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DESHANEY'S UNFINISHED BUSINESS: THE FOSTER CHILD'S DUE PROCESS RIGHT TO SAFETY

LAURA OREN*

In 1989 the Supreme Court decided DeShaney v. Winnebago County Department of Social Services, holding that a child under supervision of a state's child protection system, yet still in the immediate care of an abusive father, stated no constitutional cause of action for the state's failure to protect him from abuse because the government had not assumed "custody" of the child. In an article published in the previous volume of this journal, Professor Laura Oren argued that the DeShaney Court's adoption of a bright-line test based on custody represents an abstraction that improperly ignores the context of child abuse—the history of domestic violence in the United States as well as present methods of dealing with both victims and perpetrators of this problem.

In this Article Professor Oren addresses a question the DeShaney Court intentionally left unanswered: Does the government have an affirmative constitutional duty to protect those children whom it has taken into custody and placed in foster care? Professor Oren begins her inquiry by examining two recent federal circuit court rulings that were denied certiorari to the Supreme Court in the wake of the DeShaney opinion. The Eleventh Circuit Court of Appeals held that a child taken from her home by a state child protection agency stated a constitutional cause of action for injuries inflicted by abusive foster parents. The Fourth Circuit Court of Appeals, however, ruled that a child whose parents voluntarily had placed him in the state's foster care system did not state a constitutional claim because the state, by placing the child in an abusive foster home, had not deprived the child of any liberty interests.

Professor Oren argues that any "voluntariness" distinction is artificial, particularly with regard to the child's situation, and should not form the basis upon which a child's constitutional right to safety is determined. She contends that the foster child's right to safety can be justified not only in light of the history of the Supreme Court's treatment of children, but also in light of the DeShaney opinion itself. She concludes that foster care constitutes the kind of state custody to which the due process clause applies and that the state's failure to protect children in its

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custody is an abuse of government power, for which section 1983 provides a remedy.

I. INTRODUCTION: A TALE OF TWO FOSTER CHILDREN

State child protection systems in the United States hold several hundred thousand children in foster care each year, a number which is now rising again after years of decline.¹ Although the states take custody of the children in order to protect them from abuse or neglect in their natural families, every year many children are placed or left in dangerous foster homes where they encounter abuse and suffer serious injury.² One such child is Kathy Jo Taylor, who at age

1. The exact number of children in foster care is unknown. A December 1988 report of the House Select Committee on Children, Youth and Families, however, estimated that 276,000 children were in foster care in 1985, up 2.6% from 1983. STAFF OF HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 100TH CONG., 2D SESS., REPORT ON CHILDREN AND FAMILIES: KEY TRENDS IN THE 1980'S 45 (Comm. Print 1988) (citing U.S. Dep't of Health & Human Servs., 1988 and Select Committee on Children, Youth, and Families, U.S. House of Representatives, 1988). On a one-day count in June 1986, an estimated 375,000 children were in foster care. *Id.* Dr. Toshio Tatara, Director for the Research and Demonstration Department at the American Public Welfare Association in Washington, D.C., reports that the number of children in foster care jumped substantially from approximately 280,000 in 1986 to 360,000 in 1989. The states of California and New York are responsible for much of that increase. Telephone interview with Dr. Toshio Tatara (March 23, 1990). The American Public Welfare Association's Voluntary Cooperative Information System (VCIS) has been collecting substitute care and adoption data from state public child welfare agencies since 1982. *About VCIS Research Notes*, 1 VCIS Research Notes 1 (March 1989).

Local data reflect similar increases in the late 1980s. The Children's Defense Fund reported that the demand for foster care placements in New York City jumped 29% from 1985 to 1986. Forer, *Bring Back the Orphanage: An Answer for Today's Abused Children*, 20 WASH. MONTHLY, Apr. 1988, at 17, 20-21. In Illinois, there was a 32% increase in the number of children entering care from 1986 to 1987. *Id.* at 21.

Between 1977 and 1982 the number of children in foster care had fallen significantly as a result of reform pressures for "minimum intervention" that culminated in a 1980 federal enactment creating financial incentives to decrease reliance on foster care. *See infra* notes 58-66 and accompanying text. The number of children in foster care declined over that period from an estimated 500,000 to 237,000. A. RUSSELL & C. TRAINOR, TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE 42 (1984) [hereinafter TRENDS]. Social service agencies used foster care in only 13% of reported abuse and neglect cases in 1982, as compared to 25% of those cases in 1976. *Id.*; *see also* McQueen, *Family Crisis: Foster-Care System Is Strained as Reports of Child Abuse Mount*, Wall St. J., June 15, 1987, at 10, col. 1 (citing report by the U.S. Dep't of Health & Human Services) (after dropping to about 260,000 in 1983, the number of children in foster care rose to 270,000 in 1984 and has continued to rise since then in many sections of the country).

2. While no one knows how many children are abused while in foster care, there is evidence that they are far more likely to be maltreated than the general population of children. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 205-06 (1988). A 1986 national survey of foster family abuse and neglect, for example, indicated reported rates of abuse that in places were over ten times greater for foster children. P. RYAN & E. MCFADDEN, NATIONAL FOSTER CARE FOUNDATION PROJECT: PREVENTING ABUSE IN FAMILY FOSTER CARE (1986). Considerable unreported foster care abuse further underscores the problem. Mushlin, *supra*, at 206-07.

Foster care conditions are deplorable in New York, a state that has relatively many children in foster care. An audit of the New York State Division of Youth by the State comptroller disclosed that children had been placed with foster parents "who were emotionally unstable, suicidal, violent, and financially unable to provide the youths with a clean place to live and necessities such as drinking water." Forer, *supra* note 1, at 21. In 1987 Judge Daniel D. Leddy of New York Family Court told the *New York Times*, "It's gotten to the point where we're sending kids home to bad circumstances because foster care is such a terrible alternative." Oreskes, *A System Overloaded: The Foster Care Crisis*, N.Y. Times, Mar. 15, 1987, at 1, col. 1.

Statistics available from the American Humane Association (AHA), furthermore, indicate that the reported incidence of foster care abuse is increasing. Its national survey of reports of abuse and

nine, now lies in an irreversible coma at the Georgia Retardation Center suffering from brain damage that occurred in 1982 when her foster mother slapped, shook, and threw to the floor the then two-year-old girl.³ Kathy Jo was in state custody because her maternal grandmother was concerned about some bruises on the child.⁴ She had taken the girl to a doctor, who examined her and reported suspected child abuse to Gwinnett County Department of Family and Children Services (DFACS).⁵ Gwinnett County DFACS then took temporary custody of the toddler.⁶ Although there were relatives who were willing to care for Kathy Jo, DFACS failed to explore that alternative and instead placed the girl into foster care with abusive strangers.⁷ Within two months, the little girl suffered the injuries that left her brain damaged.⁸

neglect reflected that in 1979 0.4% of reported cases involved a foster parent perpetrator. In 1980 the rate rose to 0.6%, an increase of 50%. The incidence continued to rise in 1981, up to 0.7%, or an increase of 75%. The rate levelled to 0.5% in 1982, which nonetheless reflected a 25% increase over 1979. It is not clear whether the 1982 figures are only an aberration or if they reflect a plateau. TRENDS, *supra* note 1, Table A-IV-8, at 97. Recent data is unavailable, as the AHA no longer receives federal funding to continue the national surveys that it began in 1976. Telephone interview with Robyn Alsop, Information Services Coordinator of the AHA's American Association for Protecting Children, Denver, Colorado (March 22, 1990). Congress directed the National Clearinghouse on Child Abuse and Neglect to collect data from all states, H.R. REP. NO. 135, 100 Cong., 2d Sess. 16, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 72, 73, but no system is in place as of yet.

3. *Progress in Georgia*, JUSTICE FOR CHILDREN NEWSLETTER, Nov. 1989, at 3-4.

4. En Banc Brief of Appellant at 6, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (No. 85-8354), cert. denied, 109 S. Ct. 1337 (1989).

5. *Id.*

6. *Id.*

7. *Id.* Relatives may serve as foster caregivers under a variety of placement (and, as a result, funding) circumstances. The *Taylor* case was an abuse or neglect proceeding. Immediately following a court hearing on temporary custody, family members advised DFACS that the child's natural aunt wished to be considered as a foster parent. *Id.* DFACS, however, failed to consider that offer or investigate the aunt's suitability for formal foster caregiving status. *Id.* Presumably, if she had been screened and approved as a foster caregiver in this setting, the aunt would have been entitled to receive foster care payments on behalf of the child. The Supreme Court ruled in *Miller v. Youakim*, 440 U.S. 125 (1979), that states may not exclude foster children in the care of relatives from the federally-subsidized aid to families with dependent children-foster care program. *Id.* at 145. In most states, these foster care payments are substantially greater than other public assistance that is available for relatives who have taken a dependent child into their family. *Id.* at 129 n.5. In New York State, for example, persons within the third degree of blood kinship may be certified as foster parents for their child relatives in an expedited and modified process. See *In re Coop*, 140 Misc. 2d 951, 952, 531 N.Y.S.2d 449, 449 (N.Y. Fam. Ct. 1988) (citing 18 N.Y.C.R.R. § 444.8). The *Coop* litigation resulted in a court order also directing administratively expedited processing of applications by more remote kin and friends of the child. *Id.* at 958-59, 531 N.Y.S.2d at 453.

The Department of Social Services in New York City also has granted foster-care status to relatives when the Department has custody of the child pursuant to a "voluntary" agreement under Social Services Law § 384-a. See *In re Curtis H.*, 112 Misc. 2d 460, 460, 446 N.Y.S.2d 986, 986 (N.Y. Fam. Ct. 1982) (denying court approval necessary for federal reimbursement of state and city expenditures for foster-care when the voluntary agreement *post-dated* and merely ratified "past private arrangements between relatives").

In some states, placement with relatives may be highly informal and even serve to bypass the child protection system. A Texas advocacy group for children reported that there has been an "alarming" increase in relative placements by Children's Protective Services (CPS) in the state in the last few years. *Justice for Children in the News*, JUSTICE FOR CHILDREN NEWSLETTER, Mar. 1990, at 2. The group charged that this trend reflects "the desire on the part of CPS to bypass the court system as well as of the foster care system (including their checks and balances and more stringent screening requirements) in order to place children and close CPS's cases." *Id.*

8. En Banc Brief of Appellant, *supra* note 4, at 7.

Kathy Jo Taylor (through her guardian) sued the state officials who were involved in her placement in the dangerous foster home, alleging that they had deprived her of rights or privileges guaranteed by the fourteenth amendment of the United States Constitution or by federal law.⁹ The United States Court of Appeals for the Eleventh Circuit, sitting en banc, ruled that when the state involuntarily places a child in the custodial environment of foster care, so that the child is unable to seek alternative living arrangements, the state assumes a constitutional duty to ensure the safety of that environment.¹⁰ "The state's failure to meet that obligation, as evidenced by the child's injuries," in the absence of overriding societal interests constituted a deprivation of liberty and a violation of Kathy Jo's substantive due process rights.¹¹

The Eleventh Circuit thus reversed the district court's dismissal of the suit and reinstated Kathy Jo's complaint.¹² *Taylor v. Ledbetter* went to the United States Supreme Court on a petition for writ of certiorari. The Court held the petition for a long time,¹³ but finally denied certiorari¹⁴ immediately after issuing its opinion in *DeShaney v. Winnebago Department of Social Services*.¹⁵ In *DeShaney* the Court ruled that a child who was enmeshed in a state's child protection system, but who, unlike Kathy Jo, was still in the legal care of the father who beat him, stated no constitutional claim because he was not in state "custody."¹⁶

The Court held in *DeShaney* that *custody* is the operative line demarcating constitutional liability under the due process clause for a state's failure to protect a child from "private" violence.¹⁷ I have argued elsewhere that *DeShaney* was wrongly decided: the Court improperly ignored the context of that case—the past and present practice of child protection and the history of domestic violence in this society.¹⁸ Right or wrong, however, *DeShaney* expressly left open¹⁹ the issue raised by Kathy Jo Taylor's tragic case: Does the state have an affirmative constitutional duty to protect those children whom it has taken into custody and placed in foster care?

