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FROM POVERTY TO ABUSE AND BACK AGAIN: THE FAILURE OF THE LEGAL AND SOCIAL SERVICES COMMUNITIES TO PROTECT FOSTER CHILDREN

*Sharon Balmer**

“I don’t know what to say. We just picked the kid up from one crack house and dropped her off at another.”¹

Stephanie’s life ended as it began, her tiny body wrapped in a plastic bag and left on a New York City street.² When her parents dumped her body the first time, the plastic prevented her from receiving enough oxygen and she suffered severe brain damage. The second time Stephanie was wrapped in plastic and dumped onto the street she died. This time she was abandoned by her foster mother. Though this foster mother had provided the foster care agency with glowing recommendations, police investigators found her home filled with feces, insects, and rodents, and Stephanie’s medical equipment caked in grime. The foster mother had also canceled Stephanie’s health services a few months earlier without the agency’s knowledge.³

Bruce was found digging through the trash for food because his foster parents fed him only breakfast cereal, uncooked pancake batter, and peanut butter.⁴ He had been placed in foster care eight years earlier because his

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1. Kurt Mundorff, Comment, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 148 (2003) (a New York City Administration for Children’s Services caseworker reflects on her first day).

2. Leslie Kaufman, *Help, But Not Enough, for Girl Who Was Discarded Twice*, N.Y. TIMES, July 18, 2003, at A1.

3. This is not to say that all foster parents are abusive. Many foster parents are altruistic people who provide loving homes to children who need them. People choose to become foster parents for many different reasons, however, including financial ones. See Mundorff, *supra* note 1, at 131 (“While I met with some warm, caring foster parents, the vast majority of foster parents I met were obviously in it for the money. They were baby boarders.”).

4. Iver Peterson, *In Home That Looked Loving, 4 Boys’ Suffering Was Unseen*, N.Y. TIMES, Oct. 28, 2004, at A1. This case sparked public outrage that compelled New Jersey to

biological parents were also starving him.⁵ His foster parents even locked the kitchen to keep him from taking food.⁶ Neighbors, foster care agency caseworkers, and the family's pastor all described this family positively, some of whom noted that they were loving and deeply religious.⁷

After decades of legislative reform, stories like these still appear on the front pages of our newspapers, and foster children who are injured while in protective care are turning to the courts to change the system. It is still relatively difficult for a child to prevail in an action against child protective workers and agencies.⁸ Opinions addressing children's issues are few, and courts seem hesitant to expand causes of action.⁹ This Comment explores the current state of children's legal remedies for injuries incurred as the result of a foster care placement. Part I describes the foster care system in the United States. Part II discusses, generally, the possible causes of action available to foster children. Part III examines the most successful way for a child to recover damages; a 42 U.S.C.A. § 1983 ("section 1983") cause of action for the violation of the constitutional right to safety while in state custody. The Supreme Court has not ruled on whether foster children have such a right, and district courts are divided about what standard to apply if a constitutional right to safety even exists for children in foster care. Finally, Part IV suggests reasons why courts have been reluctant to allow civil rights actions by children in foster care, and also advocates for a shift in the way the legal community views children's issues. Until a consistent and appropriate standard of care is established, shocking stories of foster care child abuse will continue to make news around the country.

form an independent panel to overhaul its child protective system. *See* Leslie Kaufman, *Advocates Paint a Dismal Picture of a Child Welfare Agency*, N.Y. TIMES, Jan. 11, 2003, at B5; *see also* Richard Lezin Jones & Leslie Kaufman, *Foster Care in New Jersey Is Called Inept*, N.Y. TIMES, June 10, 2003, at B1 (detailing an advocacy group's report on New Jersey's lack of oversight of foster care); Richard Lezin Jones & Leslie Kaufman, *Foster Care Caseworkers' Errors Are Detailed in New Jersey*, N.Y. TIMES, May 1, 2003, at B1 (describing the details of foster care records released by the New Jersey Division of Youth and Family Services). Florida's child protective system was plagued by scandal in 2002 after it was reported that a five-year-old girl was missing for fifteen months before caseworkers realized she was gone. *See* Manuel Roig-Franzia, *No Easy Fix For Florida's Troubled Child Welfare System*, WASH. POST, Aug. 15, 2002, at A3. New Jersey and Florida have received national attention for their failures, and most other states are not faring much better. In 2002, no state met all federal requirements, and sixteen did not meet any federal requirements. *See* Robert Pear, *U.S. Finds Fault in All 50 States' Child Welfare Programs, and Penalties May Follow*, N.Y. TIMES, Apr. 26, 2004, at A16.

5. Peterson, *supra* note 4.

6. *Id.*

7. *Id.*

8. *See infra* Part III.

9. *See infra* Part IV.

PART I: THE SAD STORY OF FOSTER CARE IN THE UNITED STATES

In 2003, over half a million children were living in foster homes.¹⁰ An increase in drug and alcohol abuse, poverty, and homelessness has led to an increase in the population of children in foster care.¹¹ In the simplest terms, the foster care system is failing its growing population. Some children's advocates contend that forty percent of foster children end up on welfare or in prison,¹² and foster children are sixty-seven times more likely to be arrested than children who did not grow up in foster care.¹³ While in care, children are often shuffled from home to home over the course of many years, so they are unable to form lasting bonds with any adult.¹⁴ They often do not receive proper medical or psychiatric attention,¹⁵ though it is common for foster parents to seek medication to control foster children more easily.¹⁶ A grand jury in San Diego found a large disparity between the care of foster children, and that of biological children; the foster children were given cheaper food and clothing, restricted to certain areas of the house, and sometimes forbidden to open the refrigerator or watch television with the family.¹⁷ Most concerning, however, is the fact that children in foster care are physically abused at a much greater rate than children in the general population.¹⁸

No one knows exactly how many children in foster care are being abused or neglected, but many suspect that many such cases go

10. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT 1 (Apr. 2005), at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report10.pdf> (last visited Oct. 14, 2005). The Department of Health and Human Services reports that 523,000 children were living in foster homes in 2003. *Id.* While some cities, particularly New York, have seen a decrease in the number of children entering the foster care system over the last few years, rural areas are recording yearly increases as high as sixteen percent. Kate Zernike, *A Drug Scourge Creates Its Own Form of Orphan*, N.Y. TIMES, July 11, 2005, at A1. This is attributed to the growing methamphetamine epidemic. *Id.*

11. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 8-9 (1995).

12. Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (1999).

13. *Id.*

14. See Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 208 (1988). Program abuse is another form of mistreatment common to foster care. It occurs when the agency fails to provide children with a stable home environment or provide for medical and developmental needs. *Id.* at 207.

15. See Levesque, *supra* note 11, at 7.

16. See Mundorff, *supra* note 1, at 160.

17. *Id.*

18. See *infra* notes 19-24 and accompanying text.

unreported.¹⁹ In 1999, the Department of Health and Human Services reported that the rate of child maltreatment in foster care was more than seventy-five percent higher than in the general population, and the mortality rate amongst foster children resulting from maltreatment was almost 350 percent higher than among children in the general population.²⁰ Another study, conducted between 1986 and 1990 by the National Foster Care Education Project, found that the incidence of child abuse for children in foster care was over ten times greater than in the general population.²¹ Foster care children are also more vulnerable to sexual abuse because, practically speaking, the incest taboo does not apply within the foster family structure.²² The rate of substantiated allegations of sexual abuse is four times higher for children in foster care than children in the general population.²³ When accounting for the many cases of abuse and neglect that go unreported, one author concluded that forty-three percent of all foster children were in unsuitable foster homes and fifty-seven percent were at risk of harm in foster care.²⁴

Paradoxically, children are placed into foster care to protect them from this kind of abuse. Foster care is designed to be a “temporary, safe haven for children whose parents are unable to care for them.”²⁵ It is an underlying premise of this system that a child’s natural parents can be rehabilitated, and the foster family is a temporary, stable substitute.²⁶ Unfortunately, most children linger in foster care for longer than expected and their living situations are anything but stable.²⁷ Even with recent legislation aimed at getting foster children into adoptive homes or back with their parents as soon as possible,²⁸ placing a child into any situation that is not a “safe haven” could cause serious damage to an already traumatized child.²⁹ Many caseworkers, however, fear liability or negative publicity if they leave a child with an abusive parent.³⁰ Removing children

19. Mushlin, *supra* note 14, at 205.

20. BARBARA E. HANDSCHU ET AL., NY CIVIL PRACTICE: FAMILY COURT PROCEEDINGS § 46.04(c) (2005).

21. Mushlin, *supra* note 14, at 206.

22. *Id.* at 205.

23. Chaifetz, *supra* note 12, at 7.

24. Mushlin, *supra* note 14, at 207.

25. *Id.* at 204.

26. *See* Levesque, *supra* note 11, at 5.

27. *See id.* at 5-7.

28. *See infra* notes 55-58 and accompanying text.

29. Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 453 (1997).

30. Mundorff, *supra* note 1, at 152. Often the caseworker who makes the decision to remove the child immediately shifts the burden of the child’s care to another child protective

becomes the safer and, because of federal funding policies, more lucrative choice.³¹

While children's advocates have initiated impact legislation for over twenty years and federal, state, and local reforms have been numerous, our child protective systems seem to have a "remarkable immunity to reform."³² The foster care system in this country creates what one court called a "lost generation of children whose tragic plight is being repeated every day."³³ Another court finds "profound disarray in the state's system of caring for abused and neglected children."³⁴ Increased rates of abuse and neglect in the foster care system can now be linked to child protective agencies that do not meet minimum professional standards.³⁵ There are few incentives for agencies to do a good job and little to discourage them from dangerously cutting corners.³⁶ These failing agencies create dangerous situations by placing children into homes without first investigating them beforehand, and without supervising the families after the placement.³⁷ Because the Civil Rights Act applies both to those who violate constitutional rights and those who allow those rights to be violated, caseworkers and government agencies can all be held legally responsible when children are injured while in foster care.³⁸

worker who then places the child into a foster home. Still, another worker may then supervise that placement. *Id.*

31. Many benefit financially from a child's placement in foster care. One author described foster care agencies "vying for their fair share of the market in children" and caseworkers choosing to remove children after normal working hours to maximize overtime pay. *Id.* at 156-60; *see also* Levesque, *supra* note 11, at 19 (explaining the effect of the Child Welfare Act on financial incentives to place children in foster homes).

32. Mushlin, *supra* note 14, at 212.

33. LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.C. Cir. 1991).

34. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 848 (7th Cir. 1990).

35. Mushlin, *supra* note 14, at 209.

36. *See* Christopher Weddle & David Lansner, *Liability of Child Protective and Foster Care Agencies and Caseworkers*, in CRIMINAL LAW AND URBAN PROBLEMS, at 13, 20 (PLI Litig. & Admin. Practice, Course Handbook Series No. 189, 2002) (noting that "[c]ase workers who intentionally intimidate and lie to adults they are investigating regarding their rights and the consequences of the investigation will not be chastised by the courts or supervisors").

37. *See* Mushlin, *supra* note 14, at 209-11.

38. *See* Carolyn Kubitschek, *Social Worker Malpractice for Failure to Protect Foster Children*, 41 AM. JURISPRUDENCE TRIALS § 1, §§ 4, 14, 17 (2004). Whether the Civil Rights Act permits a foster child to sue his foster parent is still unaddressed in many circuits, although the Fourth Circuit has rejected such claims. *Id.* § 19.

**PART II: WHAT CHILDREN CAN DO: RECOVERING UNDER STATE TORT
LAW AND 42 U.S.C.A. § 1983**

Because children are both naturally and legally dependant on adults for protection, there is little that children can do to keep themselves out of abusive situations, and there is no consistent legal remedy for them to seek monetary, injunctive, or declaratory relief after they have been injured. While children have filed actions under state tort laws and federal claims under section 1983 without great success,³⁹ federal statutory claims for violations of substantive due process rights under section 1983 have proven to be a more successful avenue for children seeking redress for injuries incurred while in state custody.⁴⁰

A. State Tort Claims

In foster care cases, a typical tort claim asserts a common law duty that one who has taken affirmative steps to rescue another has assumed a general duty over that person's safety.⁴¹ Plaintiff foster children claim under negligence law that the child's injuries were caused by the failure of the child protective government worker to act when he or she knew or should have known the child was at risk.⁴² But because tort law does not usually require a governmental actor to act affirmatively to benefit another, children may have difficulty establishing a positive duty for a negligence claim.⁴³

Even if a child could establish such a claim, she may then have trouble overcoming governmental immunity. In many states, tort claims are not available to foster children because of complex state tort statutes that bar

39. See Bryan R. Berry, *Crime of Dispassion: Eighth Circuit (Mis)Applies DeShaney in Failing to Hold State Employees Accountable to the Children They Protect*, 66 MO. L. REV. 881, 885 (2001). For a description of 42 U.S.C.A. § 183, see *supra* notes 61-69 and accompanying text.

40. See *infra* Part III for a discussion of the actions that can be brought under 42 U.S.C.A. § 1983.

41. See Kubitschek, *supra* note 38, §§ 24-27 for a discussion of cases upholding liability under state tort law. There are four theories that form the basis of such liability: government agencies must use reasonable care in supervising foster children because one must act with reasonable care; agencies owe a duty to foster children because placing children in foster care creates a special relationship between the children and the state; an agency's function is ministerial and so the agency must act as a reasonable person would; and state statutes regulating supervision of foster parents give foster children a cause of action when the state does not properly supervise the foster care placement. *Id.* § 25.

42. See, e.g., MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT § 2.03(2)(b) (2005); HANDSCHU, *supra* note 20, § 46.04(3) (discussing breach of contract claims as well).

43. See Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 995-1002 (1996).

claims against government workers.⁴⁴ In *County of Los Angeles v. Superior Court (In re Terrell R.)*, the court read California's Liability of Public Entities Act narrowly, so as to almost guarantee absolute immunity for child protective caseworkers where common law had established no such precedent.⁴⁵ The court reasoned that child protective workers were immune to lawsuits from children injured by their foster parents because the statutes governing foster care were not meant to protect children from their foster parents.⁴⁶

Courts in other states have held that the state's placement of a child in foster care and the removal of a child from a home are entitled to governmental immunity even if done negligently because they are discretionary acts.⁴⁷ The Georgia State Supreme Court, however, held that the supervision of a child in foster care and the provision of adequate medical care to foster children were not discretionary functions and, as such, child protective agencies and workers were liable for failing to fulfill these duties.⁴⁸ New York's highest court has also allowed foster children to plead claims under common law tort without being precluded by governmental immunity.⁴⁹

B. Section 1983 Claims for Violations of Federal Child Welfare Statutes

Children have not fared much better in seeking relief for violations of the massive federal statutory regulations that govern the foster care system.

44. See Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL'Y REV. 267, 295 (2004).

45. 125 Cal. Rptr. 2d 637, 645-56 (Ct. App. 2002).

46. *Id.* at 646.

47. *E.g.*, Jackson v. Dep't of Human Res., 497 S.E.2d 58, 59 (Ga. Ct. App. 1998) (holding that placing children in foster care is a discretionary act and entitled to governmental immunity under the Georgia Tort Claims Act); Gloria G. v. State Dep't of Soc. Rehab. Servs., 833 P.2d 979, 987 (Kan. 1992) (holding that the discretionary function exception of the Kansas Tort Claims Act provides immunity to caseworkers for removing a child from foster care); Williams v. Horton, 437 N.W.2d 18, 21 (Mich. Ct. App. 1989) (holding that the defendant caseworker had immunity under the Michigan Tort Claims Act because placing a child in a foster home is a discretionary function). Discretionary acts have been defined as those that require the exercise of personal deliberation and judgment. Mauricia Allen, *The Georgia Tort Claims Act: A License for Negligence in Child Deprivation Cases?*, 18 GA. ST. U. L. REV. 795, 805-20 (2002).

48. See Edwards v. Dep't of Children & Youth Servs., 525 S.E.2d 83, 86 (Ga. 2000); Brantley v. Dep't of Human Res., 523 S.E.2d 571, 575 (Ga. 1999).

49. Mark G. v. Sabol, 93 N.Y.2d 710, 722 (N.Y. 1999). For a thorough discussion of Mark G., see Beth A. Diebel, Note, *Mark G. v. Sabol: Substantive Due Process Rights, A Possibility for Foster Care in New York*, 64 ALB. L. REV. 823 (2000).

In the Adoption Assistance and Child Welfare Act of 1980 (AACWA), Congress set out to federalize state-run agencies by implementing a comprehensive regulatory structure to protect children and reduce the amount of time spent in foster care by moving children toward permanency through adoption or reunification with their biological parents.⁵⁰ But, in *Suter v. Artist M.*, the Supreme Court, held that the AACWA could not be enforced through a section 1983 action and did not create an implied private right of action.⁵¹ The Court reasoned that, because Congress only used the vague “reasonable efforts” standard to define a caseworker’s duty to a child while using more specific language elsewhere in the statute, it had not intended to create a private right of action.⁵² After *Suter*, Congress amended the AACWA to state that a provision of the Act could not be deemed unenforceable by its inclusion in a section of the Act that did not contain specific language.⁵³ Circuit courts are divided over whether this amendment creates a private right of action for children under the AACWA,⁵⁴ and the Supreme Court has not yet granted certiorari to hear and settle the dispute.

