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COMMENT

THE FORGOTTEN CHILDREN
OF THE FOSTER CARE SYSTEM:
MAKING A CASE FOR THE
PROFESSIONAL JUDGMENT
STANDARD

ANDREA KOEHLER*

“They are everybody’s children, and nobody’s children. They are the forgotten children in the . . . foster care system.”¹

INTRODUCTION

Each year, thousands of children are separated from their families and placed into foster care.² While under the not-so-careful watch of the state, many suffer further abuse and neglect.³ In some cases, child

* Executive Online Editor, Golden Gate University Law Review, Volume 44; J.D., May 2014, Golden Gate University School of Law.

¹ CAROLE KEETON STRAYHORN, FORGOTTEN CHILDREN, at xi (2004), available at www.hope4kidz.org/pdf/FORGOTTEN_CHILDREN.PDF.

² U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FY 2002-FY 2012, at 1 (2013), available at www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf.

³ See, e.g., NAT’L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING 1-2 (2011), available at www.nccpr.org/reports/01SAFETY.pdf; Patricia Kilday Hart, *Judge Paves Way for Class Action Lawsuit Over Texas Foster Care System*, HOUSTON CHRONICLE (Aug. 29, 2013), www.houstonchronicle.com/news/columnists/kilday-hart/article/Judge-paves-way-for-class-action-lawsuit-over-4769761.php (Texas); Martine Powers, *Lawsuit Faults Mass. on Foster Care System*, THE BOSTON GLOBE (Jan. 21, 2013), www.bostonglobe.com/metro/2013/01/21/class-action-case-against-mass-child-welfare-system-start-trial-tuesday/yr6NaoTi6mLuCeNLfHXcyL/story.html (Massachusetts); Christine Clarridge, *DSHS Settles Tacoma Foster Children’s Abuse Case for \$11 Million*, THE SEATTLE TIMES (Dec. 11, 2012), http://seattletimes.com/html/localnews/2019884510_dshs12m.html (Washington); Benjamin Weiser,

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welfare employees are so derelict in their duties that they are unaware children are being harmed. Thus, maltreatment goes undetected. Despite egregious failures to protect the children in its care, the state often suffers no repercussions.

One reason for this travesty is that the “deliberate indifference” liability standard⁴ applied by most courts sets a low bar for the government’s duty to protect foster children.⁵ For example, when a caseworker repeatedly fails to perform mandated visits, home studies, and other duties, and, as a result, is unaware that a foster child is being maltreated, the caseworker’s conduct may not be considered sufficiently “conscience shocking”⁶ for the court to impose liability.⁷ On the other hand, if courts were to adopt the “professional judgment” liability standard,⁸ such a pattern of omissions on the part of a caseworker would likely result in a finding of liability and allow the foster child to obtain redress.

The following hypothetical⁹ illustrates the unjust implications of applying the deliberate indifference standard to cases of foster care maltreatment, rather than applying the more appropriate professional judgment standard.

City Settles With Disabled People Fraudulently Adopted in '90s and Abused, THE NEW YORK TIMES (Dec. 6, 2012), www.nytimes.com/2012/12/07/nyregion/new-york-city-settles-suit-by-abused-foster-children.html (New York); Aimee Green, *Attorney Files \$4.75 Million Lawsuit Against State on Behalf of 11-Year-Old Boy Whose Lane County Foster Parents Broke His Bones, Burned Him*, OREGON LIVE (June 11, 2012), www.oregonlive.com/pacific-northwest-news/index.ssf/2012/06/attorney_files_475_million_law.html (Oregon); Lisa Demer, *Sisters Awarded \$2 Million for Years of Abuse in State Care*, ANCHORAGE DAILY NEWS (Apr. 21, 2012), www.adn.com/2012/04/21/2434854/sisters-awarded-2-million-for.html (Alaska).

⁴ Under the deliberate indifference standard, a state agent may be liable if he or she “knows of and disregards an excessive risk to [the] health or safety [of someone in state care].” Farmer v. Brennan, 511 U.S. 825, 837 (1994). This standard will be further discussed below.

⁵ Carolyn A. Kubitscheck, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 32 HUMAN RIGHTS MAGAZINE (2005), available at www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/winter2005/hr_winter05_fostercare.html.

⁶ As will be discussed below, the Supreme Court held that in order to be liable for a violation of due process rights, the conduct in question must “‘shock[] the conscience’ and violate[] the ‘decencies of civilized conduct.’” Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Rochin v. California, 342 U.S. 165, 172-72 (1952)).

⁷ See, e.g., Omar v. Babcock, 177 F.App’x. 59, 64 (11th Cir. 2006).

⁸ Under the professional judgment standard, a state agent may be liable for actions that are “a substantial departure from accepted professional judgment, practice, or standards.” Youngberg v. Romeo, 457 U.S. 307, 323 (1982). This standard will be further discussed below.

⁹ This hypothetical is largely based on the heartbreaking story of Demetrius “Omar” Jurineack. The facts have been modified to illustrate a circumstance in which the verdict could turn on the liability standard applied. See Petition for Writ of Certiorari, Omar v. Babcock, 549 U.S. 993 (2006) (No. 06-78); Omar, 177 F.App’x. 59.

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A CASE FOR THE PROFESSIONAL JUDGMENT STANDARD

Cody was only fourteen-months old when his mother abandoned him and the Department of Children and Families (DCF) took him into state custody. When Cody was almost three, the DCF placed him with Marie Wilkes. Ms. Wilkes fostered and subsequently adopted him. During his time in Wilkes's household, Cody suffered egregious abuse. Wilkes beat the young child with a broom handle, hammers, and high-heeled shoes; repeatedly whipped him with a belt severely enough to require hospital treatment; deprived him of food and water for days at a time; forced him to eat his own feces; tied him to a bedpost; locked him in a dog cage; and more. Three long years after his placement with Wilkes, the DCF finally removed Cody from her custody.

The DCF failed to protect Cody from abuse in several ways. First, the caseworker assigned to Cody failed to perform a child-specific home study prior to placing Cody in Wilkes's care. Instead, she relied on a study for a female teenager completed over a year prior to Cody's placement. During that previous study, Wilkes emphasized that she did not wish to care for a young child. Second, during one of several hospitalizations prior to his adoption, Cody's doctor noticed looped lesions on his body and reported his suspicion of abuse to the DCF. In addition to this instance, Cody was hospitalized on nine occasions for dehydration and unexplained seizures. While the DCF did perform a brief investigation subsequent to the doctor's report of suspicious bruising, it failed to explore whether Cody's repeated bouts of severe dehydration were the result of maltreatment. Third, DCF records showed that Cody's caseworker failed to make numerous mandatory monthly visits to the Wilkes home. Several of the missed visits occurred during the months immediately after the doctor's report of suspected abuse. Despite these signs and the lack of a child-specific home study, the DCF allowed Cody to remain in Wilkes's care and ultimately approved his adoption by Wilkes.

Years later, Cody pursued an action under 42 U.S.C.A. § 1983 to vindicate his substantive due process rights under the Fourteenth Amendment. He alleged that the DCF employees involved with his case had abdicated their duty to protect him from harm when they placed and kept him in Wilkes's abusive home. Cody was unable to procure through discovery any written evidence that DCF officials were *actually aware* that Wilkes was abusing him. However, he did present the expert testimony of a former DCF official who alleged numerous failures on the part of the DCF agents responsible for managing his case. The expert claimed that the DCF employees failed to follow departmental policies,

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including the policy requiring a child-specific home study and the policy requiring documentation regarding the reasoning for placement. Additionally, the report noted a failure to make the statutorily required monthly visits to the Wilkes home. The expert also concluded that the DCF failed to properly train Wilkes prior to placing Cody in her care and failed to recognize signs of abuse.

If the presiding court in Cody's case were to apply the deliberate indifference standard, Cody would likely have been unsuccessful because he failed to prove that the DCF workers were deliberately indifferent to his safety needs. In order to satisfy this standard, "an official must not only be aware of facts suggesting a substantial risk of serious harm to the [child], but the official must also draw the inference that the [child] is likely to be harmed."¹⁰ Even if the defendants were aware of facts that could lead to the conclusion that Cody was in danger of abuse, they would not be held liable if they did not *actually draw the conclusion*.

If, on the other hand, the court had applied the professional judgment standard, Cody would have had a much stronger case. Under that standard, a government actor may be found liable when his or her acts or omissions are "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."¹¹ Thus, if the reason the defendants did not actually conclude Cody was in danger of abuse was because they failed to comply with statutorily mandated practices and professional standards, they would most likely be found liable for the harms he suffered.

Despite many requests for the Supreme Court to affirm the government's duty to protect foster children and adopt an appropriate liability standard, the Court has declined to grant certiorari for any such cases.¹² Part I of this Comment presents a brief look at the children in foster care and the maltreatment they experience, as well as the federal and state legislation enacted to provide for their safety. Part II explores §

¹⁰ *Omar*, 177 F.App'x. at 63 (citing *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994))).

¹¹ *Youngberg*, 457 U.S. at 323.

¹² *E.g.*, *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163 (4th Cir. 2010), *cert. denied*, 131 S.Ct.392 (2010); *Omar*, 177 F.App'x. at 59, *cert. denied*, 549 U.S. 993 (2006); *Eugene D. ex rel. Olivia D. v. Karman*, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990); *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, *Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983).

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1983 and Supreme Court precedent establishing the duty to protect persons from harm caused by private parties, with a focus on the special relationship doctrine. It also discusses the applicable standards of liability defined by the Court. Part III reviews and analyzes the various liability standards used in federal and state actions brought by foster children for failure to protect them from harm. Part IV assesses the relevant individual and state interests involved in foster care maltreatment actions brought under § 1983. This section also compares and contrasts these interests to the interests of institutionalized mental health patients and prisoners, as these are the subjects of the Supreme Courts only holdings regarding the liability standards applicable to special relationship cases. Further, it assesses the peculiar circumstances of foster children and the heightened duty that the state has to protect them from harm. Finally, it proposes that the Supreme Court should recognize the heightened duty to protect foster children from harm and adopt the professional judgment standard as the appropriate standard in foster care maltreatment actions.

I. FOSTER CHILDREN & THE LAWS INTENDED TO PROTECT THEM

A. FOSTER CHILDREN'S PECULIAR NEED FOR PROTECTION

Children are removed from their homes and placed into foster care when the government determines that their parents are unable or unwilling to take proper care of them.¹³ Reasons for removal may include abuse, neglect, and abandonment.¹⁴ In 2011, over two million children came into contact with the child welfare system due to reports of alleged abuse or neglect.¹⁵ Of those children, over 740,000 were confirmed victims of maltreatment.¹⁶ Roughly 644,000 children spent

¹³ JAN MCCARTHY ET AL., A FAMILY'S GUIDE TO THE CHILD WELFARE SYSTEM 40-41 (2003), available at www.cwla.org/childwelfare/fg.pdf.