The Fourth Circuit has said no, at least where the child is in foster care

9. *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989).

10. *Id.* at 795.

11. *Id.* at 795, 797.

12. *Id.* at 792, 800.

13. NATIONAL CENTER ON WOMEN & FAMILY LAW, INC., Memorandum on Memorandum from Congressional Research Service, the Library of Congress, American Law Division, to House Subcommittee on Select Education (April 18, 1989); see also Memorandum by Congressional Research Service, *The Implications of DeShaney*, to House Subcommittee on Select Education (Apr. 18, 1989) at 1 [hereinafter *Implications*] (petition for review in *Taylor* held an "inordinate" period before denial of certiorari).

14. *Taylor v. Ledbetter*, 109 S. Ct. 1337 (1989).

15. 109 S. Ct. 998 (1989).

16. *Id.* at 1005.

17. *Id.* at 1005-06.

18. Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 700-17 (1990) [hereinafter *DeShaney in Context*].

19. *DeShaney*, 109 S. Ct. at 1006 n.9. The Court noted appellate decisions that had recognized a foster child's right to safety, including the Eleventh Circuit's en banc decision in *Taylor*. *Id.*

"voluntarily."²⁰ *Milburn v. Anne Arundel County Department of Social Services*²¹ concerned another child injured while under the protection of a state's foster care system. Two-year-old Charles Milburn was placed "voluntarily" by his parents in Maryland's foster care system.²² He sustained significant injuries

20. *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474 (4th Cir.), *cert. denied*, 110 S. Ct. 148 (1989).

21. *Id.*

22. *Id.* Maryland's family law statutes provide, in pertinent part, that the Social Services Administration of the Department of Human Resources (SSA) shall establish a program of foster care for minor children either (1) who have been "placed in the custody of a local department, for a period of not more than 6 months, by a parent or legal guardian under a written agreement voluntarily entered into with the local department" or (2) who are abused, abandoned, neglected or dependent, as found by a juvenile court proceeding. MD. FAM. LAW CODE ANN. § 5-525 (1984) (emphasis added).

Nationally, a significant number of foster care placements may be described as "voluntary," although the practice varies from state to state. A 1980 study reflected a number of states with a very high proportion of placements classified as voluntary: 77% in New York State; 73% in New Jersey; 47% in Connecticut; 46% in New Mexico; 41% in Minnesota; and 40% in Massachusetts. Table, Directory of Agencies, 1980 Child and Youth Referral Survey, Public Welfare and Social Services Agencies (Washington, D.C.: Department of HHS, Office for Civil Rights, Sept. 1981), *cited in* COMPARISON OF VOLUNTARY AND COURT-ORDERED FOSTER CARE: DECISIONS, SERVICE, AND PARENTAL CHOICE, vol. I, RESEARCH INSTITUTE FOR HUMAN SERVICES (Portland State University), at 3. The median state, on the other hand, was Alabama, with a 10% voluntary placement rate. *Id.* A 1983 report estimated that for the country as a whole, voluntary placement constituted 25% of all foster care placements, but that there was a wide variation from state to state. *Id.* Mark Hardin, Director of the ABA Center on Children and the Law's Foster Care Project, who was a consultant on the Portland report, believes that the trend in voluntary placements is most likely downward. Telephone interview with Mark Hardin (March 26, 1990). Dr. Toshio Tatara, Director for the Research and Demonstration Department at American Public Welfare Association in Washington, D.C., collected data for 1983 from 26 responding states that indicated that most children were placed under a court order, while voluntary placement constituted less than 7% of the total. Dr. Tatara also believes that purely voluntary placements are much less frequent today than they were in the 1970s. Telephone interview with Dr. Toshio Tatara (March 23, 1990).

Any conclusion, however, largely depends on one's definition of "voluntary." New York State, for example, which is responsible both for a disproportionate number of foster placements in the country, and for a high rate of "voluntary" placements, enacted in 1973 a provision for court-approval of "voluntary" agreements to transfer care and custody of a child to an authorized agency on a temporary basis pursuant to Social Service Law § 384-a. N.Y. SOC. SERV. LAW § 384-a (McKinney 1983 & Supp. 1990). A social services official who accepts care and custody of a child through a § 384-a voluntary agreement and who believes that the placement is likely to last for more than 30 days, must petition the family court for approval of the placement. *Id.* If the judge is satisfied that the parents executed the agreement voluntarily, because they were unable to make adequate provision for the care, maintenance, and supervision of such child at home, that reasonable efforts have been made prior to the placement to prevent the need for removal of the child from her home, that it is in the best interest of the child to be removed, and that it would be contrary to her welfare to be forced to remain, the court may approve the petition. *Id.* This procedure was instituted largely for the purpose of making voluntary placements eligible for federally funded foster-care reimbursement. *In re George O.*, 115 Misc. 2d 782, 787, 455 N.Y.S.2d 146, 150 (N.Y. Fam. Ct. 1981). 42 U.S.C. §§ 601-617 initially provided that states could receive federal funds for foster care only where children of AFDC families were placed by court order. Reimbursement first was provided for voluntarily placed foster children in the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 102(b)(1)(A), 94 Stat. 500, 515 (codified at 42 U.S.C. § 608(a)(1) (1982 & Supp. III 1985)), amended by Pub. L. No. 99-272 § 12306(c)(2), 100 Stat. 294 (1986)). While § 102(c) of the 1980 Act only authorized federal funding for voluntary placements through fiscal year 1983, funding has been extended since then through other legislative measures. See *In re George O.*, 115 Misc. 2d at 788 n.17, 455 N.Y.S.2d at 151 n.17; see also Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1748 n.6 (1987) (Funding has been extended at least three times, most recently through fiscal year 1987 in the Comprehensive Omnibus Budget Reconciliation Act of 1985.).

Although an order transferring care and custody of the child is entered upon approval of the § 358-a petition, "the actual transfer of care and custody to a social services official flows not from

four separate times during his nearly two-year stay in a foster home.²³ He suffered multiple bruises, a fracture of his right femur, a deep laceration over his left eye, and suspicious burns to his hand which resulted in surgery and permanent disfigurement.²⁴ Despite repeated hospital reports that these injuries were the result of child abuse, the Department of Social Services (DSS) returned him to his dangerous foster home.²⁵ There he suffered still another injury, a broken tibia, before the state finally removed him and placed him in a safer foster home.²⁶

Charles Milburn raised similar due process claims to those sustained by the Eleventh Circuit in the *Taylor* case.²⁷ Nonetheless, within a month of the United States Supreme Court's decision in *DeShaney*, the Fourth Circuit affirmed the lower court's dismissal of this foster care lawsuit.²⁸ The court of appeals found *DeShaney* to be "indistinguishable" from the foster care case.²⁹ The Fourth Circuit held that although Joshua DeShaney remained in his father's custody and Charles Milburn was in foster care, this difference did not matter.³⁰ As in *DeShaney*, the state had not restrained the Milburn boy or deprived him of any liberty interest.³¹ Instead, it was his natural parents who "voluntarily" placed him in the foster home.³² The injuries to the child, moreover, "did not occur while he was in the custody of the State of Maryland, rather while he was in the custody of his foster parents, who were not state actors."³³

As in *Taylor*, the Supreme Court denied certiorari in *Milburn*,³⁴ thereby leaving intact both the Fourth Circuit ruling denying a cause of action to a foster child and the Eleventh Circuit decision in *Taylor* which recognized the constitutional claim to safe conditions of confinement in foster care.³⁵ Denial of certio-

the court's order, but rather, pursuant to Section 384-a of the Social Services Law, from the agreement itself." *In re George O.*, 115 Misc. 2d at 787-88, 455 N.Y.S.2d at 151. Despite the court's involvement, therefore, such arrangements still may be characterized as "voluntary" and are essentially the same as the agreement signed by Charles Milburn's parents in Maryland.

If "voluntary" were to be used in the sense of a foster placement that parents agreed to or did not actively contest, many court-ordered placements growing out of abuse and neglect proceedings might also fall in that category. On the other hand, so-called voluntary agreements may be entered into under duress and threat of child protection proceedings. See, e.g., *Mushlin*, *supra* note 2, at 240; *Garrison*, *supra*, at 1748. But see *Garrison*, *supra*, at 1807-08 (although foster care agencies do not keep good records, available evidence suggests many voluntary placements do not involve parents who are pleading guilty and soon would be coerced into accepting help from the state).

23. *Milburn*, 871 F.2d at 474-75.

24. *Id.* at 475.

25. *Id.*

26. *Id.*

27. Compare *id.* at 475-76 (alleging Department of Social Services violated plaintiff's fourteenth amendment rights through continued placement in abusive home) with *Taylor v. Ledbetter*, 818 F.2d 791, 795, 797 (11th Cir. 1987) (en banc) (alleging state officials violated fourteenth amendment rights of child involuntarily placed in abusive foster home), *cert. denied*, 109 S. Ct. 1337 (1989).

28. *Milburn*, 871 F.2d at 474.

29. *Id.* at 476.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. 110 S. Ct. 148 (1989).

35. See *Taylor v. Ledbetter*, 109 S. Ct. 1337 (1989).

rari, of course, is not a judgment on the merits of the case.³⁶ Following so shortly after its express reservation in *DeShaney*, however, the Court's actions on the *Taylor* and *Milburn* cases inevitably raise questions about the future of litigation claiming a right to safe conditions in foster care.

Moreover, if we are not careful, the factual distinction between the two circuit cases may provide the basis for a further formal paring of the rights of children who suffer violence after they have already been drawn into the state's child protection system: The State of Georgia placed two-year-old Kathy Jo Taylor in foster care "involuntarily;"³⁷ the State of Maryland entered into a "voluntary" contract with twenty-three-month-old Charles Milburn's parents to place the boy in a foster home that it selected for him, licensed, and supervised.³⁸ The readings we make of the *DeShaney* opinion³⁹ will determine whether this distinction is significant and will write the constitutional conclusions to the stories of foster children like Kathy Jo Taylor and Charles Milburn.

This Article, then, is about unfinished business from *DeShaney*: Does foster care constitute the kind of "custody" that the Supreme Court has conceded triggers the protection of the due process clause?⁴⁰ Part II discusses the history

36. C. WRIGHT, THE LAW OF FEDERAL COURTS § 108 n.24 (1983) (citing *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973)). But see Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1255 (1979) (denial of certiorari may be a sign of which way the Court is leaning on the issues involved); *Implications*, *supra* note 13 ("While one may not infer Court approval of the result just because it refuses to review a lower court decision, the timing of the action, especially taken with the fact that the petition for review in *Taylor* had been filed September 25, 1987, and was thus held an inordinate period of time before denial, suggests that some inference of consistency with the rule established in *DeShaney* may be drawn from the *Taylor* denial.").

37. *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989).

38. *Milburn*, 871 F.2d at 474; see MD. FAM. LAW CODE ANN. § 5-525 (1983); see also Aristotle P. v. Johnson, 721 F. Supp. 1002, 1008-09 (N.D. Ill. 1989) (distinguishing a case involving children "involuntarily taken from free society" from *Black v. Beame*, 419 F. Supp. 599 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 515 (2nd Cir. 1977), and from *Milburn*, cases in which the children were voluntarily placed in foster care by their parents).

The Supreme Court's denial of certiorari in both *Taylor* and *Milburn* does not imply that it endorses the distinction between voluntary and involuntary placement in foster care. See *supra* note 36 (possible significance of the denial of certiorari). In their brief in opposition to the plaintiff's petition for writ of certiorari, the *Milburn* defendants urged the Supreme Court to deny the petition on the grounds of qualified immunity, among other reasons. Brief in Opposition to Petition for Writ of Certiorari at 5-6, 9-10, *Milburn v. Anne Arundel County Dep't of Social Servs.*, 110 S. Ct. 148 (1989) (No. 89-96). They argued that the qualified immunity issue made this an inappropriate case to grant review to determine the important question left open in *DeShaney* about foster care. *Id.* That argument may have been persuasive.