In 1996, because many of AACWA’s provisions had proven ineffective, Congress enacted the Adoption and Safe Families Act (ASFA).⁵⁵ ASFA focuses specifically on the well-being of children in foster care above all other concerns.⁵⁶ It stresses that the temporary nature of foster care requires that caseworkers plan for the child’s future as soon as he or she enters care.⁵⁷ ASFA also contains enforcement mechanisms, including a requirement that states must report data on the children in their care; conditional financing based on strict compliance with ASFA; and the

50. See Levesque, *supra* note 11, at 14-17; see also Braveman & Ramsey, *supra* note 29, at 452.

51. 503 U.S. 347, 364 (1992).

52. *Id.* at 363.

53. 42 U.S.C.A. § 1320a-2 (2005).

54. See Brendan P. Kearse, *Abused Again: Competing Constitutional Standards for the State’s Duty to Protect Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 387 (1996). Compare Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 682 (S.D.N.Y. 1996) (holding that the amendment required courts to look to pre-*Suter* law for possible causes of action under AACWA), and Jeanine B. *ex rel.* Blondis v. Thompson, 877 F. Supp. 1268, 1284 (E.D. Wis. 1995) (holding for a limited cause of action under AACWA), with Eric L. *ex rel.* Schierberl v. Bird, 848 F. Supp. 303, 311 (D.N.H. 1994) (holding that for children’s rights to be privately enforceable under the AACWA, Congress will have to clarify those rights), and Charlie H. v. Whitman, 83 F. Supp. 2d 476, 483-84 (D.N.J. 2000) (holding that the amendment did not overrule *Suter*).

55. 42 U.S.C.A. § 671 (2005).

56. See Judge Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997: Confronting an American Tragedy*, 46 LA. B.J. 477, 478 (1999).

57. *Id.*

incorporation of a strict definition of “reasonable efforts.”⁵⁸ The Supreme Court has never ruled on whether a private right of action exists under ASFA, but some circuit courts have addressed the issue. For example, the Seventh Circuit determined that ASFA created rights that children could enforce under section 1983 because the law was clearly intended to benefit children in foster care.⁵⁹ But in 2003, the Eleventh Circuit ruled against such a right of action, holding that ASFA does not contain “rights-creating language.”⁶⁰

C. Section 1983 Claims for Violations of Substantive Due Process Rights

Because of the limited success of state law and federal statutory claims, children have begun to turn to actions claiming violations of constitutional rights under section 1983.⁶¹ This statute permits the application of the Fourteenth Amendment’s due process clause to protect individual liberty from unjustified intrusions by state government.⁶² While the due process clause usually keeps states from actively infringing on individual rights, the Supreme Court has held that in “certain limited circumstances, the Constitution imposes upon states affirmative duties of care and protection with respect to particular individuals.”⁶³ This duty stems not from the identity of the abusive party or from states’ knowledge of the abuse, but from state-imposed limits on the injured party’s freedom to protect his own interests.⁶⁴

The Fourteenth Amendment protects individuals from deprivations of life, liberty, and property.⁶⁵ Created to allow individuals to assert Fourteenth Amendment civil rights claims against the government, section 1983 states that one acting under the color of state law is subject to liability if he or she deprives another of rights, privileges, or immunities secured by the Constitution.⁶⁶ It does not create new substantive due process rights, but allows individuals to recover if previously established rights are

58. *Id.* at 479-80.

59. Jeanine B., No. 93-C-0547, 2001 U.S. Dist. LEXIS 12091, at *12.

60. 31 *Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003).

61. See Scott J. Preston, Casenote: “*Can you Hear Me?*”: *The Unites States Court of Appeals for the Third Circuit Addresses the Systematic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653, 1670-71 (1996).

62. 42 U.S.C.A. § 1983 (2005).

63. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 198 (1989).

64. *Id.* at 200.

65. U.S. CONST. amend. XIV, § 1; see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citing several cases in the Court’s substantial due process jurisprudence).

66. 42 U.S.C.A. § 1983.

violated.⁶⁷ To bring a Section 1983 cause of action, the plaintiff must establish both that the defendant was a state actor and that the defendant's act violated a constitutional right or caused a right to be violated.⁶⁸ To overcome the defense of governmental qualified immunity, plaintiffs must also show that the constitutional right was "clearly established" at the time the events occurred.⁶⁹

1) *The Development of the Right to Safety in State Custody*

The right to safety in state custody emerged in the 1970s. Before this, the "hands-off" doctrine kept courts from reviewing prison issues and enforcing a right to safety.⁷⁰ In 1976, however, following the civil rights movement of the 1960s, the Court rejected the "hands-off" doctrine and recognized a constitutional right to safety for prison inmates.⁷¹ In *Estelle v. Gamble*, a prison inmate charged that correction officials violated his Eighth Amendment right to be free of cruel and unusual punishment by failing to provide him with adequate medical care.⁷² The Court held that the state is constitutionally required to care for individuals who have been deprived of their liberty by the state and that the state could not be deliberately indifferent to an inmate's health or safety.⁷³ The Court clarified, however, that an "inadvertent failure to provide medical care cannot constitute" a deprivation of a right.⁷⁴ To meet the deliberate indifference standard established in *Estelle*, an inmate must "allege acts or omissions sufficiently harmful to evidence deliberate indifference" and "offend evolving standards of decency."⁷⁵

In 1982, the Supreme Court recognized the constitutional right to safety in another setting; in *Youngberg v. Romeo*, the Court held that mental patients institutionalized in state hospitals had a right to safe conditions and basic services rooted in the Fourteenth Amendment's due process clause.⁷⁶ The Court found that if it was cruel to hold criminals in unsafe conditions, "it must be unconstitutional to confine the involuntarily committed—who

67. See Kubitschek, *supra* note 38, § 4.

68. See 42 U.S.C.A. § 1983.

69. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

70. See Mushlin, *supra* note 14, at 219. The "hands-off" doctrine was created to keep federal courts away from prison matters, as "prisons were considered the exclusive domain of the Congress and of the state governments." *Id.*

71. 429 U.S. 97, 103 (1976).

72. *Id.* at 98.

73. *Id.* at 104-05.

74. *Id.* at 105-06.

75. *Id.* at 106.

76. Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

may not be punished at all—in unsafe conditions.”⁷⁷ Instead of applying the deliberate indifference standard formulated in *Estelle*, the Court in *Youngberg* articulated a new standard: the professional judgment standard.⁷⁸ The professional judgment standard is determined by balancing the state’s interest against the liberty interests of the patient.⁷⁹ The *Youngberg* Court held that a violation of professional judgment must exhibit 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.”⁸⁰ The Court limited its decision by requiring deference to the judgment actually exercised and allowing exceptions to liability if the professional can show his behavior was due to budgetary constraints.⁸¹

2) *When Does a Child Have a Right to Safety? The Supreme Court’s Controversial Decision in DeShaney v. Winnebago County Department of Social Services*

The Supreme Court has never ruled directly on whether foster care constitutes state custody, or whether children in foster care have a constitutional right to safety. In *DeShaney v. Winnebago County Department of Social Services*, the Court found that there was no right to safety for Joshua, who had been beaten to the point of irreversible brain damage by his biological father.⁸² Although Joshua was in his father’s physical custody, child protective caseworkers were assigned to work with the family after numerous reports of abuse were made to the Winnebago Department of Social Services (DSS).⁸³ The DSS caseworkers had seen and recorded many signs that Joshua was being abused, but did nothing to protect him even after he was admitted to the emergency room with injuries typical of child abuse.⁸⁴ While the Court acknowledged that these circumstances were tragic, it held that the State had not acted to deprive Joshua of his liberty.⁸⁵ Because Joshua had remained in his father’s

77. *Id.* at 315-16.

78. *Id.*

79. *See id.* at 321-22.

80. *Id.* at 323.

81. *Id.*

82. 489 U.S. 189, 193 (1989).

83. *Id.* at 192. The child protective caseworkers suggested that Joshua be enrolled in a preschool, that his father’s girlfriend move out of the home, and that his father participate in anger management counseling. *Id.* at 192. Joshua’s father did not adhere to any of these recommendations. *Id.* at 193.

84. *Id.*

85. *Id.* at 199-203.

custody, no special relationship arose to create an affirmative duty of protection under the due process clause.⁸⁶ The Court emphasized that Joshua's father was a private actor and the State played no role in creating the harm that befell him.⁸⁷

But, "[p]oor Joshua!" Justice Blackmun wrote in his dissent to the majority's much criticized opinion.⁸⁸ Blackmun advocated an interpretation of the Fourteenth Amendment that would undo the formalistic legal reasoning that keeps courts from "recognizing either the facts of the case before it or the legal norms that should apply to those facts."⁸⁹ He suggested that this can be done by understanding that "compassion need not be exiled from the province of judging."⁹⁰ The majority did share some of this compassion; in what has now become a famous footnote, on which many circuit courts have based a right to safety in foster care,⁹¹ the majority opinion provided that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."⁹² Based on this footnote, lower courts have created two exceptions to *DeShaney's* block on liability for affirmative duties: the state-created danger exception and the special relationship exception.⁹³ The state-created danger exception allows children to recover damages when the state either places them in or returns them to a known dangerous situation.⁹⁴ The special relationship exception

86. *Id.*

87. *Id.* at 201.