¹⁴ *Id.* (defining abuse to include physical abuse, sexual abuse and emotional abuse).

¹⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2011, at viii (2012), available at www.acf.hhs.gov/sites/default/files/cb/cm11.pdf (Data submitted by the States, the District of Columbia, and Puerto Rico. Total is based on the Federal Fiscal Year, or October 1 through September 30.).

¹⁶ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2008-2011: REPORT TO CONGRESS 5 (2013), available at www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf (defining maltreatment as an incident of abuse or neglect).

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time in the public foster care system, with 398,000 children in foster care¹⁷ on the last day of the year.¹⁸

The maltreatment that leads these children to be removed from their parents' care is just the first level of suffering they experience.¹⁹ The process of removal then adds an additional layer of trauma the children must endure.²⁰ Further, many foster children are subsequently bounced from foster home to foster home, which often leads to the development of serious behavioral²¹ and emotional attachment problems.²² Sadly, once these already vulnerable children are removed from their homes and placed into state care, many are subjected to further maltreatment in their foster homes.²³ Throughout their young lives, these children experience physical and emotional abuse, neglect, abandonment, loss of family connections, impermanence, and more.²⁴

As a result of these traumatic experiences, foster children suffer from an increased risk for mental health disorders,²⁵ teen pregnancy,²⁶

¹⁷ The federal government defines foster care as "24-hour substitute care for children placed away from their parents or guardians and for whom the title IV-E agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes." 45 C.F.R. § 1355.20(a) (Westlaw 2014).

¹⁸ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FY 2002-FY 2012, at 1 (2013), available at www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf.

¹⁹ Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 JCAPN 70, 70 (May 2008); see also Sheri Wallace, *The Grieving Child in Care*, CHILD. VOICE MAG. (May/June 2003), www.cwla.org/articles/cv0305grieving.htm.

²⁰ See UPenn Collaborative on Cmty. Integration, *Removal from the Home: Resulting Trauma*, Temple University Collaborative on Community Inclusion, available at http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/Factsheet_4_Resulting_Trauma.pdf (last visited Apr. 15, 2014) (noting the detrimental psychological and neurobiological effects of disruptions in the parent-child attachment); Wallace, CHILD. VOICE MAG. (explaining that when the bonds between parent and child are broken by removal, then child must go through a grieving process).

²¹ David H. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 PEDIATRICS 336, 343 (2007).

²² *Childhood Mental Health: Attachment*, ADVOKIDS, <http://advokids.org/resources/childhood-mental-health/attachment/> (last visited April 15, 2014).

²³ See NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING 1-2 (2011), available at www.nccpr.org/reports/01SAFETY.pdf.

²⁴ NINA WILLIAMS-MBENGUE, MOVING CHILDREN OUT OF FOSTER CARE: THE LEGISLATIVE ROLE IN FINDING PERMANENT HOMES FOR CHILDREN 2 (2008), available at www.ncsl.org/documents/cyf/movingchildrenoutofcare.pdf.

²⁵ One study found that 47.9% of foster children have "clinically significant emotional and behavioral problems." As adults, over 50% of former foster children experience mental illness, compared to 22% of the control group. Another particularly disturbing study found that 30% of former foster children have been diagnosed with Post-traumatic Stress Disorder (PTSD), which was

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homelessness,²⁷ academic failure,²⁸ and incarceration.²⁹ Thus, it is vital that the state and child welfare agencies do everything they can to keep these children safe. In furtherance of that obligation, numerous laws, regulations, and professional standards have been developed to establish the framework for the state's protection of its most vulnerable children.

B. LAWS ENACTED TO SAFETGUARD THE WELL-BEING OF FOSTER CHILDREN

Federal involvement in child protection began in 1912, when Congress enacted legislation to establish the Children's Bureau, a federal agency dedicated to child welfare issues.³⁰ Several years later, the Social Security Act (1935) was enacted, creating the Child Welfare Services Program.³¹ Through this program, the federal government provides funding to the states for child protective services and foster care

almost twice the rate of PTSD found in veterans who had been in combat. Joann Grayson, *Mental Health Needs of Foster Children and Children at Risk of Removal*, CYF NEWS, Winter 2012, at 2-3, available at www.apa.org/pi/families/resources/newsletter/2012/01/winter.pdf.

²⁶ Approximately 51% of female teens in foster care will become pregnant, compared to 20% of other female teens. 46% of those females in foster care will have multiple pregnancies before the age of 19. Heather D. Boonstra, *Teen Pregnancy Among Young Women in Foster Care: A Primer*, 14 GUTTMACHER POL'Y REV. 8, 9 (2011), available at www.guttmacher.org/pubs/gpr/14/2/gpr140208.pdf.

²⁷ National studies indicate a homelessness rate of between 12-30% of former foster children who aged out of the system. *Facts About Aging Out*, CHILDREN'S RIGHTS, www.childrensrights.org/issues-resources/foster-care/facts-about-aging-out/ (last visited April 15, 2014); A study of former foster children in the Midwestern U.S. found that by the age of 26, 36% had been homeless at some point in their lives. *Predictors of Homelessness During Transition from Foster Care to Adulthood*, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO, www.chapinhall.org/research/inside/predictors-homelessness-during-transition-foster-care-adulthood (last visited April 15, 2014).

²⁸ Foster children are 2.5-3.5 times as likely to receive special education than other children, 3 times more likely to be expelled, and 2 times as likely to be absent. NAT'L WORKING GRP. ON FOSTER CARE & EDUC., *FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE 1* (2014), available at www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=1279&Command=Core_Download&method=inline&PortalId=0&TabId=124.

²⁹ WILLIAMS-MBENGUE, *MOVING CHILDREN OUT OF FOSTER CARE 2*; see also *Facts About Aging Out*, CHILDREN'S RIGHTS (reporting that national studies indicate that, of foster children who aged out of the system, between 18-26% were incarcerated).

³⁰ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, *THE STORY OF THE CHILDREN'S BUREAU* 4 (2012), available at http://cb100.acf.hhs.gov/sites/all/themes/danland/danblog/files/Story_of_CB.pdf.

³¹ CHILD WELFARE INFO. GATEWAY, *MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 2* n.1 (2012), available at www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf.

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services.³² In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA).³³ CAPTA provides funding for child maltreatment-related research, training, and program development.³⁴ It also established child maltreatment reporting requirements and established the National Center on Child Abuse and Neglect (now the Office on Child Abuse and Neglect).³⁵ Other significant federal laws enacted for the benefit of foster children³⁶ include the Adoption and Safe Families Act of 1997,³⁷ the Foster Care Independence Act of 1999,³⁸ and the Fostering Connections to Success and Increasing Adoptions Act of 2008.³⁹

Today, the Children's Bureau works with state, tribal, federal, and local agencies to promote the safety and well-being of children through the development of programs to prevent child maltreatment.⁴⁰ A crucial responsibility of the Bureau is to monitor state foster care systems.⁴¹ In accord with Social Security Act requirements, the Children's Bureau tracks data regarding the maltreatment of children in foster care, with the

³² *Id.*

³³ CHILD WELFARE INFO. GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2011), available at www.childwelfare.gov/pubs/factsheets/about.pdf. See generally Child Abuse Prevention and Treatment Act, 42 U.S.C.A. §§ 5101-5119c (Westlaw 2014) (provides funding in support of investigation, prevention, and identification of abuse and neglect of children).

³⁴ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, THE STORY OF THE CHILDREN'S BUREAU 15.

³⁵ *Id.*

³⁶ See generally CHILD WELFARE INFO. GATEWAY, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 3.

³⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.), available at www.gpo.gov/fdsys/pkg/PLAW-105publ89/html/PLAW-105publ89.htm (providing for improved permanency planning for children in foster care).

³⁸ Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified in scattered sections of 42 U.S.C.), available at www.gpo.gov/fdsys/pkg/PLAW-106publ169/pdf/PLAW-106publ169.pdf (providing states with additional funding to implement programs to aid foster children with the transition from state care to independence).

³⁹ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.), available at www.gpo.gov/fdsys/pkg/PLAW-110publ351/html/PLAW-110publ351.htm (providing for increased support for relative caregivers, improved outcomes for foster children, tribal access to foster care and adoption, and adoption incentives).

⁴⁰ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2012, at 1 (2013), available at www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

⁴¹ The Bureau monitors foster care systems through Adoption and Foster Care Analysis and Reporting System assessment reviews, Child and Family Services Reviews, Statewide Automated Child Welfare Information System assessment reviews, and Title IV-E foster care eligibility reviews. U.S. Dep't of Health & Human Servs., Children's Bureau, *Monitoring*, ACF: CHILDREN'S BUREAU, www.acf.hhs.gov/programs/cb/monitoring (last visited Jan. 19, 2014).

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ultimate goal of reducing the incidence of abuse and neglect.⁴² Another important function of the Children's Bureau is to administer a number of funding programs to support state foster care programs and child protective programs.⁴³

For a state to receive federal funding for its foster care programs, the state must establish and maintain basic licensing standards that correspond with the recommendations of certain national organizations,⁴⁴ including standards related to safety and the protection of civil rights.⁴⁵ The intent of these licensing requirements is to reduce the risk of harm to foster children and to ensure that they are provided with a "safe, stable, nurturing environment."⁴⁶ One licensing requirement of vital importance is that each member of a foster household must pass a background check showing no record of child abuse or neglect and no convictions for certain crimes.⁴⁷ Additionally, licensing requirements generally include a minimum age, a minimum income, and adequate physical and mental health.⁴⁸ Most states also require that prospective foster parents complete a training course prior to becoming licensed,⁴⁹ and some states require regular maintenance training after licensure.⁵⁰ Finally, most

⁴² U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2012, at 90.

⁴³ See CHILD WELFARE INFORMATION GATEWAY, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 2 (2012), available at www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf (including title IV-B Child Welfare Services and Promoting Safe and Stable Families programs, the title IV-E Foster Care Program, the title IV-E Adoption Assistance Program, and the title IV-E Chafee Foster Care Independence Program); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2012, at 1.

⁴⁴ One such organization is the Child Welfare League of America. See Children's Welfare League of Am., *History: The Role of CWLA in Standards Development*, CWLA, www.cwla.org/programs/standards/history.htm (last visited Jan. 19, 2014).

⁴⁵ Social Security Act, 42 U.S.C.A. § 671(a)(10) (Westlaw 2014).

⁴⁶ CHILD WELFARE INFO. GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 1 (2011), available at www.childwelfare.gov/systemwide/laws_policies/statutes/homestudyreqs.pdf.