39. Since *DeShaney*, a number of courts, including the United States Supreme Court itself, have made various readings of that case that purport to distill the essence of that decision. This Article's reading of *DeShaney*, however, is specific to the foster care context. For debate on the ways in which lawyers, jurists, and scholars read legal texts, see Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

40. This Article does not address federal statutory rights that may be enforceable under 42 U.S.C. § 1983. Lower courts have found that applicable provisions of the Social Security Act create enforceable rights to a case plan and a case review system for foster children in states that have accepted federal assistance. *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 122-23 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 816 (1989); cf. *Del A. v. Edwards*, 855 F.2d 1148, 1149, 1152 (5th Cir. 1988) (no qualified immunity to officials because rights of foster children or potential foster children under federal Adoptive Assistance and Child Welfare Act of 1980 to development of case plan, to review of plan, to timely hearing, and to development of information systems, were clearly established, but declining to decide question of whether private right of action for money damages enforceable

and nature of foster care. Part III examines the *DeShaney* decision and its construction of the custody line for constitutional liability. Part IV analyzes the *Taylor* and *Milburn* cases and explains why the "voluntariness" of a foster care placement should not abrogate the child's constitutional right to safety. Part V demonstrates that recognition of foster children's constitutional right to safety is consistent both with the realities of the foster care system and with the Supreme Court's decisions concerning children, including *DeShaney*. Foster care is the kind of custody that creates affirmative constitutional responsibilities. In Part VI, the Article concludes that the state's failure to protect children who are in its custody constitutes an abuse of the power of government that is remediable under section 1983.

II. THE FOSTER CARE SYSTEM

The foster care systems that failed Kathy Jo Taylor and Charles Milburn now play a proportionately small but vital role in the elaborate child protection systems that have been erected everywhere in the United States since the 1960s.⁴¹ All states have laws that funnel mandatory child abuse or neglect reports⁴² to specialized social service agencies that have very specific duties of

through § 1983 created as result). After a trial on the merits in 1989, the court adopted injunctive relief as an appropriate measure to enforce rights under the fourteenth amendment and the Adoption Assistance and Child Welfare Act of 1980, devising a comprehensive plan to reform Louisiana's child welfare system submitted by court-appointed experts. *Del A. v. Edwards*, No. 86-0801 (U.S. Jan. 25, 1990) (LEXIS Genfed library, U.S. file). See also *Artist M. v. Johnson*, 726 F. Supp. 690 (N.D. Ill. 1989) (§ 1983 available to enforce provisions of the Adoption Assistance and Child Welfare Act of 1980). But see *Taylor*, 818 F.2d at 800 (no merit in Social Security Act claims); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923 (8th Cir. 1987) (Social Security Act does not create enforceable rights for abused child's grandparents); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (rights granted by the Adoption Assistance and Child Welfare Act of 1980 too amorphous to support a § 1983 action).

The case plan and case review system are defined in the statute. A case plan must contain a description of the home or institution where the child will be placed, with a discussion of the appropriateness of the placement, and a plan for assuring that the child receives proper care, that services are provided to the parents, child, and foster parents that will facilitate return of the child to her own home or permanent placement elsewhere, and that address the needs of the child while in foster care. A case review system means that the state must establish a procedure for periodic review of the status and welfare of each child in foster care. *L.J. ex rel. Darr*, 838 F.2d at 123 n.3. One court has granted preliminary injunctive relief against a defendant who failed to adhere to these requirements thereby placing children at risk of harm from their foster parents. *Id.* at 120.

41. For a description of the history and current policy and structure of child protection law, see *DeShaney in Context*, *supra* note 18, at 665-69.

42. Mandatory reporting statutes were developed in the early 1960s after the "pediatric awakening" established that child abuse could be identified through medical examination. E. PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM THE COLONIAL TIMES TO THE PRESENT* 164, 173 (1987). Since then, there has been enormous growth in the number of cases of child abuse or neglect reported. In 1963, 150,000 children were the subject of reports of suspected abuse or neglect. By 1972, an estimated 610,000 children were reported a year; and by 1981, 1.3 million. Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 151, 151, 154 (1983). National data collected by the American Humane Society reflected a 170% jump in incidence per 1000 children in the general population, from a rate of 10/1000 in 1976 (669,000 incidents reported) to an incidence of 27/1000 in 1984 (1.7 million incidents reported). Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102, H.R. REP. NO. 100-135, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 72, 77. The precise meaning of the huge increases in maltreatment reports, however, remains disputed. See, e.g., Besharov, *supra*, at 161-63 (substantial underreporting of abuse as well as overreporting of incidents that are later determined to be unfounded).

oversight and protection for children at risk.⁴³ As a society we have eschewed a criminal or punitive approach and instead "we have adopted a predominantly therapeutic—or, in the vernacular, a 'social work' response to the problems of child abuse and child neglect."⁴⁴ At the same time, the therapeutic process works within a framework of the legal power to coerce parental cooperation.⁴⁵ Generally we do not punish an abusive or neglectful parent.⁴⁶ Instead, the modern approach is to provide services in the home, or, as a last resort, to remove the child to a safer place in a foster home.⁴⁷

In the early 1970s, federal funding legislation and a rapid growth of state programs designed to prevent child abuse and neglect produced a significant

43. See *DeShaney in Context*, *supra* note 18, at 668.

44. D. BESHAROV, *THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES* 76 (1985). Douglas Besharov is an attorney who was the first director of the National Center on Child Abuse and Neglect. See also *TRENDS*, *supra* note 1, at 50 ("the value of the helping rather than punitive approach to this problem should be re-emphasized among the general public, CPS agency staff themselves and other professionals").

The preventative, therapeutic approach to child protection that remains the basis for state regulation of child raising today developed during the Progressive Era, 1900-1920. L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (BOSTON 1880-1960, at 59-61 (1988); see also E. PLECK, *supra* note 42, at 126 (discussing government policy against domestic violence during the period)).

45. D. BESHAROV, *supra* note 44, at 77.

46. Besharov, *supra* note 42, at 159-61 (citing U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING* 36 (1978), Table 28 (1979)); see also *TRENDS*, *supra* note 1, Figure V-1, at 41 (court action, criminal or civil, sought in only 18% of the reported cases of child abuse or neglect, 1976-1982). The report of the AAPC on national trends in child abuse and neglect observed that between 1976 and 1980, the percentage of cases involved in court action declined steadily, but then began to increase. *Id.* at 42. By 1982, 20% of the families receiving services were involved with the court. The reporters speculated that this may reflect an increased severity of cases entering the system, or that it may mark "a return to more punitive practice associated with greater public awareness and concern about violence." *Id.* See also *id.*, Table A-V-7, at 110 (statistical analysis).

In some parts of the country, criminal prosecution for child abuse has become more common in the 1980s. See Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 302 (1987). Patton believes that criminal prosecution for child abuse (including sexual abuse) in Los Angeles County "is no longer a remote possibility, it is probable." *Id.* Influential professionals, however, continue to favor a treatment-oriented rather than a punitive policy. See Besharov, *supra* note 42, at 164-65; *TRENDS*, *supra* note 1, at 50 (deploring apparent trend to resort to the court more often in sexual abuse cases).

47. This policy may be changing in some states. A new child abuse law in California allows police to immediately remove the parents from a home rather than the child when they suspect abuse may have occurred. *California Child-Abuse Law Lets Police Take Parents From Home*, Wall St. J., Feb. 2, 1990, at B6, col. 1. Under the law, which took effect January 1, 1990, police can obtain a restraining order against one or both parents by phoning a judge from the scene of the alleged child abuse. Once the sitting judge issues the order of removal, parents can return home only after it has been determined that there is no longer a reason for the order. *Id.* Other states are considering the California model, which grew out of a report by the state's Attorney General's office recommending changes in how the state handles child abuse cases. County welfare departments in California supported the bill as a way of cutting costs by keeping children out of state-supported foster homes.

The proposal has drawn criticism from individuals as diverse as Chris Hansen, associate director of the A.C.L.U. Children's Rights Project, who is concerned about the extraordinary exercise of state power to separate a family when inadequately trained social workers and police have to make quick judgment calls, and Rev. William F. Wendler, a United Methodist clergyman of Long Island, New York, who is critical of any law that disrupts the family. Reverend Wendler works with an organization called Victims of Child Abuse Laws. He says that "except in extreme cases, families should not be torn apart by the state on the strength of mere allegations," many of which are later found to be "frivolous." New York is one of several states considering similar legislation. *Id.*

increase in the number of children placed in foster care.⁴⁸ Child welfare experts and lawmakers, however, soon recognized that the child welfare system and its "indiscriminate reliance on foster care over other alternatives" was not accomplishing its therapeutic and rehabilitative goals.⁴⁹ The system frequently failed to rehabilitate families or minimize the time children spent in the custody of the state.⁵⁰ Some children languished for years in what Justice Brennan called the "limbo" of long-term foster care.⁵¹ It seemed that the longer the "temporary" placement lasted, the less likely it was that the child would ever return to a permanent home.⁵² It became clear that the "dubious" benefits of foster care were purchased at enormous public expense.⁵³

The modern child welfare system of the 1970s and its foster care component gave agencies broad discretion and permitted them to supplant the authority of the natural parents.⁵⁴ Critics recognized that regardless of the reason for the original foster placement, and even when ostensibly voluntary, "usurpation of the parental role was invariable":⁵⁵

When a child entered foster care, whether by court order or voluntary placement, the parent was required to cede legal custody—the right to decide where the child lives and the kind of care he will receive—to the state's foster care agency. The agency thereafter decided where the child would reside and how long he would remain there; the parent retained no right to be consulted on decisions about the child's care or, typically, to regain custody without agency or court approval. . . . Parents who voluntarily placed their children, no matter what the reason for placement or their parenting ability, lost custody rights just like

48. DeShaney in *Context*, *supra* note 18, at 667-68. In a 25-year period after passage of the first federal funding legislation, the 1974 Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5115 (1983), federal expenditures went up from a few million to \$325 million annually. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?*, MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 31 (1984).

49. Garrison, *supra* note 22, at 1754. Alternatives included in-home services or adoption by another family. *Id.*

50. *Id.* at 1753.

51. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816, 836 (1977) (foster parents not entitled to preremoval hearing before their foster child can be peremptorily transferred from their home to another foster home or to natural parents who initially placed her in foster care).

A study of very young *infants* who had entered New York City's foster-care system in 1985 found that three years later the majority remained without permanent homes. *Study of Foster Infants Finds New York City Failed Them*, N.Y. Times, February 1, 1989, at A1, col. 1 (citing a study completed by the city's Office of Comptroller). William J. Grinker, head of the City's Human Resources Administration, issued a statement saying that the study's findings were outdated, and pointing to the department's record of placement in 1988. *Id.*

52. *OFFER*, 431 U.S. at 836; see also Garrison, *supra* note 22, at 1823 (child's chances of returning home diminish over time).

53. Garrison, *supra* note 22, at 1754. In 1971 a year of foster care in New York cost approximately \$4,354. *Id.* In 1987 Douglas Besharov estimated the cost of family foster care at \$10,000 per child each year. Besharov, *Suffer the Little Children: How Child Abuse Programs Hurt Poor Families*, 39 POLICY REV. 52 (Winter 1987).

54. Garrison, *supra* note 22, at 1755-56.

55. *Id.* at 1756.

parents who had been found unfit.⁵⁶

This usurpation of the parental role continues today.⁵⁷

56. *Id.* at 1755-56.

In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), a class of foster parents unsuccessfully challenged New York State's discretion to remove foster children from their foster homes. The interests of the state and the natural parents (intervenor in the lawsuit) were aligned in emphasizing the temporary nature of foster care and in resisting the recognition of a liberty interest that would make it more difficult for the state to exercise its power to move foster children about or return them to their natural families. See *id.* at 824. As a result, Justice Brennan's opinion took pains to emphasize the continuing rights and responsibilities of natural parents whose children were in foster care. *E.g., id.* at 828 & n.20. Nonetheless, the extent to which the state supplanted parental authority in both voluntary and court-ordered foster placements is clear from the *OFFER* decision.