88. *Id.* at 213 (Blackmun, J., dissenting).

89. *Id.* at 212.

90. *Id.* at 213.

91. *See, e.g.,* LaShawn A. v. Dixon, 762 F. Supp. 959, 991-92 (D.C. Cir. 1991); Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990); Lewis v. Neal, 905 F. Supp. 228, 231 (E.D. Pa. 1995).

92. *DeShaney*, at 201 n.9.

93. *See* Berry, *supra* note 39, at 895.

94. *See generally* Michele Miller, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, 11 HASTINGS WOMEN'S L.J. 243 (2000) (providing a full discussion of the state-created danger theory). This theory of liability is usually posed when children are returned to unfit biological parents who then abuse them. *Id.* at 244. It has been applied in foster care cases as well, but with limited success. *See* M.B. *ex rel.* T.B. v. City of Philadelphia, No. 00-5223, 2003 U.S. Dist. LEXIS 2999, at *12 (E.D. Pa. Mar. 3, 2003) (allowing recovery under the state-created danger theory for a child who was physically tortured when returned to his mother); *but see* Olivia Y. *ex rel.* Johnson v. Barbour, 351 F. Supp. 2d 543, 553-54 (S.D. Miss. 2004) (dismissing a claim brought on behalf of abused and neglected children based on the Fifth Circuit's consistent rejection of the state-created danger theory).

allows children to recover when the state creates a special relationship by taking physical and legal custody of the child.⁹⁵ Though foster children have asserted causes of action under both of these theories, this Comment focuses primarily on the special relationship theory because of its greater use and greater success.

While the Supreme Court has only reviewed right-to-safety cases involving prison inmates and mental patients, lower courts have long held that the doctrine applies in situations involving foster children injured while in care.⁹⁶ The Supreme Court, however, explicitly held back from determining whether it approved of the line of cases holding that foster care created a special relationship between the state and the foster child.⁹⁷ The Court also declined to specify what standard it would apply if a right to safety did exist for children in foster care.⁹⁸ The Court, therefore, left the door open for circuit courts to determine whether foster children are entitled to a right to safety, as well as to define the applicable standard of care.

PART III: AFTER *DESHANEY*: DO CHILDREN HAVE A RIGHT TO SAFETY IN STATE CUSTODY? THE CIRCUITS ARE SPLIT

Having unlimited freedom or the ability to exercise all of the rights enjoyed by adults is not generally in a child's best interest. Few would challenge the proposition, however, that children are not property and are entitled to basic human rights.⁹⁹ Outside the foster care system, children

95. See, e.g., *Reiser v. District of Columbia*, 563 F.2d 462, 479 (D.C. Cir. 1977) (finding that a parole officer had a special duty to inform the owners of the apartment complex where the parolee worked of parolee's dangerous propensity); *Semler v. Psychiatric Inst. of D.C.*, 538 F.2d 121, 125 (4th Cir. 1976) (holding that a probation order created a special relationship between the public and the mental hospital that had approved the release of a dangerous patient); see generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort).

96. See, e.g., *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) (holding that when the state involuntarily places a child in the custodial environment of foster care, it assumes a constitutional duty to ensure the safety of that environment).

97. *DeShaney*, 489 U.S. at 201 n.9; see also *Taylor*, 818 F.2d at 798 ("The relationship between state officials charged with carrying out a foster child care program and the children in the program is an important one involving substantial duties and, therefore, substantial rights.").

98. *DeShaney*, 489 U.S. at 201 n.9.

99. The United States is far behind other nations in recognizing children's basic rights. See Jim Weill, *The Convention on the Rights of the Child and the Well-Being of America's Children*, 5 GEO. J. ON FIGHTING POVERTY 257, 257 (1988). Though the United Nations Convention on the Rights of the Child was the most broadly and rapidly ratified human rights treaty, the United States is the only country with an internationally recognized

often rely on their parents to advocate for their interests.¹⁰⁰ When the state takes legal custody of a child by placing him or her in foster care, however, it assumes the unique position of becoming that child's legal parent. *Parens patriae*, literally "parent of his or her country,"¹⁰¹ describes the government's authority over and responsibility for the protection of children.¹⁰² Because the state actively assumes this parental role, it also takes on the duty to advocate for and ensure the safety of the children in its care.

In *DeShaney*, the Court held that the state is required to provide individuals in state custody with basic human needs, such as "food, clothing, shelter, medical care, and reasonable safety"¹⁰³ While most circuit courts require states to meet children's basic needs, they articulate a standard for showing a failure to meet them in different ways. Circuits apply the "deliberate indifference standard," the "professional judgment standard," or a mix of the two.¹⁰⁴ When deciding which standard to apply, some courts have considered whether the plaintiff seeks monetary damages, or simply injunctive or declaratory relief.¹⁰⁵

A. When and Where Kids Are Safe: Most Circuits Uphold the Right to Safety for Children in Foster Care

Compassion is not completely exiled from the province of judging, as one district court in the Twelfth Circuit demonstrated in holding that "it taxes the powers of the Court's imagination to fathom what would violate the [C]onstitution if not the deliberate indifference to the gruesome and

government that has not yet ratified it. *Id.* at 257. Children in the United States are more likely to be victims of child prostitution and illegal labor than children in any other Western country. *Id.* at 260. They are also more likely to use drugs or become pregnant. *Id.* at 260.

100. *Id.* at 261.

101. BLACK'S LAW DICTIONARY 511 (2d Pocket ed. 2001).

102. See Gray, *supra* note 56, at 477 n.1. *Parens Patriae* is historically recognized as the state's interest in promoting the welfare of children. *Id.*

103. *DeShaney*, 489 U.S. at 200.

104. See *infra* Part III.B.

105. See, e.g., *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 n.29 (D.C. Cir. 1991) (finding that the deliberate indifference standard may be warranted when plaintiffs are seeking money damages); *Kenny A. ex rel. Winn v. Perdue*, No. 02-CV-1686-MHS, 2004 U.S. Dist. LEXIS 27025, at *14 (N.D. Ga. Dec. 11, 2004) (applying the professional judgment standard because plaintiffs were not seeking monetary relief). This Comment focuses mainly on children's actions against caseworkers in their individual capacities. Many children bring suits against caseworkers because it is much more difficult to prove the liability of governmental agencies or states. Section 1983 differs from common law tort actions because it does not allow the use of *respondeat superior*. Kubitschek, *supra* note 38, § 17. *Respondeat superior* is a legal doctrine that makes an employer liable for an employee's wrongdoing. BLACK'S LAW DICTIONARY 609 (2d Pocket ed. 2001).

unfettered torture of a helpless little boy¹⁰⁶ The Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia Circuits agree and recognize a child's Fourteenth Amendment right to safety while in foster care.¹⁰⁷

In 1981, the Second Circuit was the first to establish that children had some right to safety while in state custody.¹⁰⁸ In *Doe v. New York City Department of Social Services*, the court found caseworkers could be subject to liability for failing to perform custodial duties that were assigned to them.¹⁰⁹ In this case, the plaintiff foster child had been sexually abused by her foster father for a number of years.¹¹⁰ Though child protective workers grew increasingly suspicious of the foster father's strange behavior, they did not investigate their suspicions or make the mandatory visits to the home.¹¹¹ Moreover, they failed to include required information, such as the foster child's many absences from school and a psychiatrist's recommendations, in their reports.¹¹² The court found these workers were deliberately indifferent to the welfare of the plaintiff foster child because their failures to act were the proximate cause of her subsequent abuse.¹¹³

Circuit courts have expanded this basic right not to be handed over to an abusive party to include the right to be protected from a "knowing placement in an unsupervised and abusive foster care environment,"¹¹⁴ the right to reasonably safe living conditions,¹¹⁵ and the right to be protected from psychological, emotional, and physical harm.¹¹⁶ Some courts have

106. Omar *ex rel.* Cannon v. Lindsey, 243 F. Supp. 2d 1339, 1345 (M.D. Fla. 2003).

107. *E.g.*, Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 879-80 (5th Cir. 2004); Nicini v. Morra, 212 F.3d 798, 807-08 (3d Cir. 2000); Norfleet *ex rel.* Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 293 (8th Cir. 1993); Yvonne L. *ex rel.* Lewis v. N.M. Dep't of Human Servs., 959 F.2d 883, 893 (10th Cir. 1992); LaShawn A. v. Dixon, 762 F. Supp. 959, 992 (D.C. Cir. 1991); Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990); K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 858 (7th Cir. 1990); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (en banc); Doe v. N.Y. City Dep't of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981).

108. *Doe*, 649 F.2d at 141.

109. *Id.*

110. *Id.* at 137.

111. *Id.* at 139.