⁴⁷ Disqualifying crimes under federal law include felony child abuse or neglect, spousal abuse, a crime against children (including child pornography), a crime involving violence (including rape, sexual assault, or homicide), and if within the prior five years, felony assault, felony battery, or a felony drug offense. Moreover, disqualifying crimes under state laws may include any other crime of violence, arson, kidnapping, illegal use of weapons or explosives, fraud, forgery, burglary, and robbery. CHILD WELFARE INFO. GATEWAY, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS 1-2 (2011), available at www.childwelfare.gov/systemwide/laws_policies/statutes/background.pdf.

⁴⁸ CHILD WELFARE INFO. GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 2.

⁴⁹ *Id.* at 3.

⁵⁰ See *id.* at 11 *passim*.

states require a home study to evaluate whether the household is suitable for providing a safe home for foster children.⁵¹

In addition to licensing and home study requirements, most states have created standards for caseworker performance in order to prevent maltreatment and improve outcomes for children.⁵² For example, forty-three states require that caseworkers visit with foster children at least once a month, to regularly assess the children's well-being.⁵³ Many states have also adopted quality standards for caseworker visits, addressing such issues as safety needs and communication.⁵⁴ As the frequency and quality of caseworker visits increase, so do positive outcomes for foster children.⁵⁵ When caseworkers maintain regular contact and open lines of communication with foster children, they are in a better position to evaluate their needs and to discover maltreatment.⁵⁶

Despite these protective measures, foster children across the nation continue to be abused and neglected while in state care.⁵⁷ When the child welfare system fails them, many foster children turn to litigation.

II. WHEN THE STATE FAILS TO PROTECT: 42 U.S.C.A. SECTION 1983 & THE STATE'S DUTY UNDER THE SPECIAL RELATIONSHIP DOCTRINE

Where the state has failed to protect a foster child from abuse and neglect, the child may pursue legal action against the child welfare agencies, officials, and employees responsible for their care. Aggrieved

⁵¹ *Id.* at 5.

⁵² NAT'L CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE CASEWORKER VISITS WITH CHILDREN AND PARENTS 3 (2006), available at www.ncsl.org/Portals/1/documents/cyf/caseworkervisits.pdf.

⁵³ *Id.*; *But see* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2008-2011: REPORT TO CONGRESS 19 (2013), available at www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf (reporting that only approximately 82% received monthly visits in 2011).

⁵⁴ NAT'L CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE CASEWORKER VISITS WITH CHILDREN AND PARENTS 4.

⁵⁵ *Id.* at 1; DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, STATE STANDARDS AND PRACTICES FOR CONTENT OF CASEWORKER VISITS WITH CHILDREN IN FOSTER CARE 1 (2005), available at <http://oig.hhs.gov/oei/reports/oei-04-03-00351.pdf> (reporting that findings of Child and Family Service Reviews (CFSRs) show a correlation between a positive rating on caseworker visits and positive ratings on other areas under review, including permanency and child safety).

⁵⁶ NAT'L CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE CASEWORKER VISITS WITH CHILDREN AND PARENTS 5.

⁵⁷ *See* NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING 1-2 (2011), available at www.nccpr.org/reports/01SAFETY.pdf.

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children may bring a suit under state tort laws.⁵⁸ They may also bring § 1983 actions against the state for violations of rights granted by some of the aforementioned federal laws.⁵⁹ Finally, they may bring § 1983 actions for violations of their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution.⁶⁰

To determine what must be proven in a § 1983 action against the state for violations of a foster child's rights under the Fourteenth Amendment, one must look to both the statute and to a line of Supreme Court cases regarding the government's duty to protect. In *DeShaney v. Winnebago County*, the Court described exceptions to the general rule that the state has no affirmative duty to protect people from harm caused by private parties.⁶¹ One of the exceptions is the "special relationship doctrine," which lower courts have applied to the relationship between the state and foster children in its care.⁶² While the Supreme Court has yet to hear a special relationship action brought by a foster child, lower courts have assessed the rights of foster children and determined the applicable liability standards under § 1983 by looking to Supreme Court cases that have defined the state's duty to protect in other contexts.

A. RIGHT TO REDRESS UNDER §1983 FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

When deprived of a right granted by the Constitution or federal law, an aggrieved party may bring a private action against the responsible government agents under § 1983.⁶³ Enacted as part of the Civil Rights Act of 1871, § 1983 "is not itself a source of substantive rights," but a

⁵⁸ See Eric M. Larsson & Jean A. Talbot, *Cause of Action for Negligent Placement in or Supervision of Foster Home*, 43 COA2D 1 § 5 (Dec. 2013). Beyond this reference, this Comment will not discuss state tort actions.

⁵⁹ See *id.* at § 10. Beyond this reference, this Comment will not discuss § 1983 actions for violations of rights granted by federal laws.

⁶⁰ See *id.*

⁶¹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

⁶² See, e.g., *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir. 2010); *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).

⁶³ 42 U.S.C.A. § 1983 (Westlaw 2014) (stating in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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 . . .").

means for asserting other federal rights.⁶⁴ To establish an action under § 1983, the plaintiff must prove that the harmful action occurred “under color of state law”⁶⁵ and that it caused a deprivation of a constitutional right or a federal statutory right.⁶⁶ While not expressly stated in § 1983, the plaintiff must also show that the government actor possessed the requisite state of mind to be held liable for the underlying violation.⁶⁷ The applicable state-of-mind requirement, or liability standard, depends on the constitutional or statutory right that has been deprived.⁶⁸

When the state has failed to protect a foster child from maltreatment, the rights implicated are those substantive due process rights granted by the Fourteenth Amendment.⁶⁹ Specifically, the Fourteenth Amendment protects the liberty interest in a safe environment and the interest in being free from unreasonable risks of harm.⁷⁰ As the Eleventh Circuit has explained:

[T]he child’s physical safety was a primary objective in placing the child in the foster home. The state’s action in assuming the responsibility of finding and keeping the child in a safe environment place[s] an obligation on the state to insure the continuing safety of that environment. The state’s failure to meet that obligation, as evidenced by the child’s injuries, in the absence of overriding societal interests, constitute[s] a deprivation of liberty under the fourteenth amendment.⁷¹

⁶⁴ *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

⁶⁵ Requires that the defendant “exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1998) (quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941)).

⁶⁶ *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

⁶⁷ *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 405 (1997).

⁶⁸ *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (citing the following examples: *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause) and *Estelle v. Gamble*, 429 U.S. 97 (1976) (“deliberate indifference” to prisoner’s serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment)).

⁶⁹ *See, e.g., Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987).

⁷⁰ *Taylor*, 818 F.2d at 795; *see also Washington v. Glucksberg*, 521 U.S. 702, 777 (1997) (bodily integrity as a liberty interest); *Daniels*, 474 U.S. at 341 (freedom from bodily injury as a liberty interest).

⁷¹ *Taylor*, 818 F.2d 791 at 795.

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That being said, while an act perpetrated by a government agent that directly harms a person would be considered an unconstitutional deprivation of liberty, a failure to actively prevent harm caused by private parties does not generally subject the state to liability.⁷² So, when a foster child has been maltreated by his or her foster parent, the child must rely on one of the exceptions to the “no-duty rule”⁷³ the Supreme Court set forth in *DeShaney v. Winnebago County*.

B. STATE’S LIMITED DUTY TO PROTECT AGAINST HARM CAUSED BY PRIVATE PARTIES

In *DeShaney*, the Supreme Court affirmed the general principle that the state has no constitutional duty to protect people from harm caused by private parties, explaining that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”⁷⁴ The minor plaintiff, Joshua DeShaney, sued child welfare agents under § 1983 for failing to protect him from the abuse of his father, alleging that the failure was a violation of his Fourteenth Amendment substantive due process rights.⁷⁵ Joshua’s caseworkers had been repeatedly alerted to suspicions that his father was abusing him, but chose not to remove Joshua from his father’s care.⁷⁶ Approximately two years after the first allegations of abuse were reported, Joshua’s father beat him into a coma, leaving him with permanent injuries so severe that Joshua would spend the remainder of his life in an institution.⁷⁷ The Court found that, as the state had no constitutional duty to protect Joshua from his father, the failure to protect him did not constitute a violation of his due process rights.⁷⁸ Thus, the child welfare agents could not be held liable under § 1983.⁷⁹

The Court noted in its decision, however, that certain circumstances exist where the Constitution may impose a duty upon government actors

⁷² *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989).

⁷³ See Laura Oren, *DeShaney and “State-Created Danger”: Does the Exception Make the “No-Duty” Rule?*, 35-SUM ADMIN. & REG. L. NEWS 3, 3-4 (2010).

⁷⁴ *DeShaney*, 489 U.S. at 195.

⁷⁵ *Id.* at 194-95.

⁷⁶ *Id.* at 192-93.

⁷⁷ *Id.* at 193.

⁷⁸ *Id.* at 202.

⁷⁹ *Id.*

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to affirmatively protect persons from harm.⁸⁰ Two exceptions to the *DeShaney* no-duty rule have been recognized (1) where the state has created the danger⁸¹ or (2) where there exists a special relationship between the harmed party and the state.⁸² If one of these exceptions applies, and the state therefore has an affirmative duty to protect someone, the responsible government agents may be held liable for their actions and for the failure to act when necessary.⁸³

The “special relationship doctrine” applies when the state has taken a person into custody “against his [or her] will,” effectively restraining the person’s “freedom to act on his [or her] own behalf.”⁸⁴ In that instance, the state must then assume the duty to provide for the person’s basic needs, including the need for safety.⁸⁵ Where the government fails to provide for these needs, it can be held liable in a § 1983 action for the violation of the individual’s rights under the Fourteenth Amendment or the Eighth Amendment.⁸⁶

At the time *DeShaney* was decided, the Supreme Court had already decided that the state had affirmative duties to protect prisoners⁸⁷ and involuntarily committed mental patients, and they could, therefore, bring § 1983 actions against government actors for failures to protect them from harm.⁸⁸ Although the Court also noted that a similar action might lie when a child has been removed from his home and placed into foster care, it did not conclusively decide the issue.⁸⁹ While a few courts had recognized the duty to protect foster children from harm prior to

⁸⁰ *Id.* at 198 (summarizing the protections afforded in *Estelle v. Gamble* and *Youngberg v. Romeo*).

⁸¹ *Id.* at 201; *see also* Schnurr v. Bd. of Cnty. Comm’rs, 189 F.Supp.2d 1105, 1122-1123 (D. Colo. 2001). Beyond this mention, the state created danger exception is outside the scope of this Comment.

⁸² *DeShaney*, 489 U.S. at 200; *see also* Schnurr, 189 F.Supp.2d at 1122-1123.