Foster placement in New York, whether voluntary or court-ordered, vested "custody" of foster children in the state-authorized agency making the placement and gave any such agency the discretion to remove children from the foster home. *Id.* at 820 n.3 (citing N.Y. SOC. SERV. LAW § 383(2) (McKinney 1976)). Voluntary placement required the signing of a written agreement by the natural parent or guardian, transferring the care and custody of the child to an authorized child welfare agency. *OFFER*, 431 U.S. at 825, (citing N.Y. SOC. SERV. LAW § 384-a(1) (McKinney Supp. 1976-77)). Although the terms of such agreements are by statute open to negotiation, N.Y. SOC. SERV. LAW § 384-a(2)(a), the Court observed that the natural parents contended that the agencies required them to execute standardized forms. *OFFER*, 431 U.S. at 825.

The only apparent difference in the legal consequences of voluntary and court-ordered placements in New York was that after 1975 parents received for the first time a right to demand the return of children who were voluntarily placed. A new law obligated the agency, in the absence of a court order, to return the child within 20 days of notice from the parent. *Id.* at 825 (citing N.Y. SOC. SERV. LAW § 384-a(2)(a)). But see *In re George O.*, 115 Misc. 2d 782, 790, 455 N.Y.S.2d 146, 151-52 (N.Y. Fam. Ct. 1981) (family court has jurisdiction and return of child upon parent's request not automatic, even where voluntary agreement to keep child until specified date had expired, and the agency had never filed for court-approval of the voluntary placement). Involuntary placement, on the other hand, requires court consent prior to termination of foster care. *OFFER*, 431 U.S. at 828 (citing N.Y. SOC. SERV. LAW § 383(1) (McKinney Supp. 1976-1977)).

The state retained the right to place any child in foster care either in an institution or, as is more commonly done, in individual foster homes, as well as to remove the child from any such foster home. *Id.* at 826. The typical contract between authorized foster-care agency and foster parent expressly reserved the right of the agency to remove the child on request. Conversely, the foster parent was "free to cancel the agreement at will." *Id.* The power of removal was frequently exercised, even to transfer the child from a foster home in which warm feelings engendered too close an attachment, to another foster home. *Id.* at 861-62. (Stewart, J., concurring). Justice Brennan further noted in *OFFER* that although the contract with the agency delegated day-to-day supervision of the children to foster parents, they did not have the full authority of legal custodians. *Id.* at 827. The authorized agency did not surrender legal guardianship and it set limits and advanced directives as to how the foster parents were to behave toward the child. *Id.* at 828 n.18. Agencies frequently prohibited corporal punishment; required that children over a certain age be given an allowance; forbade changes in the child's sleeping arrangements or vacations out-of-state without agency approval; and required the foster parent to discuss the child's behavioral problems with the agency. "Furthermore, since the cost of supporting the child is borne by the agency, the responsibility as well as the authority, of the foster parent is shared with the agency." *Id.*; see also *Andrews v. County of Otsego*, 112 Misc. 2d 37, 43, 446 N.Y.S.2d 169, 173 (1982) (foster parent does not assume all the obligations incident to the parental relationship but only those responsibilities assigned by the agency as a matter of law).

57. For example, the state continues to have enormous power to move even voluntarily placed children from placement to placement. In 1983 sixteen-year-old class plaintiff Derrick Zoe was voluntarily placed at an institutional facility by his mother, who claimed that he was performing inadequately at school and was inattentive to parental commands. *Doe v. New York City Dep't of Social Servs.*, 670 F. Supp. 1145, 1168 (S.D.N.Y. 1987). Thereafter he was moved among a number of group homes and back into institutional care, and also experienced five different overnight placements. *Id.* at 1168-69. The succession of placements became the subject of a lawsuit against the city. *Id.* Derrick was no more immune to the state's authority to move him than other children who came into care involuntarily. In the midst of a crisis in foster care availability, the City's practice of multiple overnight placements in effect rendered these children homeless. See *New York Faulted For Rights Lapses in Foster-Care*, N.Y. Times, Sept. 26, 1987, at A1, col. 3.

In the 1970s, in response to identified problems in the foster care system,⁵⁸ to the recognition of class and ethnic bias in child welfare decisionmaking,⁵⁹ and to a new sensitivity to family privacy,⁶⁰ a reform movement developed that preached a philosophy of "minimum intervention" with the end of reducing the length and use of foster placement.⁶¹ Congress passed the Adoption Assistance and Child Welfare Act of 1980,⁶² which changed the structure of federal financial incentives in order "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."⁶³ The 1980 Act provided federal grants for foster care and required the development of a case review system for each child in the state's foster program.⁶⁴ As a result of this and other changes inspired by the reform mood (and by reductions in federal funding and other state budgetary problems⁶⁵), the number of children in foster care declined substantially between 1977 and 1982.⁶⁶

Today, foster care usually is a proportionately small component of state child welfare systems, although the absolute number of children in care is still substantial and may be increasing.⁶⁷ Douglas Besharov, former director of the National Center on Child Abuse and Neglect, observed in 1983 that nationally, less than twenty percent of substantiated cases of child abuse result in removal

58. Because of funding and staffing problems and questionable policies, agencies frequently failed to exercise their discretion in a way that accomplished therapeutic goals. As a result, children were "unnecessarily placed in foster care, and stayed there too long." Garrison, *supra* note 22, at 1757-58.

59. See, e.g., Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888-89 (1975) (troubling possibility class bias plays a role in decision to declare children neglected or abused); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children in Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

60. See, e.g., Stanley v. Illinois, 405 U.S. 645, 656-58 (1972) (state violates due process when it presumes unmarried father who lived with children to be unfit and when it assumes custody of those children after the death of the mother without affording him a hearing).

61. Garrison, *supra* note 22, at 1758.

62. Pub. L. No. 96-272, 94 Stat. 500, 513 (codified as amended at 42 U.S.C. § 608(a)(1) (1982 & Supp. IV 1986)).

63. Legis. History of Pub. L. No. 96-272, 1980 U.S. CODE CONG. & ADMIN. NEWS 1448, 1450.

64. *Id.* at 1451-53; see also E. PLECK, *supra* note 42, at 178-79 (discussing policy behind 1980 legislation). A citizens' advocacy group in Houston, Texas criticizes the 1980 Act and its federal funding incentive for reinforcing "the existing philosophical bias at Children's Protective Services to preserve the family unit which has resulted in leaving numerous abused and neglected children at risk." *TDHS Public Hearings on November 8, 1989*, JFC NEWSLETTER, Nov. 1989, at p. 1. The group invited interested members to come to a public hearing on the use of federal block grant funds. *Id.* The 1980 Act made these funds available to states if they could demonstrate that they had made reasonable efforts to prevent or eliminate the need for removal of the child from her home. *Id.*

65. Budget motivations continue to inspire policy changes today. See, e.g., *California Child-Abuse Law Lets Police Take Parents From Home*, Wall St. J., February 2, 1990, at B6, col. 1 (new California law that permits police to remove an abuser rather than the child from the home supported by county welfare departments "as a way of cutting costs by keeping children out of state-supported foster homes").

66. See *supra* note 1.

67. The AHA reported a decline in the use of foster care in abuse and neglect cases from 25.3% in 1976 to 13.4% in 1982. TRENDS, *supra* note 1, Table V-3 at 41; see *supra* note 1.

from the home to foster care.⁶⁸ Instead, agencies generally provide in-home supervision unless the parents refuse to cooperate.⁶⁹ Like the rest of the child welfare system, however, foster care is straining under increased pressure. The number of children who need foster care began rising after 1984 at the same time that the number of available foster homes was shrinking.⁷⁰ Children's welfare advocates charge that the "system is overwhelmed"⁷¹ and is not doing the hard job it needs to be doing.⁷² Local investigations and exposes document substantial problems that threaten the welfare of the children in the system.⁷³

Foster care is the point where it is most clear that the state already has breached any line that may be drawn between private and public — between the family and the state.⁷⁴ It is a significant state intrusion on the autonomy and privacy of individual families. The state long ago began to intrude into families who were unable to support or care for their children.⁷⁵ The child welfare system was originally an aspect of public poor relief.⁷⁶ Children of the poor were put to work or apprenticed out to masters as a form of relief for their families,

68. Besharov, *supra* note 42, at 160 & n.41.

69. *Id.*

70. See, e.g., *Family Crisis: Foster-Care System Is Strained as Reports of Child Abuse Mount*, Wall St. J., June 15, 1987, at 10, col. 1 [hereinafter *Family Crisis*]; *Child Protective Services in Texas: Staff Report to the Senate Committee on Health and Human Services* 11 (Feb. 1989) (Texas Senate) (total number of children in foster care in Texas remained constant over the past few years even though some agency officials have implied that an increasing number of the investigations involve far more severe abuse; decline in number of foster homes in Texas since 1987 "may be the driving force behind these statistics") [hereinafter *Texas Senate Committee Report*].

71. *Family Crisis*, *supra* note 70, at 1, col. 1 (quoting Mary Lee Allen, child-welfare expert at Children's Defense Fund, child-advocacy group in Washington, D.C.).

72. *Id.* at 10, col. 1 (Marcia Robinson Lowry, head of the American Civil Liberties Union's Children's Rights Project, charges that states take federal money but do not adequately regulate and evaluate foster homes.).

73. For example, a 1988 study of infants who entered New York City's foster-care system in 1985 found that three years later the majority remained without permanent homes, "their cases often testimony to poor social work, sloppy record-keeping and inaction." *A Study of Foster Infants Finds New York City Failed Them*, N.Y. Times, Feb. 1, 1989, at 1, col. 1.

See also *Doe v. New York City Dep't of Social Servs.*, 670 F. Supp. 1145, 1147-69 (S.D.N.Y. 1987) (class action filed on behalf of New York City foster children rendered virtually homeless by City's shortage of foster homes and practice of multiple overnight placements).

74. For a history of the "transition of the family from a public to a private institution," see M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 6 (1985). Feminist scholars have discussed the political implications of a legal division between public and private realms. See Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Professor Mari Matsuda viewed *DeShaney* as "a recent tragic example" of the tendency of law to leave to the private sector harms and injuries typically experienced by women, children, people of color and poor people. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-22 & n.11 (1989).

The state's refusal to intrude on what has been defined as the private family sphere serves to enforce existing power relationships within the family. See C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* 102 (1987) (division between public and private spheres is not gender neutral; it reinforces existing power relationships). Family privacy is a two-edged sword for the weaker members subject to physical violence inside the family, and they may welcome or even seek out public intervention by the state. L. GORDON, *supra* note 44, at 296.

75. See Aren, *supra* note 59, at 894-902.

76. *Id.*

training for the children, and social control.⁷⁷ In this context, courts recognized *criminal* liability under the common law as early as 1894.⁷⁸ In *Commonwealth v. Coyle*, three directors of the poor in Pennsylvania were convicted of "neglect of their duty" for apprenticing a seven-year-old who was in their legal charge to a master whose maltreatment and neglect caused the death of the child.⁷⁹ There is evidence today as well that the state is more willing to intercede in poor families and that poor children are more likely to end up in the foster care system than are the children of other classes.⁸⁰

Foster care remains an integral component of state child protection policy. It represents the coercive power of the state that is held in reserve when the child welfare agency first seeks to rehabilitate the abusive family through in-home services.⁸¹ Ostensibly, then, it is the sanctuary for those children who are

77. *Id.*

78. *Commonwealth v. Coyle*, 160 Pa. 36, 28 A. 634 (Pa. 1894).

79. *Id.* at 41-42, 28 A. at 634. Evidence at the trial showed that they knew, or should have known, at the time they left the child with the master, that the home was an unsafe place for the young boy. *Id.* at 42, 28 A. at 634. A representative of the three officials had been told by persons in the neighborhood enough about the "character of [the master] and his family, and about their harsh treatment of a child in their care," to prevent "any prudent person from committing a boy of tender years to their custody." *Id.* Even after hearing of the ill-treatment, the overseers apparently "refused to take any measures to rescue him from the cruelty to which he was subjected by their own negligent act." *Id.* at 45, 28 A. at 635.