112. *Id.*

113. *Id.* at 145.

114. Taahira W. *ex rel.* McCord-Salley v. Travis, 908 F. Supp. 533, 539-40 (N.D. Ill. 1995) (where a young girl was placed into a home containing another foster child who had a propensity to sexually abuse other children).

115. Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (en banc).

116. LaShawn A. v. Dixon, 762 F. Supp. 959, 993 (D.C. Cir. 1993).

even held that the right to safety includes the right to basic services, such as case planning and appropriate placements with conditions that are reasonably related to the purpose of the placement.¹¹⁷ To ensure that children's rights are not violated, caseworkers must continue to monitor the foster care placements,¹¹⁸ investigate any suspicions that abuse may be occurring, and determine the needs of the children in their care.¹¹⁹ Though a single act of abuse may not violate a child's right to safety, a pattern of incidents can establish that the state did not fulfill its duty to provide reasonable safety to a child in its care.¹²⁰

Though the courts seem to be expanding what sort of harm constitutes a violation of a child's rights, some courts still take a narrow view of what constitutes "state custody," and, in effect, being eligible for protection from the state's actions.¹²¹ In *Burton v. Richmond*, the Eighth Circuit found that children who were placed with their grandparents after their mother abandoned them did not have a right to safety because no special relationship had been created, even though the state was monitoring the placement and providing services.¹²² The court found that the children were not in state custody because the family made the original custodial arrangements and the state had simply helped the family take children away from an abusive mother.¹²³ Courts have also held that no special relationship exists when children are voluntarily placed into care by their

117. *Id.*; see also *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (holding that a child has the right to medical care as well as protection and supervision); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 676 (S.D.N.Y. 1996) (holding that children have a right to services that relate to the purpose of their placement). *But see* *Camp v. Gregory*, 67 F.3d 1286, 1296-98 (7th Cir. 1995) (holding that a caseworker does not have the duty to protect a child from gang violence because this is beyond the reasonable control of the foster parent); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 506 (D.N.J. 2000) (holding that children did not have the right to be held in the least restrictive setting and may remain in care unnecessarily); *Angela L. v. Children & Youth Servs. of Lawrence County*, 987 F. Supp. 418, 424 (W.D. Pa. 1997) (holding that a caseworker does not have the duty to protect a foster child from getting pregnant at age fourteen); *B.H. v. Johnson*, 715 F. Supp. 1387, 1397-98 (N.D. Ill. 1989) (holding that the right to safety does not include the right to be provided with an "optimal level of care").

118. *Taylor*, 818 F.2d at 815.

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

120. *Nina S. ex rel. Tyler v. Gray*, No. 96-1303, 1996 U.S. Dist. LEXIS 8824, at *2 (E.D. Pa. June 24, 1996).

121. See *Burton v. Richmond*, 370 F.3d 723, 730 (8th Cir. 2004); see also *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (holding that the analogy between foster children and prisoners and mental patients is incomplete because foster children have more freedom and can ensure their own safety).

122. See 370 F.3d at 730.

123. *Id.* at 727.

parents.¹²⁴ Other courts and many children's advocates disagree with these holdings, however, claiming that foster care is never voluntary for children.¹²⁵

Three circuits have not yet allowed children to succeed in section 1983 actions for violations of a constitutional right to safety. The Fourth Circuit has held that a constitutional right to safety while in state custody does not exist for children in foster care,¹²⁶ and the First and Ninth Circuits have never directly addressed the issue.¹²⁷ In *Marr v. Maine Department of Human Services*, the First Circuit assumed, but did not decide, that a constitutional right to safety existed for children in foster care.¹²⁸ The court dismissed the case, however, because it found that the defendants (a government agency and agency employees) were considered "arms of the state" and thus not people within the reach of Section 1983.¹²⁹ In *Miller v. Gammie*, the Ninth Circuit recently overruled a decision that had given child protective workers absolute immunity for a wide range of activities, and, therefore, circumvented any Section 1983 claims against them.¹³⁰ The court held that activities involving "discretionary decisions and recommendations that are not functionally similar to prosecutorial or judicial decisions" do not have a historical claim to absolute immunity and are entitled only to qualified immunity.¹³¹ This decision opens the door for children in the Ninth Circuit to bring cases for violations of a right to safety.¹³²

124. A voluntary placement occurs when a child's parents consent to the child being placed in foster care. See *Milburn ex rel. Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 476 (4th Cir. 1989); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 506 (D.N.J. 2000).

125. See *Miracle ex rel. Miracle v. Spooner*, 978 F. Supp. 1161, 1169 (N.D. Ga. 1997) (stating that the voluntary/involuntary distinction does not matter, because from the child's perspective, foster care is always involuntary); *Lewis v. Neal*, 905 F. Supp. 228, 232 (E.D. Pa. 1995) (holding that for all practical purposes a child is not free to leave her placement even if the placement was voluntary). For a discussion on voluntary placements, see *Mushlin*, *supra* note 14, at 238-42.

126. See *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997); *Milburn*, 871 F.2d at 476.

127. See *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003); *Marr v. Me. Dep't of Human Servs.* No. 01-224-B-C, 2002 U.S. Dist. LEXIS 7378, at *7 (D. Me. Apr. 24, 2002).

128. *Marr*, 2002 U.S. Dist. LEXIS 7378, at *7 (stating the court was assuming the right existed for this case only); see also *Eric L. v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994) (holding that though the Court of Appeals for the First Circuit had not decided whether foster children had a constitutional right to safety, principles other circuits used to analogize *Youngberg* to foster care situations were persuasive).

129. See *Marr*, No. 01-224-B-C, 2002 U.S. Dist. LEXIS 7378, at *7.

130. 335 F.3d at 893 (overruling *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989)).

131. *Id.* at 898.

132. *Id.*

The Fourth Circuit did explicitly hold that there is no right to safety for children placed in foster care within that circuit, citing the absence of controlling Supreme Court authority.¹³³ In *Milburn v. Anne Arundel County Department of Social Services*, the court held that foster parents were private actors, and a foster child in their care was not in state custody.¹³⁴ This holding preempted the court from ever considering whether the child protective workers could be held liable for the actions or failure to act because it held that no special relationship arose to create an affirmative duty to protect the child.¹³⁵ Though *Milburn* based some of its reasoning on the fact that the child had been voluntarily placed in foster care by her parents, the court later extended its holding to include all foster care children.¹³⁶

B. What Standard Is Most Applicable to the Foster Care Setting? Professional Judgment Versus Deliberate Indifference

Circuit courts are split over what sort of behavior on the part of agencies would violate a child's rights. Circuits apply the deliberate indifference standard articulated in *Estelle*, the professional judgment standard from *Youngberg*, and a mix of the two. Because the link between caseworkers' actions or failures to act and the harm caused is more attenuated than in many other situations, proving causation can be difficult for children injured in foster care.¹³⁷ Generally, caseworkers' actions must have been a substantial factor in the harm that occurred.¹³⁸ Due to the unique situation foster children face, a new standard tailored to the specific expectations of children placed in state foster care should be created.¹³⁹

133. *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (holding that the Fourth Circuit "had squarely held that children placed in foster care had no federal constitutional right to state protection").

134. 871 F.2d 474, 479 (4th Cir. 1989). The *Milburn* Court determined that the state had no duty to protect an individual from private violence because states are not traditionally responsible for the foster care business. *Id.* at 476; *but see* K.H. *ex rel.* *Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) (finding that the state could not shirk its responsibility to provide for those in its custody by delegating that responsibility to irresponsible parties).

135. *Milburn*, 871 F.2d at 477. In *Milburn*, the court examined the contract between the agency and the foster family. It found that the contract did not turn the foster family into state actors, because it was too general and the foster family received no compensation. *Id.* For more discussion on foster parents as state actors, see Karen Yiu, Comment, *Foster Parents as State Actors in Section 1983 Actions: What Rayburn v. Hogue Missed*, 7 U.C. DAVIS J. JUV. L. & POL'Y 117 (2003).

136. *See White*, 112 F.3d at 738.

137. *See* Kubitschek, *supra* note 38, § 11.

138. *Id.*

139. *See infra* notes 187-192 and accompanying text.