⁸³ *DeShaney*, 489 U.S. at 198.

⁸⁴ *Id.* at 200.

⁸⁵ *Id.* at 199-200 (“*e.g.*, food, clothing, shelter, medical care, and reasonable safety”).

⁸⁶ *Id.* at 198.

⁸⁷ *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

⁸⁸ *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

⁸⁹ *DeShaney*, 489 U.S. at 201 n.9.

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DeShaney,⁹⁰ the duty has subsequently been found to exist by most state and federal courts.⁹¹

Since the Supreme Court has not yet addressed the duty to protect foster children, lower courts have developed their standards by looking to the following string of Supreme Court cases that address the state's duty to protect people from harm.

C. STANDARDS OF LIABILITY IN DUTY TO PROTECT CASES

In two seminal cases, the Supreme Court addressed the state's duty to protect under the special relationship doctrine, establishing different liability standards in each instance.⁹² In *Estelle v. Gamble*, the Supreme Court held that the liability standard in prison maltreatment cases is deliberate indifference,⁹³ and in *Youngberg v. Romeo*, the Court held that the standard in mental institution maltreatment cases is the professional judgment standard.⁹⁴ Since then, the Court has refined and clarified

⁹⁰ See, e.g., *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (“[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action.”); *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) (recognizing that a child in state custody has a constitutional right not to be placed in a foster care setting known to be unsafe).

⁹¹ See, e.g., *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (“[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983.”); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (“[I]t was clearly established . . . that the state had an obligation to provide adequate medical care, protection and supervision [to foster children].”); *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992) (Children have a “clearly established right to protection while in foster care.”); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (“[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.”); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (“*Youngberg* made the basic duty of the state to children in state custody clear, and . . . the duty [can] not be avoided by substituting private for public custodians.”); *J.R. v. Gloria*, 599 F.Supp.2d 182, 194-95 (D.R.I. 2009) (recognizing an “affirmative duty to ensure the safety and well-being” of foster children); *Braam ex rel. Braam v. State*, 81 P.3d 851, 856 (Wash. 2003) (en banc) (recognizing “foster children possess substantive due process rights” to protection from harm); *Kara B. v. Dane Cnty.*, 555 N.W.2d 630, 637 (Wisc. 1996) (Foster children have a “clearly established constitutional right under the Due Process Clause to safe and secure placement in a foster home”). *But see White ex rel. v. Chambliss*, 112 F.3d 731, 738 (4th Cir. 1997) (“[W]e cannot say that a right to affirmative state protection for children placed in foster care was clearly established.”).

⁹² *Youngberg*, 457 U.S. 307; *Estelle*, 429 U.S. 97.

⁹³ *Estelle*, 429 U.S. at 104.

⁹⁴ *Youngberg*, 457 U.S. at 323.

these standards multiple times. Particularly significant were its holdings in *Farmer v. Brennan*⁹⁵ and *County of Sacramento v. Lewis*.⁹⁶

In *Estelle*, the Supreme Court established the liability standard under the Eighth Amendment for harm suffered by prisoners while in government care.⁹⁷ The plaintiff was a prisoner who brought a § 1983 action against the state, claiming that inadequate medical care resulted in a violation of his Eighth Amendment right to be free from cruel and unusual punishment.⁹⁸ The Court applied the deliberate indifference standard, under which state actors may be liable only if they are deliberately indifferent to the basic needs of the plaintiffs.⁹⁹ In describing what action was illustrative of deliberate indifference, the Court cited various examples of intentional acts by government employees.¹⁰⁰

Several years later, the Supreme Court asserted that deliberate indifference was akin to criminal recklessness, explaining that “acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.”¹⁰¹ In *Farmer v. Brennan*, the Court held that, in actions brought by prisoners alleging inhumane conditions, the plaintiff must show that the responsible prison official was aware of facts “from which the inference could be drawn that a substantial risk of serious harm existed, and he must also draw the inference.”¹⁰² Thus, as used in the Eighth Amendment context, deliberate indifference requires that the government agent subjectively knew of the risk of harm to the plaintiff.¹⁰³

In *Youngberg*, the Supreme Court set forth the liability standard applicable when an involuntarily institutionalized mental health patient has been harmed while in state care.¹⁰⁴ The plaintiff, a man who was substantially mentally disabled, had allegedly been injured over sixty times during the first two and a half years he spent in a state mental

⁹⁵ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁹⁶ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998).

⁹⁷ *Estelle*, 429 U.S. at 104.

⁹⁸ *Id.* at 101.

⁹⁹ *Id.* at 104.

¹⁰⁰ *Id.* at 104-05, 104 n.10 (noting examples of intentional conduct, including the “injection of penicillin with knowledge that prisoner was allergic,” “refusal of paramedic to provide treatment,” and “prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon”).

¹⁰¹ *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

¹⁰² *Id.* at 837.

¹⁰³ *Id.* at 838.

¹⁰⁴ *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982).

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institution.¹⁰⁵ The Court determined that mental health patients were “entitled to more considerate treatment and conditions” than prisoners.¹⁰⁶ In finding there should be a higher standard of care, the Court held that the interests of the state must be balanced against the rights of the individual.¹⁰⁷ Under the professional judgment standard, a government actor is liable when his or her actions are “such a substantial departure from accepted professional¹⁰⁸ judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”¹⁰⁹

Subsequently, the Supreme Court clarified that in order for a state agent to be held liable, the challenged action must “shock[] the conscience.”¹¹⁰ In *County of Sacramento v. Lewis*, the Court explained that the Fourteenth Amendment’s substantive due process provision protects against “arbitrary action,” and that to be sufficiently arbitrary, the challenged conduct must shock the conscience in violation of the “decencies of civilized conduct.”¹¹¹ Negligently inflicted harm may never be sufficiently shocking to be considered a constitutional violation.¹¹² Conversely, intentionally injurious conduct is highly likely to shock the conscience.¹¹³ Where the government actor’s state of mind falls in between those two poles, liability depends on “an exact analysis of the circumstances” involved.¹¹⁴

The Supreme Court has yet to rule on the state of mind required to establish liability in § 1983 actions brought by foster children, creating a split among federal and state courts as to which liability standard to apply.¹¹⁵ Many courts require that the plaintiff prove that the

¹⁰⁵ *Id.* at 310.

¹⁰⁶ *Id.* at 321-22.

¹⁰⁷ *Id.* at 321.

¹⁰⁸ The Court defined a “professional” as “a person competent, whether by education, training or experience, to make the particular decision at issue.” *Id.* at 323 n.30.

¹⁰⁹ *Id.* at 323.

¹¹⁰ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting shocks-the-conscience test first applied in *Rochin v. California*, 342 U.S. 165 (1952)).

¹¹¹ *Id.* at 845-46.

¹¹² *Id.* at 849; *see also Daniels v. Williams*, 474 U.S. 327, 328 (1986).

¹¹³ *Sacramento v. Lewis*, 523 U.S. at 854 (explaining, for example, that when a police officer has engaged in a high-speed chase, his or her conduct may only be considered conscious shocking if the officer “inten[ded] to harm [the] suspect[] physically or to worsen their legal plight.”).

¹¹⁴ *Id.* at 850.

¹¹⁵ *See, e.g., Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010) (deliberate indifference standard); *Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (deliberate indifference); *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (professional judgment standard); *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981) (deliberate

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government was deliberately indifferent,¹¹⁶ others apply the professional judgment standard,¹¹⁷ some require subjective knowledge of harm,¹¹⁸ some apply an objective standard,¹¹⁹ and some apply a “shocks-the-conscience” analysis,¹²⁰ while others do not.¹²¹ So, decades after the first court recognized the right of a foster child to bring a § 1983 action,¹²² there remains no clear liability standard.

III. COURTS SPLIT OVER DUTY TO PROTECT & APPLICABLE LIABILITY STANDARD IN FOSTER CARE MALTREATMENT CASES

Without the direction of a Supreme Court holding, courts presiding over foster care maltreatment cases have adopted myriad variations of the deliberate indifference and professional judgment standards. In defining the applicable liability standard, a court delineates the bounds of the state’s duty to protect, which consequently affects foster children’s constitutionally protected liberty interests. Unfortunately, courts have often decided which standard to use, not by assessing the interests of the maltreated foster children before them, but rather by looking to other courts, mechanically applying the standard presented by the parties, or making inapt comparisons between prisoners and foster children.

A. DELIBERATE INDIFFERENCE STANDARD IN FOSTER CARE CASES

In foster care abuse cases, a significant number of courts have chosen to adopt the deliberate indifference standard originally set forth in the prisoner’s rights action, *Estelle v. Gamble*,¹²³ a standard many

indifference); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179, 1187 (D. Wyo. 2000) (professional judgment); *Braam ex rel. Braam v. State*, 81 P.3d 851, 858 (Wash. 2003) (en banc) (professional judgment standard).

¹¹⁶ See, e.g., *Tamas*, 630 F.3d at 844; *Hernandez*, 380 F.3d at 881; *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 291-292 (8th Cir. 1993); *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d at 141.

¹¹⁷ See, e.g., *Yvonne L.*, 959 F.2d at 894; *T.M. ex rel. R.T.*, 93 F. Supp. 2d at 1187 (D. Wyo. 2000); *Braam*, 81 P.3d at 858.

¹¹⁸ See, e.g., *Tamas*, 630 F.3d at 845; *Hernandez*, 380 F.3d at 881; *J.R. v. Gloria*, 599 F.Supp.2d 182, 196 (D.R.I. 2009).

¹¹⁹ See, e.g., *Nicini*, 212 F.3d at 811-12; *Kara B. v. Dane Cnty.*, 542 N.W.2d 777, 787 (Wisc. Ct. App. 1996).

¹²⁰ See, e.g., *Hernandez*, 380 F.3d at 880; *Nicini*, 212 F.3d at 810; *Connor B. ex rel. Vigurs v. Patrick*, 771 F.Supp.2d 142, 163 (D.Mass. 2011).

¹²¹ See, e.g., *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012); *Phelan ex rel. Phelan v. Torres*, 843 F.Supp.2d 259 (E.D.N.Y. 2011).

¹²² See *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981).

¹²³ *Nicini*, 212 F.3d at 810.

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consider the “minimum standard of care required to meet the State’s substantive due process duties”¹²⁴ Some courts have further refined the deliberate indifference test in accord with the holding in another prisoners’ rights case, *Farmer v. Brennan*, that subjective knowledge is required.¹²⁵ After the *Farmer* decision, courts have required less and less of child welfare agents. However, in its infancy, the deliberate indifference standard as applied to foster care maltreatment lawsuits allowed for greater consideration of caseworkers’ failure to comply with their professional duties.