The directors were found guilty of a "common law misdemeanor" offense charging them with willful neglect or refusal to discharge their *public duties*. Counsel for the Commonwealth and the defendants agreed that there was no specific statute that governed. *Id.* at 43, 28 A. at 634-35. The court, however, found the basis in English common law, citing Archbold's Criminal Pleading and Practice (vol. 2, p. 1365), & Tawney's Case, 16 Vin. Abr. 415 (indictable for misfeasance if relieves the poor where no necessity for it); *Rex v. Wetherill*, Cald. 432 (or for misusing the poor as by keeping and lodging several poor persons in a filthy and unwholesome room); *Rex v. Winship*, Cald. 76 (or by exacting labor from them when not able to work). Overseers of the poor in Pennsylvania had been previously indicted and convicted for misdemeanor in public office for selling the keeping of paupers by public vendue or outcry to the lowest bidder. *Overseers of Milton v. Overseers of Williamsport*, 9 Pa. St. 48, 49.

The *Coyle* court found it "gratifying" that even when the conduct in binding the child to the abusive master and refusing to rescue him may not have violated any state statute, the overseers would nonetheless be held responsible under the common law for a misdemeanor in office. *Coyle*, 160 Pa. at 43, 28 A. at 635. Reviewing the English and Pennsylvania cases, the court remarked that "it is a wise policy which exacts from a public officer intrusted with the care of the poor persons in his district faithful and humane administration of the laws enacted for their relief." *Id.* The directors had a duty to inquire into the character of the master before placing the child, and to see that the master took proper care of the child afterwards. When, with knowledge of the danger, they failed to do so, they were guilty of "culpable negligence." *Id.*

80. See *Smith v. OFFER*, 431 U.S. 816, 833 (1977) ("foster care has been condemned as a class-based intrusion into the family life of the poor"); Mushlin, *supra* note 2, at 213 (foster care reserved for the children of the poor). The poor have fewer resources of their own to fall back upon in a family crisis and are therefore more likely to resort to state foster care. *OFFER*, 431 U.S. at 834; cf. Rosenberg, *Juvenile Status Offender Statutes—New Perspectives on an Old Problem*, 16 U.C. DAVIS L. REV. 283, 321-22 (1983) (juvenile incorrigibility statutes used "primarily by the poor who have few alternatives and no resources for dealing with their troubled children").

81. D. BESHAROV, *supra* note 44, at 77; see, e.g., *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). The case of Sylvia Brown, a 7-month old girl who died at the hands of her mother, is a good example of how the state frequently holds in reserve its coercive power to remove children from their parents' custody. When the baby was four months old, she was taken to the hospital with injuries that were identified as a result of child abuse. *Id.* at 187. Hospital personnel saw the mother's boyfriend hold Sylvia by the head and neck and slap her, and reported the case to the child protection agency. *Id.* After their initial review of the case, the Department of Social Services apparently reached an agreement with the mother that required her to live with the

most at risk and whose parents are least able to protect them. When there are problems with foster care, the entire child welfare system may be deformed because the state may be compelled to leave those threatened children at large with their natural parents for reasons unrelated to the seriousness of the danger.⁸² Professor Michael Mushlin has argued, moreover, that given the numbers of foster children, "[t]he foster care program now ranks with prisons, mental institutions and juvenile detention and treatment centers as a major state-operated custodial program."⁸³ The importance of resolving whether or not foster children have a constitutional right to safe conditions is therefore clear.

III. *DESHANEY*, DUE PROCESS, AND CUSTODY

Foster children Kathy Jo Taylor and Charles Milburn raised claims that were based on the Constitution of the United States. In *DeShaney v. Winnebago Department of Social Services*,⁸⁴ the Supreme Court rejected a facially similar substantive due process claim that was brought on behalf of a child who was not in state custody. The *DeShaney* Court, however, made *custody* the test of due process liability for a state's failure to protect a citizen from violence, and expressly reserved judgment on the constitutional rights of foster children.⁸⁵ To answer the open question of *DeShaney* in its own terms, it is necessary first to take a close look at that opinion's vision of a constitutional world divided by a line of custody into public and private spheres.

In *DeShaney* the United States Supreme Court ruled that the due process clause of the United States Constitution generally does not affirmatively oblige the state to provide services or aid.⁸⁶ This is true even when such assistance may be necessary to protect the life, liberty, or property of citizens, such as a young child who is suffering from his father's abuse.⁸⁷ At the same time, the Court acknowledged that its decisions since 1976⁸⁸ have recognized a limited exception

child at the grandmother's home, subject to "intensive follow-up and in-home supervision." *Id.* at 187-88. Mrs. Brown was warned that if she failed to comply with the terms of this agreement, the baby would be placed in the custody of the Department. *Id.* In other words, the child was not technically in the legal custody of the Department, but she was not in custody only by virtue of the alternative plan for intensive supervision. The Department was authorized to petition the family court for intervention if necessary. *Id.* at 189 n.5 (quoting S.C. CODE ANN. § 20-7-650(J) (Law. Co-op. 1985)). The warning to Sylvia Brown's family that without a voluntary agreement the Department would take the baby into custody was issued despite a statutory instruction that the protective agency should not threaten such action in order to coerce cooperation. *Id.*

82. See, e.g., *Texas Senate Committee Report*, *supra* note 70, at 11 (decision not to remove a child from a dangerous environment may be based on the lack of a suitable alternative placement such as a foster home); Forer, *supra* note 1, at 21 (sending children home to dangerous situations because foster care is so bad).

83. Mushlin, *supra* note 2, at 201-02 & n.9 (comparing numbers of children in foster care, which he estimates at 500,000, to the 503,601 state and federal prisoners; 220,700 mental health inpatients; 51,402 juveniles in public custody and 34,112 in private custody; 132,235 in state facilities for mentally retarded).

84. 109 S. Ct. 998 (1989).

85. *Id.* at 1006 n.9.

86. *Id.* at 1003.

87. *Id.*

88. E.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (state required to provide involuntarily committed mental patients with such services as are necessary to ensure their reasonable safety from

to this rule: "When the state takes a person into its custody and holds him there against his will, the Constitution imposes a corresponding duty to assume some responsibility for his safety and general well-being."⁸⁹

The lack of formal "custody," however defined, therefore, sealed the constitutional fate of four-year-old Joshua DeShaney, whom the State of Wisconsin failed to protect from his father's assaults.⁹⁰ Repeated trauma permanently damaged the child's brain and left him retarded and substantially paralyzed.⁹¹ The county's child protection agency was fully aware⁹² of the great danger to Joshua, and after a brief period of temporary custody specifically had undertaken to supervise closely the father's treatment of him.⁹³ It did nothing, however, but document the boy's peril in its files.⁹⁴ Wisconsin law, moreover, gave the agency the sole preemptive authority to protect this child.⁹⁵ The state treated Joshua and children similarly abused by their parents quite differently than other assault victims. Wisconsin followed the policy universally adopted in the United States in the 1960s by largely decriminalizing parent-on-child assaults and adopting instead a nonpunitive treatment approach to be implemented exclusively through the social service agency.⁹⁶ In spite of all this, the United States Supreme Court held that the State of Wisconsin's failure to protect Joshua did not violate the child's substantive due process rights because, up until the moment of the final injury, the boy remained in the "custody" of his abusive parent.⁹⁷ *DeShaney's* custody test polices a boundary between the private and the public spheres in constitutional law.⁹⁸ In highly formal reasoning, the Court held that children who remain in the "free world," that is, in the custody of their parents, clearly are on the private side of the line.⁹⁹ When they suffer abuse at the hands of their natural guardians, who are "private actors," such children have no constitutional claim to protection by the state.¹⁰⁰ By

themselves and others); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (state required to provide adequate medical care to incarcerated prisoners).

89. *DeShaney*, 109 S. Ct. at 1005.

90. *Id.* at 1007.

91. Brief for Petitioners at 7-8, *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989) (No. 87-154) [hereinafter *Petitioners' Brief*].

92. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting) (state official chronicled "in detail that seems almost eerie" growing danger to child).

93. *Petitioners' Brief*, *supra* note 91, at 5.

94. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

95. *Id.* at 1010-11 (Brennan, J., dissenting).

96. *DeShaney in Context*, *supra* note 18, at 705-11.

97. *DeShaney*, 109 S. Ct. at 1001.

98. Commentators have remarked on *DeShaney's* insistence on dividing the private and public spheres rigidly. See Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 8-14 (1989) for a criticism of the Court's Newtonian and "quite primitive vision of the state of Wisconsin as some sort of distinct object . . . that . . . acts upon a pre-political natural order of private life." *Id.* at 9-10; see also, *The Supreme Court; Leading Cases*, 103 HARV. L. REV. 137, 174 (1989) (*DeShaney's* "public/private distinction is troubling, particularly in the context of families"); cf. Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1519 (1989) (majority's division of "the world into two universes, reminiscent of the heyday of the Cold War," the free world and the world of incarceration and institutionalization).

99. *DeShaney*, 109 S. Ct. at 1006.

100. *Id.*

contrast, the Constitution places limits on the state's power to act in the public sphere.¹⁰¹ The state (by its own acts) may not deprive an individual of life, liberty or property without due process of law.¹⁰² It is not obligated, however, to guarantee certain minimum levels of safety and security against private invasion.¹⁰³ The *DeShaney* Court recognized, however, that previous decisions breached the bulwark between private and public and established that under "limited" circumstances the state may be constitutionally liable for its failure to avert violence or other danger.¹⁰⁴ For example, the state must "provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others."¹⁰⁵ Based on these cases, lower courts had suggested that the basis for the imposition on the state of an affirmative duty to protect its citizens lay in the existence of a "special relationship."¹⁰⁶ The contention was that when a state *knew* of a special danger to someone, and "specifically proclaimed, by word and by deed, its intention to protect him against that danger," the government acquired an affirmative duty to do so competently.¹⁰⁷ "Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so 'shocks the conscience' as to constitute a substantive due process violation."¹⁰⁸

Chief Justice Rehnquist, however, writing for the *DeShaney* majority, denied that special relationships have any constitutional significance.¹⁰⁹ An affirmative constitutional responsibility for safety and well-being arises instead when "the state takes a person into its custody and holds him there against his will."¹¹⁰ It is only because the state first acts to restrain an individual's liberty and thus takes away her ability to care for herself that any failure to provide for reasonable safety transgresses substantive limits on state action in the Constitution.¹¹¹

The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.¹¹²

The Court declared that although Wisconsin "may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."¹¹³ Even though the state at one time took temporary custody of Joshua, and then returned him

101. *Id.* at 1003.

102. *Id.*

103. *Id.*

104. *Id.* at 1004-05.

105. *Id.* at 1005 (citations omitted).

106. *Id.* at 1004 & n.4.

107. *Id.* at 1004.

108. *Id.*

109. *Id.* at 1006-07.

110. *Id.* at 1005.

111. *Id.* at 1005-06.

112. *Id.* at 1006 (citation omitted).

113. *Id.*

to the custody of his bestial¹¹⁴ father, "it placed him in no worse position than that in which he would have been had it not acted at all."¹¹⁵ The government merely volunteered "to protect Joshua against a danger it concededly played no part in creating";¹¹⁶ it did not throw him into the snake pit¹¹⁷ and was thus not responsible for him. Under these circumstances, regardless of any special relationship that may exist in state tort law,¹¹⁸ Joshua remained on the private side of the Constitution's boundaries, and the state had no constitutional duty to protect him.¹¹⁹

Chief Justice Rehnquist insisted that custody, rather than special relationships, marks the line between ordinary tort duty and constitutional responsibility.¹²⁰ The state's restraint of an individual's freedom to act on her own behalf "through incarceration, institutionalization, or other similar restraint of personal liberty . . . is the 'deprivation of liberty' triggering the protections of the Due Process Clause."¹²¹ The *DeShaney* Court, therefore, conceded that if the state, "by the affirmative exercise of its power," removed a child from "free society" and placed her in a foster home operated by its agents, the situation might be sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.¹²²

IV. FOSTER CHILDREN AFTER *DESHANEY*: CERTIORARI DENIED IN *TAYLOR* AND *MILBURN*

After *DeShaney* the question is, does foster care create a situation "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect?"¹²³ Is it "custody" in the constitutional sense? Before the *DeShaney* decision, the Eleventh Circuit, sitting en banc in *Taylor v. Ledbet-*

114. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

115. *DeShaney*, 109 S. Ct. at 1006.