1) The Deliberate Indifference Standard

The Second, Fifth, and Eighth Circuits generally use the harsher deliberate indifference standard set out in *Estelle v. Gamble*.¹⁴⁰ Deliberate indifference is a “state of mind” demonstrated by a deliberate lack of concern for an individual’s welfare.¹⁴¹ Though the *Estelle* Court held that for conduct to be deliberately indifferent it must offend “the evolving standards of decency,” circuit courts have articulated the standard differently in cases involving foster children.¹⁴²

In *Doe*, the Second Circuit articulated a standard whereby deliberate indifference is demonstrated by a state actor’s inattention to a known risk or facts from which risk can be inferred.¹⁴³ This standard can be met by demonstrating a pattern of omissions that establish a caseworker’s failure to perform specific duties,¹⁴⁴ actual knowledge of a specific, impending harm is not always needed.¹⁴⁵ If the risk of harm is obvious or can easily be inferred from known facts, one can assume that it was consciously disregarded by the state actors.¹⁴⁶ While gross negligence does not by itself constitute deliberate indifference, it may create a strong presumption of its existence.¹⁴⁷

Courts applying the deliberate indifference standard have acknowledged that it is a “significantly high burden for plaintiffs to overcome.”¹⁴⁸ Fortunately, some courts have allowed repeated omissions on the part of

140. See, e.g. *Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004); *Norfleet ex rel. Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

141. See Kubitschek, *supra* note 38, § 22.

142. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Compare *Estelle*, 429 U.S. at 105 (1976), with *Doe*, 649 F.2d at 142 (holding that the standard must be applied differently because of the amount of contact a caseworker has with a child and foster family is more limited than in institutional settings, like prisons and mental hospitals).

143. *Doe*, 649 F.2d at 142.

144. *Id.*; see also *Daniel H. ex rel. Hardaway H. v. City of New York*, 115 F. Supp. 2d 423, 430 (S.D.N.Y. 2000).

145. See *Daniel H.*, 115 F. Supp. 2d at 430. Though the Eleventh Circuit has held that “subjective knowledge” is enough to prove liability, it has also held that a state actor must be objectively aware of a risk or “deliberately failed to learn” of it. Compare *S.M. v. Feaver*, No. 03-80567-Civ-Hurley, 2004 U.S. Dist. LEXIS 1645, at *9 (S.D. Fla. Jan. 21, 2004), with *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004).

146. *Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (noting that if the facts show an obvious risk of abuse to a foster child, then deliberate indifference exists).

147. *Doe*, 649 F.2d at 143.

148. *Hernandez*, 380 F.3d at 882.

caseworkers, such as failure to make the required number of home visits to monitor placements, failure to adequately screen foster parents, or failure to meet other statutory duties to form the basis of liability.¹⁴⁹

2) *The Professional Judgment Standard*

Courts in the Tenth and District of Columbia Circuits generally evaluate the government's actions under the professional judgment standard set forth in *Youngberg v. Romero*.¹⁵⁰ Under this approach, the court must decide if the judgment that resulted in harm was made using the defendant's professional skills.¹⁵¹ As long as a judgment was made appropriately using professional skills, it is presumed to be valid.¹⁵² A caseworker is not liable for every decision that does not turn out well, just those that exhibit a departure from professional standards.¹⁵³ The test for determining whether a defendant failed to exercise bona fide professional judgment has four parameters.¹⁵⁴ The plaintiff must show that the worker failed to exercise professional judgment, that the worker's actions or omissions showed a lack of reasonable supervision, that the injury suffered was reasonably foreseeable, and that there was a casual link between the injury and the failure to supervise.¹⁵⁵ Like deliberate indifference, actual knowledge of impeding harm is not needed. A lack of professional judgment can be demonstrated by a worker's mere misconduct.¹⁵⁶ Many

149. See, e.g. *Miracle ex rel. Miracle v. Spooner*, 978 F. Supp. 1161, 1170 (N.D. Ga. 1997) (citing *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1997)); see also *Weddle & Lansner, supra* note 36, at 81-83; but see *Nicini v. Morra*, 212 F.3d 798, 812 (3d Cir. 2000) (holding that a caseworker's failure to do a background check on foster parents did not constitute deliberate indifference because the caseworker had no reason to suspect that the parents would have a record).

150. See, e.g., *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.C. Cir. 1991).

151. *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982). But see *Bailey v. Pancho*, 108 F. Supp. 2d 1214, 1224-39 (D.N.M. 2000) (looking instead to each defendant's personal history to determine if that defendant was a "professional" and therefore could escape liability because a professional's judgment is presumptively valid).

152. *Youngberg*, 457 U.S. at 322-23. In fact, it is not a judge's job to pick which of many professional judgments is the correct one. *Id.*

153. *T.M. ex rel. Cox v. Carson*, 93 F. Supp. 2d 1179, 1191 (D. Wyo. 2000) (finding that expert testimony should be used to determine the bounds of acceptable conduct, which should be based on a professional judgment standard); *Wendy H. ex rel. Smith v. City of Philadelphia*, 849 F. Supp. 367, 372 (E.D. Pa. 1994) ("[L]iability should attach only when the defendant failed to meet 'professionally accepted minimum standards.'").

154. *Taahira W. ex rel. McCord-Salley v. Travis*, 908 F. Supp. 533, 540 (N.D. Ill. 1995) (citing *Camp v. Gregory*, 67 F.3d 1286, 1297 (7th Cir. 1995)).

155. *Id.*

156. *Wendy H.*, 849 F. Supp. at 374 (finding that requiring actual knowledge would turn the professional judgment standard on its head because caseworkers could simply claim they

circuits applying the professional judgment standard, however, have required defendants to “act in a manner which avails them to that notice.”¹⁵⁷

Although the courts have not provided a distinct definition for what professional judgment is, they have provided some guidance. For example, courts have held that failure to properly screen, license, and train foster parents and investigate and respond to allegations of abuse could demonstrate a failure to meet professional standards.¹⁵⁸ Omissions, like the failure to visit the foster home, maintain contact with the family, or read school or psychiatric evaluations, have also been held to demonstrate a lack of professional judgment.¹⁵⁹ Courts have further held that “mere negligence” will not by itself constitute a violation of the professional judgment standard.¹⁶⁰ In some cases, expert testimony may be needed to determine if the defendant’s actions fall within the scope of professional judgment.¹⁶¹

3) When a Circuit Can’t Decide: Inconsistently Applying Both Standards

The Third, Sixth, Seventh, and Eleventh Circuits have applied both the deliberate indifference and the professional judgment standards.¹⁶² Until 2000, district courts in the Third Circuit applied the professional judgment standard,¹⁶³ finding that it better applied to foster children’s situations than the deliberate indifference standard.¹⁶⁴ But in 2000, the Court of Appeals

did not know); *see also* LaShawn A. v. Dixon, 762 F. Supp. 959, 996-97 (D.C. Cir. 1991); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (“Even if defendants did not have actual knowledge of the harm or risk, evidence of simple misconduct toward plaintiffs is actionable.”).

157. *Wendy H.*, 849 F. Supp. at 373; *see also T.M.*, 93 F. Supp. 2d at 1191; *Nina S. ex rel. Tyler v. Gray*, No. 96-1303, 1996 U.S. Dist. LEXIS 8824, at *6 (E.D. Pa. June 24, 1996). *But see* *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002) (holding that there was no duty for a caseworker to make an inquiry).

158. *See, e.g., Kenny A. ex rel. Winn v. Perdue*, 1:02-cv-1686-MHS, 2004 U.S. Dist. LEXIS 27025, at *16-17 (N.D. Ga. Dec. 11, 2004); *see also* Christine M. Dine, Comment, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children’s Right to Safety*, 38 CAL. W. L. REV. 507, 523 (2002) (enumerating the professional standards of caseworkers).

159. *Wendy H.*, 849 F. Supp. at 375.

160. *E.g., Taahira W.*, 908 F. Supp. at 543 (“Nor does the court suggest that a caseworker’s mere negligence will give rise to liability.”).

161. *See, e.g., Youngberg*, 457 U.S. at 323 n.31.

162. *See infra* notes 163-177 and accompanying text.

163. *See Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999); *Nina S. ex rel. Tyler v. Gray*, No. 96-1303, 1996 U.S. Dist. LEXIS 8824, at *5 (E.D. Pa. June 24, 1996); *Wendy H.*, 849 F. Supp. at 372.

164. *See, e.g., Jordan*, 66 F. Supp. 2d at 646 (applying the professional judgment

for the Third Circuit applied the deliberate indifference standard rather than the professional judgment standard without mentioning the Circuit's history of applying the latter in foster care cases.¹⁶⁵

The Sixth Circuit has progressed in the opposite direction. The Sixth Circuit Court of Appeals first held that deliberate indifference was "clearly established" as the proper standard.¹⁶⁶ In 2000, however, a district court in that circuit found that though deliberate indifference had been used in other contexts, such as in cases involving prison inmates, the professional judgment standard was most appropriate for cases involving foster care children.¹⁶⁷ The court made no mention of its previous application of the deliberate indifference standard.¹⁶⁸

In *Kenny A. ex rel. Winn v. Perdue*, a district court in the Eleventh Circuit departed from the circuit's clear establishment of deliberate indifference as the standard within that Circuit.¹⁶⁹ The court acknowledged the Eleventh Circuit's long history of applying the deliberate indifference standard,¹⁷⁰ but found that this history was not controlling because the Eleventh Circuit Court of Appeals had never explicitly held that deliberate indifference was the correct standard for cases involving children in foster care.¹⁷¹ The court also distinguished the case because the plaintiff was seeking only injunctive and declaratory relief while other cases involved monetary damages as well.¹⁷²

The path the Seventh Circuit has taken in cases involving foster care

standard); *Nina S.*, No. 96-1303, 1996 U.S. Dist. LEXIS 8824, at *5 (noting that the professional judgment standard "is the proper standard of care owed to a child in foster care"); *Wendy H.*, 849 F. Supp. at 372 (applying the professional judgment standard).