One of the first courts to recognize the right of foster children to bring a § 1983 action for maltreatment was the Second Circuit. In *Doe v. New York City Department of Social Services*, a case decided before *Youngberg*, the court applied the *Estelle* standard.¹²⁶ In order to be found liable, the court held that a defendant must be “deliberate[ly] indifferen[t] to a known injury, a known risk, or a specific duty[.]”¹²⁷ The court also explained that the standard was “closely associated” with gross negligence,¹²⁸ in that “gross negligent conduct creates a strong presumption of deliberate indifference.”¹²⁹ One of the plaintiff’s allegations was that the defendants failed to perform certain statutory duties designed to protect children from maltreatment, including the duty to report suspected abuse.¹³⁰ The court held that, while there may be no strict liability for failure to perform such duties, evidence of the failure to report was relevant to the issue of deliberate indifference.¹³¹ In doing so, the court affirmed its prior holdings that deliberate indifference could be inferred from a “pattern of omissions.”¹³²

¹²⁴ *Braam ex rel. Braam v. State*, 81 P.3d 851, 858 (Wash. 2003) (en banc); see also *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 709 F.2d 782, 790 (2d Cir. 1983) (concluding the deliberate indifference standard is “stricter” than the professional judgment standard); *Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 371-72 (E.D.Pa. 1994) (noting the deliberate indifference standard is “more permissive” than the professional judgment standard).

¹²⁵ See, e.g., *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 845 (9th Cir. 2010); *Hernandez*, 380 F.3d at 881; *J.R. v. Gloria*, 599 F.Supp.2d 182, 196 (D.R.I. 2009).

¹²⁶ *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d at 141.

¹²⁷ *Id.* at 145 (emphasis added).

¹²⁸ The court noted that “Traditionally the term ‘gross negligence’ has been held equivalent to the words ‘reckless and wanton,’ . . . and the Supreme Court in *Estelle v. Gamble*. . . has characterized deliberate indifference as ‘the wanton infliction of unnecessary pain.’” *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d at 143 n.4.

¹²⁹ *Id.* at 143.

¹³⁰ *Id.* at 140.

¹³¹ *Id.* at 146-47.

¹³² *Id.* at 145.

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After *Doe v. N.Y.C.*, other courts began to acknowledge the right of foster children to be free from maltreatment while in state care.¹³³ One such court was the Eleventh Circuit, which initially modeled its liability standard after the standard applied by the court in *Doe*.¹³⁴ The court chose to use the deliberate indifference standard even though they noted that the liberty interest was similar to the liberty interest in *Youngberg*.¹³⁵ Subsequent to making this comparison between foster children and mental health patients, the court proceeded to look to the Second Circuit's analysis of the similarities between foster children and prison inmates,¹³⁶ abandoning further consideration of *Youngberg*.

In addition to looking to other circuits, many courts that have applied the deliberate indifference standard have done so solely because it was the standard presented by the parties.¹³⁷ For example, in choosing to use the deliberate indifference standard,¹³⁸ the Third Circuit did not consider the professional judgment standard of *Youngberg*.¹³⁹ The court also did not assess whether to apply the objective "should have known" test or the subjective "actually knew" test asserted in *Farmer*, adopting the plaintiff's objective analysis without question.¹⁴⁰ Instead, the court focused heavily on whether the defendant's conduct was conscience shocking.¹⁴¹ The court also declined to address whether a failure to act on the part of a state agent could ever constitute deliberate indifference.¹⁴²

The Fifth Circuit, on the other hand, did apply the deliberate indifference standard set forth in *Farmer*, which includes both a subjective and an objective element.¹⁴³ The court held that for deliberate

¹³³ See, e.g., *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 812 F.2d 298, 303 (7th Cir. 1987); *Gibson v. Merced Cnty. Dep't of Human Res.*, 799 F. 2d 582, 589 (9th Cir. 1986).

¹³⁴ *Taylor*, 818 F.2d at 795-96 ("Defendants may be liable. . . if they. . . exhibited deliberate indifference to a known injury, a known risk, or a specific duty. . ."). The Eleventh Circuit subsequently adopted the deliberate indifference standard used in *Farmer*, requiring subjective knowledge that the child was at substantial risk of harm. *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004).

¹³⁵ *Taylor*, 818 F.2d at 795.

¹³⁶ *Id.* at 796.

¹³⁷ See, e.g., *Nicini v. Morra*, 212 F.3d 798, 811 n.9 (3d Cir. 2000) (en banc); *Gibson*, 799 F. 2d at 589-90; *Braam ex rel. Braam v. State*, 81 P.3d 851, 859 (Wash. 2003) (en banc).

¹³⁸ *Nicini*, 212 F.3d at 811.

¹³⁹ *Id.* at 811 n.9.

¹⁴⁰ *Id.* at 811-12.

¹⁴¹ *Id.*

¹⁴² *Id.* at 812.

¹⁴³ *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004).

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indifference to be established, the state actor “must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹⁴⁴ The court also stressed that the subjective element may be inferred “from the fact that the risk of harm is obvious.”¹⁴⁵ Clarifying that it did not intend to weaken the standard, the court further explained that deliberate indifference was a higher standard than gross negligence.¹⁴⁶

Again relying on the liability standard used by sister courts, the Ninth Circuit adopted the deliberate indifference standard with no consideration of the professional judgment standard.¹⁴⁷ The court opted to interpret the standard to require both an objective and a subjective element,¹⁴⁸ and to require that the state agent’s behavior “shocks the conscience.”¹⁴⁹ Like the Fifth Circuit, the Ninth Circuit also decided that the subjective element may be inferred where the risk of harm was obvious,¹⁵⁰ such that “a reasonable official would have been compelled to draw that inference.”¹⁵¹ In so defining the deliberate indifference standard, the court injected objectivity into the supposedly subjective element of the standard.

Overall, in defining the duty to protect foster children and determining which liability standard to adopt, most circuit courts have failed to carefully consider the peculiar circumstances of foster children. Unfortunately, neither have many of the courts that have adopted the professional judgment standard.

B. PROFESSIONAL JUDGMENT STANDARD IN FOSTER CARE CASES

While most courts have applied the deliberate indifference standard, a few courts have opted to use modified versions of the professional judgment standard set forth in *Youngberg*.¹⁵² Additionally, while the

¹⁴⁴ *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

¹⁴⁵ *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

¹⁴⁶ *Id.* at 882.

¹⁴⁷ *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010).

¹⁴⁸ *Id.* at 845.

¹⁴⁹ *Id.* at 844 (“deliberate indifference to a known or so obvious as to imply knowledge of, danger.” (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064 (9th Cir. 2006))).

¹⁵⁰ *Id.* at 845 (citing *Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004)).

¹⁵¹ *Id.*

¹⁵² *See, e.g.*, *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992); *Connor B. ex rel. Vigurs v. Patrick*, 771 F.Supp.2d 142, 163 (D.Mass. 2011); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179 (D. Wyo. 2000); *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 507 (D.N.J., 2000); *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638, 646 (E.D.Pa. 1999);

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Supreme Court and numerous other courts have asserted that a difference exists between the deliberate indifference and professional judgment standards,¹⁵³ a few courts have concluded that there is virtually no difference between the two standards.¹⁵⁴

The Seventh Circuit, for example, initially¹⁵⁵ elected to apply a version of the professional judgment standard that was essentially equivalent to the deliberate indifference standard.¹⁵⁶ The court held that the professional judgment standard did not “impose . . . [a] duty of inquiry in these cases.”¹⁵⁷ So, liability could only attach where the defendants knew of or suspected that the child was being maltreated.¹⁵⁸ Only then could the state actor’s behavior shock the conscience. In an earlier case, the Seventh Circuit also made clear that government agents could only be held liable for placing a foster child with a person or people “they know to be dangerous or otherwise unfit.”¹⁵⁹ The dissent in that case noted that the standard applied by the Seventh Circuit was more stringent than that set forth in *Youngberg*.¹⁶⁰

Upon consideration of the standard set forth by the Seventh Circuit, the Tenth Circuit noted that it “doubt[ed] there is much difference” between that standard and the deliberate indifference standard, as applied in the foster care context.¹⁶¹ Nonetheless, the court elected to apply the

LaShawn A. v. Dixon, 762 F.Supp. 959, 996 (D.D.C. 1991); Braam *ex rel.* Braam v. State, 81 P.3d 851, 858 (Wash. 2003) (en banc); Kara B. *ex rel.* Albert v. Dane Cnty., 555 N.W.2d 630, 637 (Wis. 1996).

¹⁵³ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Terrence v. Northville Reg’l Psychiatric Hosp.*, 286 F.3d 834, 848 (6th Cir. 2002) (noting that *Youngberg* provides “heightened constitutional protection” over deliberate indifference standard.); *Patten v. Nichols*, 274 F.3d 829, 843 (4th Cir. 2001) (“Applying the deliberate indifference standard. . . would be giving involuntarily committed patients the *same* treatment as that afforded to convicted prisoners, a result the *Youngberg* Court specifically condemned.”); *Kulak v. City of New York*, 88 F.3d 63, 75 (2d Cir. 1996) (concluding the professional judgment standard requires less than deliberate indifference); *Shaw ex rel. Strain v. Strackhouse*, 920 F.2d 1135, 1150 (3d Cir. 1990) (“[T]he plaintiff carries a greater burden when trying to show deliberate indifference than when trying to establish a failure to exercise professional judgment.”).

¹⁵⁴ See *Yvonne L.*, 959 F.2d at 894; *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 329.

¹⁵⁵ After *Lewis v. Anderson* and *K.H. ex rel. Murphy v. Morgan*, the Seventh Circuit described the standard as a “modified deliberate indifference standard,” rejecting the professional judgment standard set forth in *Youngberg*. *J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 792 (7th Cir. 2003).

¹⁵⁶ Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 DUKE J. GENDER L. & POL’Y 223, 231 (2008).

¹⁵⁷ *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002).

¹⁵⁸ *Id.*

¹⁵⁹ *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990).

¹⁶⁰ *Id.* at 862 (Coffey, J., dissenting).

¹⁶¹ *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992).