116. *Id.* Contrary to the Court's statement, amicus Massachusetts Committee for Children and Youth argued that the state played a role in increasing the risk of harm to Joshua. The Committee emphasized that Wisconsin's child protective services preempted any other aid that otherwise might have been extended to Joshua, and increased his isolation and his risk of suffering harm. Brief of the Massachusetts Committee for Children and Youth at 27-30, *DeShaney*, 109 S. Ct. 998 (No. 87-154) [hereinafter Massachusetts Committee Brief].

117. Conservative Judge Posner, who authored the *DeShaney* opinion in the Seventh Circuit, has conceded elsewhere that there might be a constitutional cause of action, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Judge Posner distinguished *DeShaney* from *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), an earlier case that held city police officials liable for injuries to children left alone on a busy city freeway in an abandoned car when Chicago police arrested the driver of the car but refused to transport the children or call help for them. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

118. *DeShaney*, 109 S. Ct. at 1006-07.

119. *Id.*

120. *Id.* at 1004-05.

121. *Id.* at 1006.

122. *Id.* at 1006 n.9.

123. *Id.*

ter,¹²⁴ had ruled that foster child Kathy Jo Taylor's situation was analogous to incarceration or institutionalization.¹²⁵ They viewed the liberty interest at stake in *Taylor* as comparable to the interest implicated in *Youngberg v. Romeo*,¹²⁶ a 1982 decision in which the Supreme Court held that confining an involuntarily committed and profoundly mentally retarded man in unsafe conditions violated the fourteenth amendment.¹²⁷ The Eleventh Circuit reasoned that "in both cases, the state involuntarily placed the person in a custodial environment, and in both cases, the person is unable to seek alternative living arrangements."¹²⁸ As in *Youngberg*, state action clearly was involved in Kathy Jo's case.¹²⁹ The state's action in assuming the responsibility of finding and keeping Kathy Jo in a safe environment "placed an obligation on the state to insure the continuing safety of that environment."¹³⁰ In the absence of overriding societal interests, any failure to meet that obligation therefore constituted a deprivation of the little girl's protected liberty interests.¹³¹

The Eleventh Circuit recognized that the relationship between a state agency, foster parents, and a foster child was different than the much closer relationship between superior and subordinate officers and inmates in a prison setting.¹³² This suggested to the court only that it would be more difficult for the child than the inmate to *prove* that the agency's acts or omissions were responsible for the constitutionally prohibited injury.¹³³

In their unsuccessful petition for certiorari, the state defendants in *Taylor* argued that foster care was too open a setting to give rise to any affirmative

124. 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989).

125. *Id.* at 795.

126. 457 U.S. 307 (1982).

127. *Id.* at 315-16.

128. *Taylor*, 818 F.2d at 795.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 796.

133. *Id.* The Second Circuit considered the causation and proof problems under § 1983 in the case of *Anna Doe*, a child who was physically and sexually abused by her foster father while in the legal custody of the New York City Commissioner of Welfare. *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981). State supervisory officials permitted the foster father to resist agency monitoring and failed to act despite evidence that there was a problem of abuse. *Id.* at 138-39. When a doctor retained as a psychiatric expert found sexual abuse, the agency required her to omit any mention of it in her report, and otherwise covered up the problem. *Id.* at 139. The court of appeals noted that there is no vicarious liability under § 1983, and that the statute requires proof that the particular defendant charged as a supervisory official himself has *subjected or caused someone to be subjected* to a deprivation of rights. *Id.* at 141 (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) (mayor, police commissioner, and others cannot be held responsible for police brutality absent a showing of an affirmative link between the incidents of police misconduct and some plan or policy of theirs showing their authorization or approval of such misconduct)). The Second Circuit held that in order to meet the "affirmative link" burden when supervisors are charged with failing to act, there must be proof that the omissions are "a substantial factor" leading to the denial of federal rights, and that the omissions are the result of the officials' "deliberate indifference" to a known injury, a known risk, or a specific duty. *Id.*; see also *City of Canton v. Harris*, 109 S. Ct. 1197 (1989) (municipality may be liable for failure to train police force to constitutional standards if city policymakers were deliberately indifferent to constitutional rights).

The culpable mental state of "deliberate indifference" may also be an independent constitutional requirement under the fourteenth amendment. *Taylor*, 818 F.2d at 795-96; see *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (merely negligent conduct does not violate the fourteenth amendment).

duties.¹³⁴ They portrayed the world of the foster care child as closely akin to that of a child living with natural parents:

He lives with a private couple in their home, attends their church, goes to school in their district, and shares in other activities as if he were their own child. This is the whole point of the foster care environment; it is supposed to be as normal as possible so that the child can recover from being abused or neglected by his own parents.¹³⁵

Defendants likened little Kathy Jo Taylor to the child corporally punished in the "open" school setting in *Ingraham v. Wright*,¹³⁶ and distinguished the foster child from the juvenile delinquent confined in a dangerous institution or the patient confined in a mental health facility.¹³⁷

The Eleventh Circuit, however, was not convinced. The court of appeals emphasized that children in foster homes, unlike children corporally punished in public schools, are isolated and helpless: "Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is

134. Petition for Writ of Certiorari at 7, *Taylor v. Ledbetter*, 818 F.2d 791 (No. 87-521), *cert. denied*, 109 S. Ct. 1337 (1989) [hereinafter *Petition for Writ*].

135. *Id.* at 8.

136. 430 U.S. 651 (1977). Unlike *Taylor* or *DeShaney*, *Ingraham* involved substantive eighth amendment (cruel and unusual punishment) and fourteenth amendment *procedural* due process claims. *Id.* at 659. In rejecting the notion that corporal punishment in schools constituted cruel and unusual punishment under the eighth amendment, the Court emphasized that public schools are open institutions:

Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

Id. at 670. In light of this supposedly open environment and of state laws against excessive corporal punishment, the Court was unwilling to extend eighth amendment strictures to school children. *Id.*

The *Ingraham* Court, however, recognized that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain," fourteenth amendment liberty rights were implicated. *Id.* at 674. There was no *procedural* due process violation, however, because the tort remedies provided by state law for excessive corporal punishment constituted all the process that was due school children under these circumstances. *Id.* at 682. Due process does not require notice and a hearing prior to the imposition of corporal punishment in public schools. *Id.* The openness of the public school again figured in the Court's conclusion that state law remedies sufficiently safeguarded children from the relatively unlikely occurrence of excessive corporal punishment. *Id.* at 677-78.

Foster children, of course, are not free to return "home" at the end of a day with an abusive foster parent. They are in foster care precisely because they lack "the support of family and friends" to protect them. Rather, it is the state's job to supervise the foster parents into whose day-to-day care the state has confided these children. Foster children like Kathy Jo Taylor and Charles Milburn are often much younger than school age and are unable to resist physical abuse or even to communicate a plea for help from outside the foster home that the state has selected for them. Foster children are more likely to be subjected to abuse than children in the general population. *See supra* note 2. It is difficult to understand how their situation in isolated foster homes under the domination of the foster parents who abuse them nullifies the children's fourteenth amendment liberty interest in physical security. *Cf. Pagano ex rel. Pagano v. Massapequa Public Schools*, 714 F. Supp. 641 (E.D.N.Y. 1989) (elementary school child compelled to attend school by truancy laws states a claim when school failed to protect him from repeated physical and verbal abuse by other students). The federal district court found the situation of school children subjected to constant attack by other students to be factually closer to foster children than to the child in *DeShaney*, in that the victim and the perpetrators were both under the care of the school in its *parens patriae* capacity at the time of the alleged incidents. *Id.* at 643.

137. Petition for Writ, *supra* note 134, at 7-8.

at the mercy of the foster parents."¹³⁸ Thus, the court found that a child involuntarily placed in a foster home is enough like an inmate in prison or a child committed to a mental health facility to enjoy fourteenth amendment protection of her right to safety.¹³⁹

By contrast, in *Milburn v. Anne Arundel County Department of Social Services*,¹⁴⁰ the Fourth Circuit held that a child voluntarily placed in state-supervised foster care by his natural parents did not resemble prison inmates or institutionalized patients whose rights to reasonable safety are protected by the fourteenth amendment. The Fourth Circuit's almost cavalier¹⁴¹ dismissal of the *Milburn* claim rested on their parsing of voluntariness and of state action.¹⁴² The court ruled that *DeShaney* determined the result in *Milburn*.¹⁴³ The Supreme Court's *DeShaney* opinion reserved judgment on a situation where the state, by the affirmative exercise of its power, removed a child from free society and placed him in a foster home operated by its agents.¹⁴⁴ The Fourth Circuit distinguished this language and emphasized that in *Milburn* the State of Maryland had not affirmatively restrained Charles's liberty.¹⁴⁵ Instead, the boy's parents "voluntarily" placed him in the foster home.¹⁴⁶

The Fourth Circuit does not explain the circumstances that led to Charles Milburn's foster placement without a judicial determination of removal.¹⁴⁷ In light of what we know about how the foster care system functions and in view of the often illusory nature of so-called voluntary placements,¹⁴⁸ this is a telling

138. *Taylor*, 818 F.2d at 797 (distinguishing *Ingraham v. Wright*, 430 U.S. 651 (1977)); see also *Mushlin*, *supra* note 2, at 243 ("for purposes of constitutional protection and judicial intervention, foster children have more of the attributes of prisoners than of school children").

139. *Taylor*, 818 F.2d at 797. Much of the reasoning employed by the Eleventh Circuit, however, was based on the special relationship line doctrine, which the Supreme Court firmly rejected in *DeShaney*. See *id.* at 797-98.

See also *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989). In this post-*DeShaney* decision, an Illinois federal district court ruled that children enjoy a substantive due process right to be free from arbitrary intrusions upon their physical or emotional well-being whether they are in "direct" or "indirect" state custody (including those placed in foster care or other non-state institutions). *Id.* at 1396. Thus, the Director of DCF's argument that by relinquishing direct, day-to-day control of the child to foster parents or other private institutional care, he ceased to be responsible for their well-being, was of no avail. *Id.* *DeShaney* taught that the proposition to be drawn from *Estelle* and its progeny was that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 1394 (quoting *DeShaney*, 109 S. Ct at 1005).

140. 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989).

141. The Fourth Circuit wrote a four and one-half page decision on an issue that the Supreme Court expressly left open barely one month before in *DeShaney*.

142. *Milburn*, 871 F.2d at 476-77.

143. *Id.* at 476.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 475 n.1.

148. See *supra* note 22. The Supreme Court suggested in *Smith v. OFFER* that many so-called voluntary placements were not in fact voluntary. Foster care is disproportionately sought by the poor who "have little choice but to submit to state-supervised child care when family crises strike." *Smith v. OFFER*, 431 U.S. 816, 834 (1977). Many such placements were described as in fact coerced by threat of neglect proceedings, and not voluntary in the sense of the product of an informed consent. *Id.* (citing *Mnookin, Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 601 (1973)); see also *Mushlin*, *supra* note 2, at 240.

omission. The technical distinction between voluntary and involuntary placement, however, seemed to the Fourth Circuit a sufficient basis for leaving the Milburn child outside the pale of constitutional protection.