165. *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir. 2000).

166. *Lintz v. Skipsi*, 25 F.3d 304, 305-06 (6th Cir. 1994). This court inexplicably cited *Youngberg*, however, to establish the deliberate indifference standard. *Id.* at 305.

167. *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 953-54 (M.D. Tenn. 2000).

168. *Id.*

169. No. 1:02-CV-1686-MHS, 2004 U.S. Dist. LEXIS 27025, at *13-18 (N.D. Ga. Dec. 11, 2004).

170. See *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004) (citing *Taylor*); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794, 797 (11th Cir. 1987) (en banc); *S.M. v. Feaver*, No-03-80567-Civ-Hurley, 2004 U.S. Dist. LEXIS 1645, at *8 (S.D. Fla. Jan. 21, 2004) (citing *Taylor*); *Omar ex rel. Cannon v. Lindsey*, 243 F. Supp. 2d 1339, 1343 (M.D. Fla. 2003) (citing *Taylor*); *Rhodes-Courter ex rel. Courter v. Thompson*, 252 F. Supp. 2d 1359, 1362 (M.D. Fla. 2003) (citing *Taylor*); *Rayburn ex rel. Rayburn v. Farnesi*, 70 F. Supp. 2d 1334, 1343 (N.D. Ga. 1999) (citing *Taylor*); *Miracle ex rel. Miracle v. Spooner*, 978 F. Supp. 1161, 1170 (N.D. Ga. 1997) (citing *Taylor*).

171. See *Kenny A.*, 2004 U.S. Dist. LEXIS 27025, at *14.

172. *Id.* at 14-15; see also *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 n.29 (D.C. Cir. 1991).

children is probably the most perplexing. Many consider the Seventh Circuit's holding in *K.H. ex rel. Murphy v. Morgan*¹⁷³ to be the definitive articulation of the professional judgment standard, and courts in other circuits have cited this opinion when applying professional judgment in cases involving foster children.¹⁷⁴ Despite this precedent, courts in the Seventh Circuit have slowly moved toward applying deliberate indifference rather than professional judgment, with some courts even citing to *K.H.* as precedent for the former.¹⁷⁵ The Seventh Circuit recently held that applying the professional judgment standard would effectively overrule the *K.H.* decision.¹⁷⁶ This court found that *K.H.* meant for professional judgment to be only a starting point, not a threshold.¹⁷⁷

Even if the circuits agreed on a standard, there would still be confusion among them. The difference between the two standards is unclear,¹⁷⁸ and many courts do not seem to realize that more than one standard exists.¹⁷⁹ Between circuits, and even within some circuits, the language used to articulate the standards varies greatly.¹⁸⁰ The Tenth Circuit even expressed doubt over whether there was a meaningful difference between the standards at all.¹⁸¹

173. 914 F.2d 846 (7th Cir. 1990).

174. See Yvonne L. *ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992) (citing *Morgan* before adopting the professional judgment standard); Wendy H. *ex rel. Smith v. City of Philadelphia*, 849 F. Supp. 367, 371-72 (E.D. Pa. 1994) (citing *Morgan* before applying the professional judgment standard). Often quoted is the *K.H.* Court's remark that "child welfare workers and their supervisors have a safe haven from liability when they exercise a bona fide professional judgment as to where to place children in their custody." 914 F.2d at 854.

175. See J.H. & J.D. *ex rel. Higgin v. Johnson*, 346 F.3d 788, 792 (7th Cir. 2003) (applying a "modified" deliberate indifference standard); *Lewis v. Anderson*, 308 F.3d 768, 776 (7th Cir. 2002) (applying what seems to be deliberate indifference); *Mabel A. ex rel. Murphy v. Woodward*, No. 97C 1634, 1998 U.S. Dist. LEXIS 1009, at *6 (N.D. Ill. Jan. 14, 1998) (applying deliberate indifference).

176. *J.H. & J.D.*, 346 F.3d at 792.

177. *Id.* at 792-93.

178. See Kearse, *supra* note 54, at 392-405.

179. See, e.g., *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (discussing only deliberate indifference); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (discussing only deliberate indifference standard).

180. See *Norfleet*, 989 F.2d at 293; *Meador*, 902 F.2d at 476; see also *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) (finding a liberty interest by analogizing *Youngberg*, but applying *Estelle's* deliberate indifference); *Bailey v. Pacheco*, 108 F. Supp. 2d 1214, 1219-20 (D.N.M. 2000) (finding that professional judgment creates more of a burden on the state to act or less of a burden in explaining their actions).

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

4) *Children Are Unique: A New Standard of Care Is Needed*

Neither deliberate indifference nor professional judgment is an appropriate standard to apply to children. These standards are vague, inconsistent, and cumbersome, and they were not created to address the specific needs of children. The Supreme Court used *Estelle* and *Youngberg* to hint that foster care might be a form of state custody to demonstrate the possible existence of a right, but did not state that either case had articulated the appropriate standard of care for children in state custody.¹⁸² Because the deliberate indifference standard is rooted in the Eighth Amendment and the criminal justice system, its application is wholly inappropriate to children in foster care who are being protected, not punished, by the state.¹⁸³ Children are neither legally nor developmentally adults. They have no say over their placement in foster care, whereas both adult mental patients and prisoners can petition to have their cases reviewed. Children also have particular needs for security, stability, interaction, and stimuli to assure their healthy development.¹⁸⁴ The environment children grow up in can be determinative of their personality and performance.¹⁸⁵ The importance of this comes alive when examining the tragic outcomes of foster care youth, as discussed in Part I of this Comment.¹⁸⁶

A new and higher standard should be created to replace deliberate indifference and professional judgment.¹⁸⁷ A clear standard would help state agencies know where they stand on liability issues and would allow for better training of child protective workers.¹⁸⁸ In his dissent in *K.H. ex rel. Murphy v. Morgan*, Judge Coffey advocated for a duty to provide appropriate care and respond to the needs of children judged by a standard of reasonable professional judgment.¹⁸⁹ A shift in the burden of proof

182. See Kears, *supra* note 54, at 405.

183. Even in *Youngberg*, the Court found deliberate indifference inappropriately harsh to apply to mental patients who had not done anything wrong and should not be punished. 457 U.S. 307, 316 (1982).

184. See generally JOHN BOWLBY, A SECURE BASE: CLINICAL APPLICATIONS OF ATTACHMENT THEORY 119-36 (2003). Bowlby's attachment theory explores how a child's earliest attachments are his or her foundation for later relationships. *Id.* at 126-27. Once these patterns of interaction are formed, it is hard to alter them because they operate at an unconscious level. *Id.* at 130.

185. See generally *id.* at 119-36.

186. See *supra* Part I.

187. See Dine, *supra* note 158, at 515-16; Kears, *supra* note 54, at 410.

188. See Laura A. Harper, *The State's Duty to Children in Foster Care—Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 812 (2003).

189. 914 F.2d 846, 855-56 (7th Cir. 1990) (Coffey, J., dissenting).

toward a rebuttable presumption that a caseworker did not use professional judgment may also be necessary.¹⁹⁰ Such a standard would be more applicable to children and their unique needs. Unfortunately, a higher standard like the one Judge Coffey described would place a financial burden on an already overwhelmed system.¹⁹¹ It might also create a disincentive for workers to remove children from their dangerous biological parents in fear of taking on responsibility for that child's needs.¹⁹² As the majority held in *K.H.*, at the root of the problems with the current child welfare system stem is a lack of financial resources.

**PART IV: AN EXPLANATION FOR THE LACK OF A CLEAR STANDARD:
AN IGNORED, UNDERVALUED, AND INADEQUATE CHILD PROTECTIVE
SYSTEM**

As discussed above, courts have yet to address the failures of the child welfare system in a uniform manner. Courts have been slow to recognize children's civil rights claims and hesitant to expand causes of action that would allow children to recover for violations of their basic rights.¹⁹³ This may stem from a reluctance to burden an already overwhelmed system with claims of liability or to question the decisions of caseworkers whom judges assume know more about child welfare than the courts. But it may also reflect an underlying sentiment in the legal community that children's rights and the violation of these rights are not a priority.¹⁹⁴

A. Child Welfare Agencies are Disorganized, Chaotic, and Inadequate

It is easy to understand why child protective agencies and caseworkers may fail to protect children. Agencies are mammoth organizations that are disorganized, lacking in direction, and in desperate need of funding.¹⁹⁵ Caseworkers at these agencies are poorly paid, overburdened with cases, and generally not prepared or trained for the difficult nature of their work.¹⁹⁶ Child protective workers are rarely social workers holding masters degrees in the field.¹⁹⁷ The child protective system has become de-

190. See Dine, *supra* note 158, at 516.

191. See Harper, *supra* note 188, at 812. Advocates for children's rights propose that this is a concern for the legislature and not for the courts. *Id.*

192. *Id.*

193. See *supra* Part III.

194. See *infra* notes 218-221 and accompanying text.

195. See Mushlin, *supra* note 14, at 201, 212-13.

196. *Id.* at 213.

