would rule in favor of a child's right to safety if such a case were granted certiorari. However, the Court declined to grant certiorari in cases denying foster children such a cause of action and in cases acknowledging a constitutional cause of action for right to safety; therefore, the issue remains unresolved.

Foster children deserve a forum that can address their constitutional right to safety because foster children are in such vulnerable positions. They do not have their parents to protect them and advocate for them. They do not have the ability to change their living situation on their own initiative. Foster children should have the same constitutional right to safe foster care regardless of the somewhat artificial distinction between voluntary and involuntary placement. The standard that should be used in determining whether their constitutional right to safety was violated should be the professional judgment standard because this standard merely requires that the state employees perform their job attentively. Moreover, because foster children face an incredible burden in retaining legal counsel and asserting their rights, there

should be a rebuttable presumption that the state failed to exercise professional judgment in the placement of the foster child when the foster child is abused or neglected by his or her foster parents. The state is the party in the best position to protect foster children. The Supreme Court must grant certiorari to a case addressing the issue of state liability for violation of a foster child's right to safety. The Supreme Court needs to recognize that right and enable foster children throughout the United States to enforce their right to safe foster care.

Four-year-old John Smith needed the state's help. The state purported to be helping him when they removed him from his biological parents' home and placed him in a foster home. But the help they gave John stopped there. The state stood by and watched as John was injured over and over. In a season where many children John's age are exuberant and anxiously await the arrival of Santa Claus, John Smith was in a hospital unconscious because of the "help" the state gave him. He died on Christmas Eve, putting an end to six months of torture he endured while in the care of his foster parents.¹³⁹ Surely, the lives of John and the many other vulnerable foster children are important enough for the Supreme Court to acknowledge and protect by hearing the issue of a foster child's constitutional right to safety, which, up to this point, the Court has so diligently avoided.

139. Maynard, *supra* note 1.