In other contexts, state defendants raising the issue of the "voluntariness" of a commitment to state custody have met with little success. Nicholas Romeo, the mentally retarded man whose case first established a fourteenth amendment right to safe conditions of confinement, was sent to Pennhurst State School and Hospital after his mother secured a court order under the involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act of 1966.¹⁴⁹ Subsequent cases brought by retarded citizens seeking to vindicate a right to safe conditions of confinement contemplated whether the right established in *Youngberg* was altered if the initial commitment was considered "voluntary." They generally concluded that it did not.¹⁵⁰

Courts questioned the entire notion of voluntariness in connection with the admission of mentally retarded patients or with their right to leave after admission.¹⁵¹ Severely retarded patients are incapable of giving informed consent.¹⁵² Courts found that even those who have the capacity to consent do not act voluntarily under the circumstances.¹⁵³ In light of "pressures from family and the high cost and unavailability of alternative care," retarded patients lack alternatives to state institutionalization.¹⁵⁴ The voluntariness of their commitment and continued confinement, therefore, is merely "illusory."¹⁵⁵ One federal district court observed that even the state defendants "do not disagree."¹⁵⁶ The director of the center testified that the role of the state residential facility is to be the

149. *Romeo v. Youngberg*, 644 F.2d 147, 155 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982). For twenty-six years this patient with the mind of an eighteen-month-old child had been cared for at home by his parents. *Id.* at 309. After his father's death, however, his mother could not take care of him herself, and she applied for the commitment order. *Id.* One court, which later questioned the distinction between involuntarily and technically voluntarily committed retarded patients, emphasized that Youngberg's mother had initiated the application that led to his confinement. *Kolpak v. Bell*, 619 F. Supp. 359, 377 (D.C. Ill. 1985).

150. *E.g.*, *Kolpak v. Bell*, 619 F. Supp. 359, 377 (D.C. Ill. 1985) (finding "much logic" in cases which find voluntary and involuntary residents entitled to same constitutional rights to a safe environment); *Society for Good Will to Retarded Children v. Carey*, 572 F. Supp. 1298, 1343 (E.D.N.Y. 1983) (unnecessary to decide whether voluntary or involuntary), *vacated and remanded*, *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984).

151. *See Kolpak*, 619 F. Supp. at 377-79 (collecting cases that recognize that for all practical purposes, many of the residents of state-run mental institutions are effectively admitted involuntarily: they may have been admitted upon the unilateral application of their parents or guardians; they may be incapable of expressing a desire to enter or to leave; they may be involuntarily committed when they apply for discharge; or their financial circumstances may be such that admission, voluntary or involuntary, is a foregone conclusion).

152. *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 484 (D.N.D. 1982), *aff'd in part, remanded in part*, 713 F.2d 1384 (8th Cir. 1983); *see also Kolpak*, 619 F. Supp. at 379 (discussing decisionmaking capacity of mentally handicapped).

153. *Association for Retarded Citizens*, 561 F. Supp. at 484.

154. *Id.*

155. *Id.* at 485; *see also Kolpak*, 619 F. Supp. at 363 (retarded adult son did not knowingly or voluntarily choose to enter the facility where he was beaten to death; after he was tested and his parents grew concerned about their age and inability to care for him in the future, they committed him).

156. *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1343 (E.D.N.Y. 1983), *vacated and remanded*, 737 F.2d 1239 (2d Cir. 1984).

court of last resort for those people who cannot be served any place else. The court concluded that, insofar as the patient is concerned, "he or she has no say in the matter. The mentally retarded client's stay in the institution must be deemed involuntary."¹⁵⁷

The same could be said for children whose parents "voluntarily" surrender them to state custody and who are placed by the state in foster care. Insofar as the *child* is concerned, he or she has no say in the matter. The state custodian has the sole legal right to determine where the child will live and what kind of care the child will receive.¹⁵⁸ The state's exercise of that unbounded discretion may place or leave the child confined to the care of abusive foster parents in a dangerous environment. Insofar as the *parent* is concerned, moreover, he or she also has no say in the matter. The modern child welfare system that came into being by the 1970s vested in state agencies broad discretion to determine whether and how to intervene on behalf of a child at risk of abuse or neglect.¹⁵⁹ Whether the child came to their attention because of a report of abuse or neglect, or because the parents themselves requested assistance, the state agency could choose how to proceed: "They could bring abuse or neglect charges against the parents, which would usually lead to a judicial hearing; they could offer placement or other aid without judicial approval; or they could simply do nothing at all."¹⁶⁰

State child welfare agencies assist troubled families on the agency's own terms.¹⁶¹ In general, this has meant a decriminalized, therapeutic approach to child abuse and a policy that emphasizes social services and rehabilitation of the endangered child's family rather than prosecution of parents.¹⁶² In the early 1970s it also meant a predisposition for foster care. Frequently the state only offered to place children in foster care and would render no other assistance.¹⁶³ Like the families who had no alternative but to place their retarded children and siblings in state institutions, parents often had no other choice but to accept foster placement "voluntarily."¹⁶⁴

The terms and conditions of placement, moreover, are anything but volun-

157. *Id.*; cf. *Doe v. Public Health Trust of Dade County*, 696 F.2d 901, 908 (11th Cir. 1983) (Hatchett, J., specially concurring) (child was committed by her parents and then cut off from communicating with them by hospital rules mandating that patients earn such privileges; from her perspective, continued hospitalization closely resembled involuntary commitment).

158. See *supra* notes 56-57 and accompanying text. See, e.g., *Doe v. New York City Dep't of Social Servs.*, 670 F. Supp. 1145, 1154 (S.D.N.Y. 1987) (classes of children, including those voluntarily placed in state custody, rendered virtually homeless by New York City shortage of foster homes and practice of making multiple overnight placements for children); cf. *Taylor v. Ledbetter*, 818 F.2d 791, 801 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989) (citing GA. CODE ANN. § 49-5-3 (12)) (state has right to determine where and with whom foster child committed by the court to its legal custody lives).

159. Garrison, *supra* note 22, at 1754-55.

160. *Id.*

161. *Id.*

162. See *supra* notes 44-47 and accompanying text.

163. Garrison, *supra* note 22, at 1755.

164. Cf. Rosenberg, *supra* note 80, at 320-23 (juvenile incorrigibility statutes "used primarily by the poor, who have few alternatives and no resources for dealing with their troubled children," making it unrealistic to view parental action invoking jurisdiction of the court as voluntary).

tary. Parental agreement to placement may authorize the agency to retain the child for an indefinite period and states may not allow parents to add time limits or conditions.¹⁶⁵ Most important, once the child enters foster care, whether by court order or so-called voluntary placement, "the parent [is] required to cede legal custody—the right to decide where the child lives and the kind of care he will receive—to the state's foster care agency."¹⁶⁶ The state usurps the parental role and the parent retains no rights to be consulted about where the child lives or the conditions of her care.¹⁶⁷ Parents play no role in the selection of the foster family and are not involved in decisions about the child's discipline or daily care.¹⁶⁸ Typically, parents may not regain custody of children they "voluntarily" placed in state foster care without agency or court approval.¹⁶⁹

Because of the lack of meaningful alternatives, because of "coercive undertones"¹⁷⁰ that may lead the parents to believe that they must voluntarily surrender custody, and, most important, because parents cannot control the terms and conditions of placement once they relinquish custody of their children to the state, parental foster placements are not voluntary in any true sense.

Even if the notion of "voluntary" placement in foster care is meaningful, the foster child merits a constitutional right to safety while in care. With respect to mental hospital patients, courts uniformly hold that the distinction between voluntary and involuntary commitment makes no difference to the constitutional right to safe conditions of confinement.¹⁷¹ A federal district court in North Dakota could not accept the state's contention that fourteenth amendment rights to safety and freedom from bodily restraint do not apply to voluntarily committed residents of a state mental institution.¹⁷² If that were so, the result would shock the conscience:

[T]hen the state arguably could chain confined residents to their beds and administer wanton physical beatings without violating the constitution. This shocks the conscience, and represents a complete abdica-

165. Garrison, *supra* note 22, at 1755.

166. *Id.* at 1755-56.

167. *Id.* at 1756; see *supra* notes 55-56 and accompanying text; cf. Hardin, *Setting Limits on Voluntary Foster Care*, in *FOSTER CHILDREN IN THE COURTS* 70, 74-75 (M. Hardin ed. 1983) (criticizing lack of well-established visitation rights in many voluntary foster placement agreements and frequent exclusion of natural parents from participation in decision-making concerning their children).

168. Garrison, *supra* note 22, at 1757.

169. *Id.* at 1756 (citing *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (mother of two children placed by agency when she was hospitalized spent years attempting to regain custody)); see also *In re George O.*, 115 Misc. 2d 782, 791, 455 N.Y.S.2d 146, 153 (N.Y. Fam. Ct. 1981) (court rejected a mother's contention that after the date of expiration of the voluntary foster-care agreement, she had an absolute and automatic right to the return of her child).

170. Rosenberg, *supra* note 80, at 322 (parental use of juvenile incorrigibility statutes not truly voluntary).

171. See, e.g., *Fialkowski v. Greenwich Home for Children, Inc.*, 683 F. Supp. 103, 105 (E.D. Pa. 1987) ("Indeed, the voluntariness distinction is incompatible with the clear dependence of mentally retarded individuals such as the now deceased Mr. Fialkowski on the care and supervision provided by others"); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1243, 1245 (2d Cir. 1984) (patients in a state institution have a right to safe conditions).

172. *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 485-86 (D.N.D. 1982), *aff'd in part, remanded in part*, 713 F.2d 1384 (8th Cir. 1983).

tion of the state's constitutional duty to respect the rights of all its citizens to fundamental liberty. An individual's liberty is not less worthy of protection merely because he has consented to be placed in a situation of confinement.¹⁷³

The federal court held that although the state was not obligated to provide institutions for the mentally retarded, once it did, "it must operate those facilities in a manner consistent with the constitutional rights of the residents," including the right to safety.¹⁷⁴ The court further suggested that denying these liberty rights to the voluntarily committed while recognizing those of the involuntarily confined also violates the equal protection clause of the fourteenth amendment.¹⁷⁵

The voluntariness or involuntariness of the confinement does not affect the substantive rights to safety and freedom from undue restraint, even though it may be relevant to the constitutionally required procedures to be followed in committing a patient to a state mental institution. The Supreme Court recently reinstated a complaint alleging that Florida violated the procedural due process rights of a man who was reportedly medicated and disoriented when he was admitted to a state hospital pursuant to the statutory requirements for "voluntary" admission.¹⁷⁶ Although the Supreme Court's ruling rests on another

173. *Id.* at 485. On appeal, however, the Eighth Circuit did not address the state's contention that *Youngberg* permits a different constitutional rule of safety for voluntarily committed patients, relying instead on state law. *Association for Retarded Citizens of N.D. v. Olson*, 713 F.2d 1384, 1392 (8th Cir. 1983) (referring to *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

174. *Association for Retarded Citizens*, 561 F. Supp. at 485 n.15, 486. The Supreme Court said in *Youngberg* that the state has no constitutional duty to provide mental institutions or other substantive services. Once a person is institutionalized and wholly dependent on the state, however, the state must provide certain services and care. *Youngberg*, 457 U.S. at 317; see also *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1239, 1246 (2d Cir. 1984) (discussing state obligations to institutionalized persons).

While the Court has recognized a constitutional right to safe conditions of confinement in a mental institution, it has not approved any right to treatment beyond the minimum necessary to ensure safety and freedom from undue restraint. *Youngberg*, 457 U.S. at 318. In the line of cases considering the right to treatment, courts outlined two possible rationales for any such constitutional duty: One was that the state owed treatment in exchange for the confinement, a quid pro quo argument. The other was derived from the concept of *parens patriae*. See *Clark v. Cohen*, 794 F.2d 79, 93 (3d Cir. 1986) (suit seeking placement in community living arrangement for involuntarily committed woman who had been inappropriately confined in state institution for 28 years without review). The quid pro quo rationale implicates the voluntariness of the confinement. It argues that involuntary commitment is a "massive curtailment of liberty," and that, in the absence of criminal procedural safeguards and justification for punishment, civil committees are entitled to treatment as a quid pro quo. *Id.* at 93-94. The voluntary nature of the commitment, however, is not relevant to a *parens patriae* basis for a mental patient's right to treatment. Under this rationale, treatment is due because the committees have been deprived of liberty for their own good and for the purpose of training them. The *Clark* court found some basis for the latter approach in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (state cannot indefinitely confine someone who is incompetent to stand trial). *Clark*, 794 F.2d at 95.