197. See generally HANK ORENSTEIN, PUTTING SOCIAL WORK BACK INTO CHILD WELFARE (Apr. 2000), at <http://www.naswnyc.org/c31.html> (last viewed Oct. 14, 2005).

professionalized, as trained social workers leave the field to pursue more lucrative employment, often as private practitioners.¹⁹⁸ One author noted that the requirements to become a caseworker are now less stringent than the requirements to become a foster parent.¹⁹⁹ The training that the agency does provide these caseworkers is often insufficient.²⁰⁰ Supervisors, who sometimes are social workers, are often equally overburdened and can't always step in when caseworkers need them.²⁰¹

The standards of procedure that these workers follow are "less than specific, not terribly uniform, and vary with the specific stages of intervention and official action involved."²⁰² One former worker described the standards of procedure as "incoherent."²⁰³ These standards are fluid and differ between supervisors, departments, and localities.²⁰⁴ Workers' decisions often depend more on the individual worker than on the facts of the case.²⁰⁵ Though some workers make sure their decisions are thought out and rational, the elasticity of the standards, combined with inexperience and lack of training, makes it easy for less conscientious workers to justify poor decisions.²⁰⁶ Though ASFA guidelines are much more precise, states do not always meet them.²⁰⁷ Doctoring records has become increasingly common as caseworkers and agencies strive to meet ASFA's high standards.²⁰⁸

B. Courts Are Hesitant to Articulate a Clear and Higher Standard of Liability

Federal courts have generally been reluctant to enforce legal standards of

198. See CAL. STATE UNIV. AT FRESNO, HISTORICAL REVIEW: THE CURRICULUM DEVELOPMENT PROCESS, at <http://www.csufresno.edu/socwork/iv-e/Historical.Review.Curriculum.Dev.html> (last viewed Oct. 14, 2005).

199. Levesque, *supra* note 11, at 11.

200. See Mushlin, *supra* note 14, at 209-10.

201. See *id.*

202. See Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353, 377 (1991).

203. Mundorff, *supra* note 1, at 152.

204. *Id.* at 153 (charging that inconsistency between and within child welfare systems can partially be attributed to lack of clear standards).

205. *Id.*

206. See generally Weddle & Lansner, *supra* note 36.

207. See *supra* note 4.

208. See Leslie Kaufman, *City to Sever Two Contracts for Foster Care*, N.Y. TIMES, Feb. 3, 2005, at B1 (reporting that a foster care agency had falsified records to hide failures to perform duties); Andrea Neal, *More Caseworkers Won't Solve Problems With System*, INDIANAPOLIS STAR, Jan. 26, 2005, at A10 (reporting that a caseworker lied and failed to follow procedure).

care or hold governmental actors liable for failing to protect children in their care.²⁰⁹ Claims asserting Section 1983 liability for failure to protect are similar to common law tort claims, and the Supreme Court has held that the Constitution cannot replace tort law by laying down rules of conduct.²¹⁰ In addition, the judicial system might be reluctant to judge decisions that are considered to be based on professional knowledge. In *Youngberg*, the Court stated that “there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.”²¹¹ Ironically, the child welfare profession has de-professionalized, as noted above.²¹² Those making the “professional decisions” often do not hold any higher qualifications in the field of child welfare than the judges reviewing them. Caseworkers often act on gut instinct or simply follow protocol without evaluating their possible options, as a professional social worker would.²¹³

It also may be harder for courts to believe that caseworkers harm children than it is for courts to believe that a prison guard would be deliberately indifferent to an inmate’s needs.²¹⁴ Courts often seem equally sympathetic to defendant caseworkers and plaintiff foster children. The District of Columbia Circuit found the defendants in *LaShawn A. v. Dixon* to be “beleaguered city employees trying their best . . . while plagued with excessive caseloads, staff shortages, and budgetary constraints.”²¹⁵ The Seventh Circuit wrote that caseworkers walked on a “razor’s edge,” facing liability if they return a child to his or her family and if they place him or her in foster care.²¹⁶ Out of sympathy for the caseworkers’ plight, and possibly a feeling that these workers lacked the appropriate culpability, the court allowed the caseworkers to escape liability by demonstrating financial or other professional considerations that proved to be a solid rationale for their poor decisions.²¹⁷

209. See generally *Armacost*, *supra* note 43, at 985 (showing that federal courts have generally been reluctant to enforce these standards).

210. See *Berry*, *supra* note 39, at 886.

211. 457 U.S. 307, 322-23 (1982).

212. See *supra* note 198 and accompanying text.

213. See generally *Mundoroff*, *supra* note 1.

214. *Mushlin*, *supra* note 14, at 231-32.

215. 762 F. Supp. 959, 960 (D.C. Cir. 1991).

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

217. *Id.* at 853-54.

C. Recognizing the Importance of Children's Issues: Re-Professionalizing the Child Welfare System

While it is easy to sympathize with child protective workers, we must remember that their mistakes sometimes result in children's deaths. For any real change to occur, lawyers, judges, and social workers must return to the field of child protective services. Without these trained professionals, the field will continue to stagger along without direction. The legal community in particular must alter the way it views children's rights and articulate a clear and definitive standard of what the state must provide to children in its care. In 1974, Congress established a statutory right for children to be represented in court through the Child Abuse Prevention and Treatment Act (CAPTA).²¹⁸ In 1993, the ABA urged its members to treat children as they would any other clients, identifying the legal issues affecting children as a deficiency in legal education.²¹⁹ Yet the mainstream legal community has never embraced children's rights.²²⁰ There is a "perception by the bar that legal matters directly involving children are 'kiddie matters'—at best, professional stepping-stones for the young and inexperienced, at worst, punishment for inadequate or unmotivated practitioners."²²¹ Like caseworkers, attorneys that represent children are poorly paid and overloaded with cases.

The lack of attention and respect the legal community pays to children's issues adds to the chaos of the child welfare system. As discussed above, when children bring claims against this system, courts address them in an extremely non-uniform manner. Children often cannot recover, and caseworkers rarely know when they are at risk for liability. The perception that children's issues are unimportant creates a feeling that the foster care system is not a place for professionals. This often increases the reluctance qualified lawyers and social workers already have about working in this system. It also frustrates the few strong souls who do choose to advocate for children.

218. See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 1 (2000). Not all legal scholars, however, believe that children need attorneys. For more on this debate, see Mandelbaum's discussion of Professors Martin Guggenheim and Emily Buss. *Id.* at 37-46.

219. See Jennifer R. Gavin, *Child Welfare Law Curricula in Legal Education: Massachusetts' Untried Opportunity*, 7 B.U. PUB. INT. L.J. 9, 19 (1998).

220. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 453 (1996) (calling lawyers who advocate for children's rights "kiddie libbers").

221. See Gavin, *supra* note 219, at 18 (quoting REPORT OF THE GOVERNOR'S MA. BAR ASS'N COMM'N ON THE UNMET LEGAL NEEDS OF CHILDREN 16 (1987)).

Highly qualified attorneys and social workers must be drawn back to a field that desperately needs them. Skilled attorneys are needed to put pressure on agencies to perform their duties. Governmental agencies need professional social workers who can spot symptoms of child abuse and appropriately counsel families. For child protective agencies to improve, they must be valued as more than a wasteland of children of the underclass.

CONCLUSION

In 1979, Marian Wright Edelman called our foster care system a “national disgrace.”²²² Over twenty-five years later, children are still dying in state care. The courts must recognize their role in this tragedy and establish a consistent and appropriate standard of care for children in foster care. Neither the deliberate indifference nor the professional judgment standard adequately addresses and applies to the needs of foster children. A new standard must emerge that addresses children’s unique needs, and child protective workers must be held accountable for failing to meet this standard.

Yet we must also try to understand why those assigned to protect children are failing at their task. Child protective workers, and also foster children, are caught in a chaotic system that has been abandoned by the professionals who are equipped to fix it. As lawyers or social workers, we must become actively involved in changing this system. Advocates for children must continue to push legislators to provide more financial support to the child protection system. Attorneys can no longer dismiss children’s issues as the frivolous work of young female attorneys, and social workers cannot leave the hardest work for those untrained to do it. By reclaiming the care of our children, we will send the message that in the United States, children’s rights are human rights.

222. See Chaifetz, *supra* note 12, at 9.