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professional judgment standard, recognizing that like the mental health patients in *Youngberg*, foster children are entitled to more considerate treatment than prison inmates.¹⁶² As opposed to the Seventh Circuit, the Tenth Circuit did not require that the plaintiff prove the defendant subjectively knew that the harm was occurring.¹⁶³ So, if a caseworker has exercised no professional judgment in placing the child, whether he knew the child was being maltreated or not, the caseworker might be found liable for the resulting harm.¹⁶⁴

Noting that the holding of the Tenth Circuit case created confusion about how the professional judgment standard should be applied,¹⁶⁵ the District Court of Wyoming looked to the analysis of the standard presented by the Eastern District of Pennsylvania.¹⁶⁶ The court stressed that to require actual knowledge of abuse “would encourage an ‘ostrich’ approach to placement of foster children, where a victimized foster child could be left at the mercy of abusers, just as long as the state agent never ‘knew or suspected’ that the child was being abused.”¹⁶⁷ Furthermore, the court recounted the concurring opinion of Chief Judge Seitz in the Third Circuit’s holding in *Youngberg*,¹⁶⁸ which had been cited and adopted in the Supreme Court’s opinion in the same case.¹⁶⁹ In Judge Seitz’s concurrence, he asserted that state agents “have an affirmative obligation to discover the needs of . . . patients, and to respond to those needs in an adequate manner.”¹⁷⁰ The District Court of Wyoming concluded that the Supreme Court intended for the professional judgment standard to require only that the government actor exercised professional judgment, and that liability may not be avoided by showing a lack of knowledge of harm.¹⁷¹

If all courts would take the approach of the District Court of Wyoming, which included a thoughtful assessment of the interests and circumstances of foster children and a close look at the Supreme Court’s opinion in *Youngberg*, they would realize that the professional judgment standard is the appropriate standard to apply in foster care maltreatment

¹⁶² *Id.*

¹⁶³ *Id.* (holding that the professional judgment standard “does not require actual knowledge the children will be harmed”).

¹⁶⁴ *Id.* at 893-94.

¹⁶⁵ *T.M. ex rel. R.T. v. Carson*, 93 F.Supp.2d 1179, 1188 (D.Wyo. 2000).

¹⁶⁶ *Id.* at 1190.

¹⁶⁷ *Id.* (citing *Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 371-72 (E.D.Pa. 1994)).

¹⁶⁸ *Romeo v. Youngberg*, 644 F.2d 147, 173 (3d Cir. 1980) (en banc) (Seitz, C.J. concurring).

¹⁶⁹ *T.M. ex rel. R.T.*, 93 F.Supp.2d at 1192.

¹⁷⁰ *Id.* (quoting *Romeo v. Youngberg*, 644 F.2d 147, 177 (3d Cir. 1980)).

¹⁷¹ *Id.* (citing *Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 373 (E.D.Pa. 1994)).

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cases. While some courts have considered child welfare agents' conformance with their professional and statutory duties, and other courts have compared the circumstances of foster children to the circumstances of prisoners and mental health patients, a serious assessment of foster children's interests has typically been lacking. Foster children's constitutionally protected right to safety while in state care is too important to allow this issue to remain unresolved.¹⁷²

IV. CONSIDERING THE RELEVANT INTERESTS & CIRCUMSTANCES, THE STATE HAS A HEIGHTENED DUTY TO PROTECT FOSTER CHILDREN, SO THE PROFESSIONAL JUDGMENT STANDARD SHOULD BE ADOPTED

To resolve this circuit split, the Supreme Court must delineate the duty to protect foster children by assessing what state conduct would be sufficiently conscience shocking to warrant liability. As the Court has made clear, what shocks the conscience in one setting may not be so shocking in another.¹⁷³ To determine the appropriate liability standard, the court must analyze the exact circumstances¹⁷⁴ and balance the liberty interests of the individual against the relevant interests of the state.¹⁷⁵

Therefore, in the foster care context, the court should assess the peculiar circumstances of foster children and balance their interests with the interests of the government. First and foremost, children have a significant interest in being protected from maltreatment.¹⁷⁶ Indeed, it is central to their Fourteenth Amendment right to be free from unreasonable risks of harm. Correspondingly, the state has an important interest in protecting children from maltreatment.¹⁷⁷ The government also has a general interest in the protection of its citizens.¹⁷⁸ Beyond these interests, the peculiar circumstances of foster children place them in a much more vulnerable position than mental health patients and prisoners, and, therefore, the state should be held to a higher standard of

¹⁷² See *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816) (asserting "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."); See generally Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1160-85 (2012) (discussing arguments for and against resolution of circuit splits regarding federal constitutional rights).

¹⁷³ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

¹⁷⁴ *Sacramento v. Lewis*, 523 U.S. at 850.

¹⁷⁵ *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

¹⁷⁶ *Prince v. Mass.*, 321 U.S. 158, 165 (1944).

¹⁷⁷ *Reno v. ACLU*, 521 U.S. 844, 865 (1997).

¹⁷⁸ *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 340 (1993).

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care in regards to foster children. Weighing all of these interests and circumstances, it becomes clear that the state has a heightened duty to protect foster children from harm, and the professional judgment standard is the appropriate standard to apply in foster care maltreatment cases.

A. INTERESTS IN PROTECTING CHILDREN AGAINST MALTREATMENT

The Supreme Court has long recognized the critically important interest in protecting the welfare of our nation's children.¹⁷⁹ "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."¹⁸⁰ Due to "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," the constitutional rights of children are different than those of adults.¹⁸¹ In fact, Justice Brennan has suggested that children may even be entitled to greater constitutional protection than adults.¹⁸² Upon consideration of the interests of children to be protected from maltreatment, it is clear that Justice Brennan was right.

The interests of children in being protected from abuse and being given the opportunities for healthy growth into adulthood¹⁸³ are of utmost importance. When these interests are not protected, the ramifications can be devastating. Child maltreatment is so injurious that the Centers for Disease Control and Prevention has deemed it a public health problem.¹⁸⁴ Immediate physical injuries range from bruises to broken bones to hemorrhage.¹⁸⁵ Long-term effects of maltreatment may include physical ailments such as shaken baby syndrome, impaired brain

¹⁷⁹ See, e.g., *Reno v. ACLU*, 521 U.S. at 865 (noting "the State's independent interest in the well-being of its youth"); *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (discussing "the State's traditional and 'transcendent interest in protecting the welfare of children'" (citing *Ginsberg v. N.Y.*, 390 U.S. 629, 640 (1968)); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (noting "the State has an urgent interest in the welfare of the child").

¹⁸⁰ *Prince*, 321 U.S. at 165.

¹⁸¹ *Bellotti v. Baird* 443 U.S. 622, 634 (1979).

¹⁸² See *Parham v. J.R.*, 442 U.S. 584, 627 (1979) (Brennan, J., concurring in part and dissenting in part).

¹⁸³ *Prince*, 321 U.S. at 165.

¹⁸⁴ REBECCA T. LEEB ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CHILD MALTREATMENT SURVEILLANCE 3 (2008), available at www.cdc.gov/ViolencePrevention/pdf/CM_Surveillance-a.pdf.

¹⁸⁵ CHILD WELFARE INFO. GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 3 (2013), available at www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf.

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development, and poor physical health.¹⁸⁶ Moreover, the stress that children experience as a result of maltreatment can disrupt early brain development.¹⁸⁷ It may also interfere with the development of the nervous system and regulation of the immune system.¹⁸⁸

Children who have been maltreated are also more likely to develop emotional, behavioral, and psychological problems.¹⁸⁹ Psychological effects immediately apparent in maltreated children include feelings of isolation, fear, and loss of the ability to trust others.¹⁹⁰ Long-term consequences may include low self-esteem, difficulty with relationships, depression, anxiety, and a variety of other psychological conditions.¹⁹¹ When children experience severe and prolonged maltreatment, they are more likely to have health problems as adults, including alcoholism, depression, drug abuse, eating disorders, smoking, suicide, and certain chronic diseases.¹⁹² Furthermore, when a child is removed from his or her home because of severe maltreatment, the child may suffer additional emotional trauma from the removal itself.¹⁹³

Beyond the individual interests of children in being protected against these devastating effects, the state has a great interest in preventing abuse and neglect. Child maltreatment poses a significant economic and social burden to society. Each year, the expenses flowing

¹⁸⁶ *Id.* at 3-4.

¹⁸⁷ NAT'L SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, EXCESSIVE STRESS DISRUPTS THE ARCHITECTURE OF THE DEVELOPING BRAIN, WORKING PAPER #3, at 2 (2005), *available at* http://developingchild.harvard.edu/index.php/resources/reports_and_working_papers/working_papers/wp3; CHILD WELFARE INFO. GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 4 (noting that child maltreatment may also result in poor academic performance, language development, and cognitive capacity).

¹⁸⁸ Tiffany Watts-English et al., *The Psychobiology of Maltreatment in Childhood*, 62 J. SOC. ISSUES 717, 719 (2006), *available at* www.ocfpacourts.us/assets/files/list-758/file-937.pdf.

¹⁸⁹ *See generally* CHILD WELFARE INFO. GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 4-6.

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Id.*

¹⁹² D. Runyan et al., World Health Org., *Child Abuse & Neglect by Parents & Other Caregivers*, in WORLD REPORT ON VIOLENCE AND HEALTH 59, 69 (E. Krug et al. eds., 2002), *available at* www.who.int/violence_injury_prevention/violence/global_campaign/en/chap3.pdf.

¹⁹³ CECILIA CASANUEVA ET AL., OFFICE OF PLANNING, RESEARCH & EVALUATION, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, NO. 18: INSTABILITY AND EARLY LIFE CHANGES AMONG CHILDREN IN THE CHILD WELFARE SYSTEM 1 (2012), *available at* www.acf.hhs.gov/sites/default/files/opre/early_life.pdf. Besides the initial trauma of removal, attachment is disrupted. When children do not develop healthy attachments with at least one caregiver, they are at great risk for cognitive delays, relationship dysfunction, and emotional development. CALL TO ACTION ON BEHALF OF MALTREATED INFANTS AND TODDLERS 4 (2011), *available at* www.zerotothree.org/public-policy/federal-policy/childwelfareweb.pdf.

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from new cases of abuse and neglect total approximately \$124 billion.¹⁹⁴ Every victim of fatal child abuse costs society almost \$1.3 million, and every victim of nonfatal maltreatment costs over \$210 thousand.¹⁹⁵ These estimates incorporate the increased medical costs,¹⁹⁶ criminal justice costs,¹⁹⁷ child welfare costs,¹⁹⁸ educational costs,¹⁹⁹ and productivity losses²⁰⁰ that result from child abuse and neglect.²⁰¹

Considering the individual and state interests in preventing child maltreatment, it is even more important for the state to ensure that children are protected from harm than it is to ensure the protection of adults. Children are in their formative years, and the majority of physical, emotional, social, and intellectual development occurs during childhood.²⁰² As a result, the potential impact of harm is greater for them than for adults. Maltreatment during childhood may have lifelong consequences, but early intervention may provide children with the tools to rebound from abuse and neglect.²⁰³ Placing maltreated children into nurturing foster homes, where they can obtain proper care and treatment, protects their interests in safety and personal security.²⁰⁴ To maintain that safety, it is critical that foster care agents do more than simply respond to known harms, which is essentially all the deliberate indifference standard requires. In contrast, by requiring that state agents comply with professional standards and make informed decisions, the professional judgment standard would require that caseworkers take a more active role in protecting foster children.

¹⁹⁴ Xiangming Fang, et al., *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, 36 CHILD ABUSE AND NEGLECT 156, 163 (2012).

¹⁹⁵ *Id.*

¹⁹⁶ The average lifetime healthcare cost per victim of nonfatal maltreatment is \$43,178. *Id.* at 160.

¹⁹⁷ The average lifetime criminal justice cost per victim of nonfatal maltreatment is \$6,747. *Id.*

¹⁹⁸ The average lifetime child welfare cost per victim of nonfatal maltreatment is \$7,728. *Id.*

¹⁹⁹ The average lifetime special education cost per victim of nonfatal maltreatment is \$7,999. *Id.*

²⁰⁰ The average lifetime productivity loss per victim of nonfatal maltreatment is \$144,360. *Id.*

²⁰¹ *Id.*

²⁰² See generally, GREATER TWIN CITIES UNITED WAY, RESEARCH & PLANNING, EARLY CHILDHOOD DEVELOPMENT: BUILDING BLOCKS FOR LIFE (July 2010), available at www.unitedwaytwincities.org/_asset/stt995/eli_BriefingPaperFinal.pdf.

²⁰³ See CALL TO ACTION ON BEHALF OF MALTREATED INFANTS AND TODDLERS 17.

²⁰⁴ See Melinda Smith & Jeanne Segal, *Child Abuse and Neglect: Recognizing, Preventing, and Reporting Child Abuse*, HELPGUIDE.ORG (Aug. 2013), available at www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm.

B. STATE'S INTERESTS IN THE SPECIAL RELATIONSHIP CONTEXT

In assessing the duty to protect foster children, some courts have furthered their analyses by comparing the state interests served by taking foster children into state care with the interests served by taking mental health patients and prisoners into state custody.²⁰⁵ Those government interests include general protection²⁰⁶ and punishment.²⁰⁷ To further these interests, the state may take individuals involuntarily into its custody under its *parens patriae*²⁰⁸ power and under its police power.²⁰⁹ Pursuant to its *parens patriae* powers, the government has the authority to protect individuals incapable of acting in their own best interests.²¹⁰ Its police powers grant the state the authority to protect individuals from harm and to promote the public welfare.²¹¹

So, the government essentially has dual interests in protection. On one hand is its interest in safeguarding individuals who are unable to care for themselves.²¹² On the other hand is its interest in defending society at large from those it deems a threat to the general welfare.²¹³ Removing children from the custody of parents unable to care for them, and placing the children in safe foster homes, serves the important interest in protecting them as individuals.²¹⁴ Likewise, persons suffering from mental illness may be taken into state care for their protection when they are deemed unable to care for themselves.²¹⁵ Unlike foster children, though, the government also uses its police powers to involuntarily commit someone with mentally illness when the person is deemed a risk to the safety of others.²¹⁶ In the case of an institutionalized mental health patient, the state is interested in the protection of both the individual and

²⁰⁵ See, e.g., *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 857 (7th Cir. 1990); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179, 1190-91 (D. Wyo. 2000); *Kara B. v. Dane Cnty.*, 555 N.W.2d 630, 634 (Wis. 1996).

²⁰⁶ See *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 340 (1993) (noting the state's "legitimate interests in protection, care, and treatment").

²⁰⁷ See *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011) (noting that the state has an "interest in punishment, deterrence, and rehabilitation").

²⁰⁸ Latin for "parent of his or her country." BLACK'S LAW DICTIONARY 1144 (9th ed. 2009).

²⁰⁹ *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975).

²¹⁰ Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 264 (2003).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

²¹⁵ *Addington v. Tex.*, 441 U.S. 418, 426 (1979).

²¹⁶ *Id.*

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society, because the person has been judged so mentally ill that he poses a threat to himself and others.²¹⁷ Criminals, in contrast, are taken into state custody under the police power theory largely for the protection of society.²¹⁸ Unlike foster children and mental health patients, criminals are not detained by the government for the purpose of protecting them as individuals.

In addition to protection, the government may take a person into state custody for the purpose of punishment. The primary state interests served by taking criminals into its custody include the protection of society²¹⁹ and the punishment of the individual.²²⁰ The government has a duty to protect prisoners only to the extent that maltreatment may not be so bad that it constitutes cruel and unusual punishment.²²¹ As a result, the conditions of prisons may be harsh, but liability may only attach when harm serves no “legitimate penological objectiv[e].”²²² In comparison, the Supreme Court has noted that those who have been involuntarily committed are entitled to more considerate conditions than prisoners, because the conditions of confinement for prisoners are “designed to punish,”²²³ and mental health patients “may not be punished at all.”²²⁴ The government interests served by involuntarily commitment include protecting the individual and protecting society from the mentally ill individual. Like mental health patients, foster children are not taken into state care for the purpose of punishment.²²⁵ In stark contrast, the singular societal interest in foster care is the protection of the child.

Comparing the state’s interests in the protection and punishment of prisoners, mental health patients, and foster children, it is clear that foster children are most similar to mental health patients. Not only is the state’s duty to protect foster children at least as great as it’s duty to protect mental health patients, considering the particular circumstances of foster children, the government should be subject to a heightened duty to protect the children in foster care.

²¹⁷ *Id.*

²¹⁸ *O’Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975).

²¹⁹ *See id.*

²²⁰ *See Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011).

²²¹ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

²²² *Id.* at 833 (quoting *Hudson v. Palmer*, 468 U.S. 517, 548 (1984)).

²²³ *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).

²²⁴ *Id.* at 315-16.

²²⁵ *Braam ex rel. Braam v. State*, 81 P.3d 851, 859 (Wash. 2003) (en banc).

C. DUE TO THE PECULIAR CIRCUMSTANCES OF FOSTER CHILDREN,
THE STATE HAS A HEIGHTENED DUTY TO PROTECT THEM FROM
HARM

1. *The State Steps into the Shoes of the Foster Child's Parents*

In furtherance of the individual and state interests in child protection, the government may remove a child from the care of his or her natural parents, assuming the temporary role of parent.²²⁶ With that role comes the expectation that the state will fulfill the duties reasonably expected of a parent.²²⁷ The Supreme Court has recognized that a parent has an interest in “and *obligation* for the welfare and health of the child.”²²⁸ In the foster care system, the state has taken on the temporary legal role of parent, and the foster parents effectively serve as caretakers. As “parent,” though, it is the state’s responsibility to ensure that the caretaker is not doing anything to harm the child. Because the government actively takes on the role of parent, it assumes a heightened duty to protect foster children.

The importance of the parental role is magnified by the child’s “peculiar vulnerability” and “inability to make critical decisions in an informed, mature manner.”²²⁹ By assuming the temporary role of parent for foster children, the state acknowledges that the children are not capable of taking care of themselves. Unlike most adults, who can take care of their own basic and medical needs, contact law enforcement if they are being maltreated, and logically assess their options, children generally need the guidance and assistance of adults.²³⁰ While older children can certainly protect themselves to a greater extent than infants

²²⁶ *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 855 (7th Cir. 1990) (Coffey, J., dissenting) (quoting *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974); see also *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992).

²²⁷ *K.H. ex rel. Murphy*, 914 F.2d at 855 (Coffey, J., dissenting) (quoting *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974); see also *Yvonne L.*, 959 F.2d at 894.

²²⁸ *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (emphasis added).

²²⁹ *Bellotti v. Baird* 443 U.S. 622, 634 (1979). At the international level, the United Nations has also declared “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.” Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 19 U.N. Doc. A/4354 (Nov. 20, 1959), available at www.unicef.org/lac/spbarbados/Legal/global/General/declaration_child1959.pdf.

²³⁰ See NAT’L CONFERENCE OF STATE LEGISLATURES, ADOLESCENT DEVELOPMENT & COMPETENCY 4-6 (2010), available at www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf.

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and toddlers, their competence to fully understand their rights and remedies may not be as developed as adults.²³¹

In contrast, adult prisoners are not only capable of protecting their own interests; they are largely required to do so. They do not need and are not entitled to “parental” protection. The understanding that prisoners must take an active role in protecting their own interests is reflected in the Prison Litigation Reform Act (PRLA).²³² Pursuant to the PRLA, a prisoner may not bring an action under § 1983 until he or she has exhausted all available administrative remedies.²³³ Furthermore, prisoners are primarily responsible for their own wellbeing and for maintaining the conditions of their personal space.²³⁴ Since adult inmates are generally capable of fending for themselves, it would not be shocking to require them to notify prison officials if they were at risk of harm. Thus, it is not unreasonable to require, as the deliberate indifference standard does, that a prison official have actual knowledge of harm before liability may be imposed.

Unlike prison inmates, those who have been involuntarily committed to a mental institution are generally not able to make decisions for themselves and to protect their own interests,²³⁵ but they are also not provided with “parental” care by the state. While involuntary commitment is effected in part through the government’s *parens patriae* power, the state does not actually step into the role of parent for mental health patients. Children who have been committed are still primarily the responsibility of their parents, as commitment does not normally involve the termination of parental rights.²³⁶ Adults may have

²³¹ *Id.*

²³² See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of U.S.C. (1996)).

²³³ 42 U.S.C.A. § 1997e(a) (Westlaw 2014).

²³⁴ See, e.g., FEDERAL BUREAU OF PRISONS, INMATE INFORMATION HANDBOOK, FCI/SCP GILMER (2012), available at www.bop.gov/locations/institutions/gil/GIL_aohandbook.pdf (inmate responsibilities include: maintaining the cleanliness of the inmate’s living area, arriving at work on time, knowing the amount of money in his commissary account, keeping “call-out” appointments, and generally understanding and complying with all institution policies).

²³⁵ JOHN A. MENNINGER, INVOLUNTARY TREATMENT: HOSPITALIZATION AND MEDICATIONS 1, available at www.brown.edu/Courses/BI_278/Other/Clerkship/Didactics/Readings/INVOLUNTARY%20TREATMENT.pdf (last visited Apr. 18, 2014).

²³⁶ Cf. 39 C.J.S. *Guardian & Ward* § 9 (2013) (“[A] guardian should not be appointed where at least one parent is living and is not found to be unfit or incapacitated or to have relinquished or forfeited his or her rights.”). But see MARY GILBERTI & RHODA SCHULZINGER, BAZELON CENTER FOR MENTAL HEALTH LAW, RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN’S MENTAL HEALTH NEEDS: EXECUTIVE SUMMARY 1 (2000), available at www.bazelon.org/LinkClick.aspx?fileticket=-hWbIbUX5v8%3d&tabid=104 (explaining that, due to

guardians appointed,²³⁷ but they are not provided parental care from the state. Also unlike foster children, mental health patients often find support in family members concerned with their wellbeing.²³⁸ Even though the state does not have a heightened duty to protect involuntarily committed mental health patients, the patients are still entitled to more considerate care than prisoners.

To an even greater extent than mental health patients, children are in need of guidance and protection. It is imperative that the state take an active role in their protection, beyond just responding to obvious risks. As one court so eloquently stated, “[s]omething more than refraining from indifferent action is required to protect these innocents.”²³⁹ The professional judgment standard is more appropriate for the state’s heightened “parental” duty to protect foster children, because it requires that caseworkers actively avail themselves of the information necessary to make learned professional decisions about those in their care.

2. *Foster Children Rely on Caseworkers to Guard Their Safety*

Children who have been removed from their parents’ care have a critical need for someone to advocate for their best interests.²⁴⁰ As one court has explained, “the law does not impose the duty of guarding their own safety on wards of the state. Rather, that duty is the quintessential responsibility of the caseworkers assigned to safeguard the well-being of this helpless and vulnerable population.”²⁴¹

Foster children need caseworkers to ensure that they remain safe while in state care, due in large part to the tendency for children to remain silent regarding maltreatment. One reason for this is that they often see the abuse as “normal” and fear another relocation.²⁴² In 2012, the alleged victims submitted only 0.4% of the reports of child

exorbitant costs, many families are effectively forced to choose between obtaining mental health treatment for their children and retaining legal custody).

²³⁷ J. Howard Ziemann, *Incompetency and Commitment Proceedings*, 8 AM. JUR. TRIALS 483 § 2 (2014).

²³⁸ Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 STAN. L. REV. 625, 628 (1979).

²³⁹ *Braam ex rel. Braam v. State*, 81 P.3d 851, 859 (Wash. 2003) (en banc).

²⁴⁰ *Parham v. J.R.*, 442 U.S. 584, 631 (1979) (Brennan, J., concurring in part and dissenting in part).

²⁴¹ *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 843 (9th Cir. 2010).

²⁴² Susanne Babbel, *The Foster Care System and Its Victims: Part 2*, PSYCHOLOGY TODAY (Jan. 3, 2012), www.psychologytoday.com/blog/somatic-psychology/201201/the-foster-care-system-and-its-victims-part-2.

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maltreatment.²⁴³ There are many reasons that children who have been abused choose not to report the abuse, including shame, fear of punishment, prior victimization, and self blame.²⁴⁴ Also, the perpetrator may threaten to harm the child if he or she reports the abuse.²⁴⁵ When questioned, these reasons may also result in the child denying the abuse.²⁴⁶ When children have been abused by their parents, they often develop difficulty trusting others,²⁴⁷ and therefore may be less likely to confide in caseworkers regarding abuse in foster homes. The existence of mandatory reporting laws throughout the county²⁴⁸ is clear evidence that legislatures and child welfare agencies recognize that children often do not speak up for themselves.

Due to the particularly vulnerable circumstances of foster children and the reality that many do not report the maltreatment they experience, it is essential that caseworkers play an active role in protecting them. Statutory mandates and industry standards for monitoring child placement have been designed to provide the affirmative protections needed to safeguard foster children.²⁴⁹

Several courts have held that when a professional failed to act in accord with state laws or agency rules, he or she may be found to have

²⁴³ U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2012, at 12 (2013), available at www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

²⁴⁴ *Reasons Why Children do not Tell*, THE NEST CHILD ADVOCACY CTR., www.nestcac.org/WhyDontKidsTell.html (last visited Jan. 19, 2014) (also citing fear no one will believe them, fear of loss, loyalty to the offender, instruction to secrecy, belief the child is protecting siblings from abuse, desire to prevent breakup of family unit); *Reasons Why Children do not Tell*, CHILD SAFE OF CENT. MO., www.childsafehouse.org/get-informed/reasons-not-tell.cfm (last visited Jan. 19, 2014); see also Melinda Smith & Jeanne Segal, *Child Abuse and Neglect: Recognizing, Preventing, and Reporting Child Abuse*, HELPGUIDE.ORG (Aug. 2013), www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm.

²⁴⁵ See DERRY KORALEK, CAREGIVERS OF YOUNG CHILDREN: PREVENTING AND RESPONDING TO CHILD MALTREATMENT 17 (1992), available at www.childwelfare.gov/pubs/usermanuals/caregive/caregive.pdf.

²⁴⁶ *Reasons Why Children do not Tell*, THE NEST CHILD ADVOCACY CTR. (also citing fear no one will believe them, fear of loss, loyalty to the offender, instruction to secrecy, belief the child is protecting siblings from abuse, desire to prevent breakup of family unit); *Reasons Why Children do not Tell*, CHILD SAFE OF CENT. MO.

²⁴⁷ Smith & Segal, *Child Abuse and Neglect: Recognizing, Preventing, and Reporting Child Abuse*.

²⁴⁸ See CHILD WELFARE INFO. MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2012), available at www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (describing mandatory reporting laws across the U.S. and its territories).

²⁴⁹ See generally CHILD WELFARE INFO. GATEWAY, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION (2012), available at www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf.

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substantially departed from “professional judgment.”²⁵⁰ A pattern of failures to ensure foster home licensing standards are met, to perform child-specific home studies, and to perform minimum monthly home visits²⁵¹ should subject child welfare agents to liability if a foster child is harmed as a result. Caseworker visits, in particular, are “critical” to ensuring the safety of children in the foster care system.²⁵² As one court noted, foster children are “isolated . . . [and] helpless,” and without proper supervision of the foster home, the child is “at the mercy of the foster parents.”²⁵³ If these duties are not performed, the fact that a caseworker is unaware of signs of maltreatment, and therefore does not conclude that a child is being harmed, should not preclude the child from obtaining a remedy. In that instance, the government has failed to perform its heightened “parental” duty to protect foster children and should be held liable for the resulting harm.

3. *Supervision by Foster Parents is Minimal*

In defining the limits of the state’s duty to protect, several courts have also considered the degree of supervision that government agents have over the persons in their care.²⁵⁴ For example, the Ninth Circuit justified its contrary use of the professional judgment standard for mental health patients and the deliberate indifference standard for foster children by asserting that the application of different standards is “logical” because “the degree of control and day-to-day responsibility that the government exerts over [mental health patients] is considerably higher.”²⁵⁵ Another court noted that there is a “closer relationship” between prison officers and inmates than there is between child welfare agents and foster children.²⁵⁶ In prisons, state agents have daily contact with inmates, so they are better able to monitor potentially harmful

²⁵⁰ See, e.g., *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1439 (9th Cir. 1987) (Ferguson, J., concurring).

²⁵¹ The federal government has concluded that one major reason so many states do not comply with child welfare law requirements is that state child welfare agencies are understaffed. Maria Scannapieco & Kelli Connell-Carrick, *Child Welfare Workplace: The State of the Workplace and Strategies to Improve Retention*, CHILD WELFARE 31, 32 (2007).

²⁵² NAT’L CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE CASEWORKER VISITS WITH CHILDREN AND PARENTS 3 (2006), available at www.ncsl.org/Portals/1/documents/cyf/caseworkervisits.pdf.

²⁵³ *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987).

²⁵⁴ See *Ammons v. Wash. Dep’t of Soc. & Health Servs.*, 648 F.3d 1020, 1029 n.8 (9th Cir. 2011); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Taylor*, 818 F.2d at 796.

²⁵⁵ *Ammons*, 648 F.3d at 1029 n.8.

²⁵⁶ *Taylor*, 818 F.2d at 796.

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activity and its effect upon inmates.²⁵⁷ Another court has noted that it is more difficult to protect children from maltreatment in private foster homes than it is to protect them in institutions.²⁵⁸ Whereas state actors have daily contact with prisoners and mental health patients, foster children are visited approximately once a month.²⁵⁹

Underlying the claim that frequency of contact is relevant to the liability standard is the reality that it is more *difficult* for the government to monitor foster homes than it is to monitor institutions. However, the paramount interest in child protection—an interest shared by the state and the children in its care—should take precedence over a governmental claim of inconvenience. It is, in fact, the state that creates this difficult situation when it elects to remove the child from his or her home and place the child with strangers, rather than with government agents. This election may be a better choice for foster children than institutional care,²⁶⁰ but it should not lessen the duty of the government to protect the child. As one court has noted, “[i]t should have been obvious from the day *Youngberg* was decided that a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons.”²⁶¹ When the state has chosen to remove a child from the custody of his parents, and then places the child in a home that the state only monitors intermittently, it should at a very minimum follow basic standards to ensure the home is safe.

Given the heightened duty to protect foster children, the state’s minimal contact with foster parents should serve as a reason for higher expectations of foster care agents, not lower. In contrast to foster homes, the daily monitoring in prison and mental institutions provides more opportunities for the government to gain knowledge of maltreatment. Professional and statutory standards for foster home visits, investigations, and licensures have been designed in recognition of the state’s reduced control of foster homes. Since caseworkers have fewer

²⁵⁷ *Id.*

²⁵⁸ *K.H. ex rel. Murphy*, 914 F.2d at 852.

²⁵⁹ See NAT’L CONFERENCE OF STATE LEGISLATURES, CHILD WELFARE CASEWORKER VISITS WITH CHILDREN AND PARENTS 3 (2006), available at www.ncsl.org/Portals/1/documents/cyf/caseworkervisits.pdf; U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, CHILD WELFARE OUTCOMES 2008-2011: REPORT TO CONGRESS 19 (2013), available at www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf (reporting that approximately 82% of foster children received monthly visits in 2011, of the states reported).

²⁶⁰ See Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 CHILD, FAMILIES, & FOSTER CARE 31, 38 (2004), available at www.princeton.edu/futureofchildren/publications/docs/14_01_02.pdf.

²⁶¹ *K.H. ex rel. Murphy*, 914 F.2d at 851.

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opportunities to interact with foster families, it is crucial that they comply with these standards. If they fail to do so, they should be held liable under the professional judgment standard.

CONCLUSION

It would be plainly shocking for the state to shirk its duty because it is not itself the daily caretaker of foster children. Application of the deliberate indifference standard allows government agents to avoid liability in this way. In contrast, the professional judgment standard recognizes the need for proactive measures on the part of state agents. Under the professional judgment standard, the government would only be liable if its agents exhibited an egregious *pattern* of failures to fulfill their professional mandates—simple negligence would not result in liability. When caseworkers have been so derelict in their duties that they do not know children in their care are at substantial risk for harm, when proper monitoring would have provided such knowledge, they cannot be reasonably said to have exercised professional judgment. When their actions or failures to act are based on a professionally inadequate knowledge base, those actions or omissions should be considered so arbitrary as to be conscience shocking.