The right claimed by foster children Kathy Jo Taylor and Charles Milburn is a basic interest in safety of the kind accepted in *Youngberg* and does not raise the more unsettled questions about any right to treatment or services beyond that minimal level.

175. *Association for Retarded Citizens*, 561 F. Supp. at 485 (citing Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Scientific and Legal Interface*, 10 CREIGHTON L. REV. 124, 127 (1976)); see also *Seide v. Prevost*, 536 F. Supp. 1121, 1136 (S.D.N.Y. 1982) (distinguishing between constitutional rights to safe and humane environment of voluntary and involuntary admittee; especially with regard to federal equal protection clause).

176. *Zinerman v. Burch*, 110 S. Ct. 975 (1990). Although *Burch*'s complaint could be read to

ground,¹⁷⁷ it presumes the importance of the genuineness of the patient's "voluntary" consent. Implicitly, therefore, the Constitution does not require the same procedures for voluntary and involuntary admission to and continuing confinement in a state mental hospital.¹⁷⁸ In 1975 the Court held in *O'Connor v. Donaldson*¹⁷⁹ that there is no constitutional basis for involuntary confinement of mentally ill people who are dangerous to no one and can live safely in freedom.¹⁸⁰ Subsequently, the Court also has ruled that to commit a mental patient "involuntarily," the state must meet its burden of proof with clear and convincing evidence.¹⁸¹ No one can deny the unstated premise of these cases. Civil actions to take adult mentally ill citizens into state custody and to hold them *against their will* constitute formidable deprivations of liberty. Considerable formal procedures of law are necessary to make such infringements of the freedom from bodily restraint constitutionally valid. That conclusion, however, does not

include a substantive due process claim, Burch did not raise the issue in the petition for certiorari, and the Court expressly withheld its views on the merits of that claim. *Id.* at 983 n.13.

177. The only issue that the Supreme Court decided was whether or not the existence of postdeprivation state tort remedies for wrongful admission to the state hospital was sufficient to satisfy procedural due process under the United States Constitution. By a 5-4 majority, Justice Blackmun's opinion held that it was not sufficient under circumstances such as these. The Court determined the "proper scope" of the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981) (overruled in part, not relevant to this issue, by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984)). In *Parratt* and *Hudson* the Court had ruled that in situations where the state cannot predict and guard against random and unauthorized deprivations of property or liberty interests, no § 1983 procedural due process claim will arise unless the state also "fails to provide an adequate postdeprivation remedy." *Zinermon*, 110 S. Ct. at 978.

Justice Blackmun declared that the *Parratt* rule applied in narrow circumstances only, distinguished by three differences: In *Zinermon*, (1) it was eminently predictable that just such errors would occur in "voluntarily" admitting incompetent patients who were incapable of consent; (2) *pre* deprivation process was not impossible here, because state officials could have used the established state procedure for *involuntary* admission rather than accept a "voluntary" application from an incompetent; and (3) although not approved by state law specifically, the hospital officials' conduct was not "unauthorized" because "the State delegated to them the power and authority to effect the very deprivation complained of" in the lawsuit, and the "concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." *Id.* at 989-90. The Court's ruling permitted the lawsuit to proceed but did not address "the broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements." *Id.* at 979.

178. The *Zinermon* Court focussed on the competence of the patient giving consent, rather than insisting that procedures for involuntary and voluntary admission be identical in any case. The Florida statutory scheme in fact provided quite different procedures for voluntary and involuntary confinement to a mental hospital. While there are elaborate procedural safeguards for involuntary commitment under Florida state law, and for continuing review of the commitment, the process is much simpler for a patient such as Burch who was admitted and detained at the state hospital for five months under statutory provisions for voluntary admission. *Id.* at 981-82.

179. 422 U.S. 563 (1975).

180. *Id.* at 575. Donaldson specifically challenged the 15 years of involuntary confinement during which he repeatedly, but unsuccessfully, demanded his release. *Id.* at 565-67.

The Court did not reach broader questions, including whether compulsory confinement by the State triggers a right to treatment. *Id.* at 573. In his concurring opinion, Justice Burger specifically questioned the *quid pro quo* rationale for a right to treatment that was advanced by the lower courts, but not reached in the Supreme Court. *Id.* at 580-89 (Burger, C.J., concurring). He found no basis for "equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due process of law with a constitutional right to *treatment*" in exchange for that confinement. *Id.* at 587-88 (Burger, C.J., concurring) (emphasis in original).

181. *Addington v. Texas*, 441 U.S. 418 (1979) (adult mental patient involuntarily committed to Texas state hospital after application by his mother and trial under the state's civil commitment statute).

imply that a distinction between voluntary and involuntary commitment is equally meaningful for the right to safe *conditions* of confinement.¹⁸²

Similarly, we should not be misled by voluntariness distinctions that the Court recognizes where the commitment of mentally ill *children* is involved. The Court defines "voluntary" and "involuntary" differently for children than for adults. Parents have broad, although not completely unbridled,¹⁸³ discretion to consent unilaterally to the "voluntary" confinement of a child in a state mental hospital. In *Parham v. J.R.*,¹⁸⁴ the Court upheld a Georgia voluntary admission statute that permitted parents to commit their children.¹⁸⁵ Upon application by the parent, state officials could admit the child without formal proceedings so long as hospital personnel found evidence of mental illness and considered the child suitable for treatment in the hospital.¹⁸⁶ The Court acknowledged that children, as well as adults, have substantial liberty interests in not being confined unnecessarily for medical treatment and in not being stigmatized by an erroneous label of mental illness.¹⁸⁷ It also concluded that "the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."¹⁸⁸ Nonetheless, the Court refused to require an adversarial hearing either before or after a parent or guardian committed a minor child to a state mental hospital.¹⁸⁹

182. See *supra* notes 138-60 and accompanying text.

183. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (parental discretion to admit children to mental hospital not absolute and unreviewable). Although due process does not require a formal adversarial hearing, it does demand a neutral professional factfinder with authority to refuse to admit any child who does not satisfy the medical standards for admission at the outset and also to review the commitment periodically. *Id.* at 606-07.

184. 442 U.S. 584 (1979).

185. *Id.* at 616-17. The Court rejected a facial challenge to the Georgia statutory scheme. *Id.* It did not decide on the record before it whether every child in the plaintiff class in fact had received an adequate independent diagnosis of her emotional condition and need for confinement under the standards announced in the opinion. It therefore encouraged the district court on remand to consider any individual claims. *Id.* at 617.

The Court also left for remand any ruling on the kind of periodic reviews necessary to justify continuing voluntary confinement. *Id.* The Court suggested that although it found that no different procedures were constitutionally required for children admitted on application by their parents or upon application of the state acting as their legal guardian, this difference might matter with respect to requirements for continuing review of the initial commitment. *Id.* at 619. The Court feared that over time a child who was a ward of the state was more likely to become "lost in the shuffle." *Id.*

186. *Id.* at 591; see GA. CODE ANN. § 88-503.1 (Harrison 1975). After a specified period of time, the child may be discharged at the request of a parent or guardian, and even without such a request must be released if the superintendent of the hospital finds that the child has "recovered from his mental illness or . . . sufficiently improved [so that] hospitalization of the patient is no longer desirable." *Parham*, 442 U.S. at 591. Compare this to the constitutionally required criteria for *involuntary* admission of adults in *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state cannot constitutionally confine a nondangerous adult who is capable of surviving safely in freedom).

187. *Parham*, 442 U.S. at 600-601.

188. *Id.* at 600.

189. *Id.* at 608-10, 619. No formal adversarial proceeding was required for a number of reasons: The state's "*parens patriae* interest in helping parents care for the mental health of their children" would be frustrated if parents were disinclined to take advantage of the state's proffered aid because "the admission process was too onerous, too embarrassing, or too contentious." *Id.* at 605. A more formal admission process for children brought in by their parents would consume too much staff time and money in "procedural minuets" instead of diagnosis and treatment of the patients. *Id.* at 605-06. Formal hearings also pose the danger of intruding into the parent-child relationship and pitting parent and child against each other as adversaries. The Court was concerned that such

The due process analysis in *Parham* reflected the Court's belief that "Western civilization" conceives the family as a "unit with broad parental authority over minor children."¹⁹⁰ In his majority opinion, Chief Justice Burger observed that the law presumes that parents, who "possess what a child lacks in maturity, experience, and capacity for judgment," generally act out of the "natural bonds of affection . . . in the best interests of their children."¹⁹¹ Parents have the right to make decisions for their children even where those choices are not agreeable to a child or entail some risk.¹⁹² The *Parham* Court concluded that "absent a finding of neglect or abuse," parents "retain a substantial, if not the dominant," role in the commitment decision.¹⁹³

Parham represents a voluntariness half-way house. Although not entirely voluntary from the child's point of view,¹⁹⁴ much less process is due when parents consent to commitment of their minor children than when the state takes an adult mental patient into custody and confines her involuntarily. It is not surprising that "voluntariness" figures in the line of civil commitment cases. All of these cases concern procedural due process challenges to rules for admitting adults or children to state mental hospitals or for retaining them in the institutions thereafter. The specific liberty interest at stake and the nature of the constitutional claim make the question of consent unavoidable. Plaintiffs asserted an interest in *freedom from confinement* and contested the procedures utilized to take patients into state institutions or to keep them there. It makes sense that the Constitution requires little or no formal process, such as an adversarial hearing, when a competent adult herself *seeks* admission to a state-operated treatment facility, but that it demands much more when the *state* restrains the liberty of someone who has not been convicted of any crime and has not consented to such confinement. It is less convincing, although still explicable, that parents may informally (subject to limits) commit children to mental health hospitals.

Foster children such as Charles Milburn, however, are not complaining about the procedures that placed them in state custody or that keep them there. Instead, they are asserting a substantive violation of a liberty interest explicitly

confrontations would impede the ability of the parent to assist the child's treatment while in the hospital and also interfere with a smooth homecoming. *Id.* at 610.

190. *Id.* at 602.

191. *Id.* at 601 (citing 1 W. BLACKSTONE, COMMENTARIES *447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190).

192. *Id.* at 603-04 (distinguishing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), in which Court declared unconstitutional a state statute that gave parent *absolute* veto over minor child's decision to have an abortion).

193. *Id.* at 604; *cf.* *Colon v. Collazo*, 729 F.2d 32 (1st Cir. 1984) (following the rationale of *Parham*, nondelinquent youths may be committed on temporary basis to juvenile facility provided that the Department of Social Services investigated the reason for the placement and the parents consented to the confinement).

194. *See Doe v. Public Health Trust*, 696 F.2d 901, 908 (11th Cir. 1983) (Hatchett, J., specially concurring) (from the minor's point of view, continued hospitalization "closely resembles an involuntary commitment" and she must rely on her parents to protect her interests). The majority held that the minor patient committed voluntarily by her parents does not suffer any massive curtailment of liberty, but that she may state a claim if the hospital's refusal to let her communicate with her parents had the effect of transforming her from a "voluntary" to a de facto "involuntary" patient. *Id.* at 904-05.

recognized in *Youngberg v. Romeo*¹⁹⁵ and reaffirmed in Justice Rehnquist's *DeShaney* opinion.¹⁹⁶ Regardless of how they first came into care, foster children are claiming that *while they are in state custody* the state must provide them with the minimum of services necessary to ensure their reasonable safety.¹⁹⁷ Thus it does not matter whether foster children in New York City who are subjected to repeated overnight placements are Persons in Need of Supervision (PINS), abused and neglected children, juvenile delinquents, or children voluntarily placed by their parents.¹⁹⁸ For all of these children waiting to be placed more permanently, the overnight program "constitutes an inherent deprivation of adequate shelter and treatment."¹⁹⁹ As we have seen, courts uniformly find that *consent* to state custody simply is not relevant to a mental patient's right to safety in the state institution.²⁰⁰ Similarly, parental consent to foster care should not abrogate the state's responsibility for the safety of children *in its custody*. As the federal court observed in *Wilder v. City of New York*,²⁰¹ even if foster care is not tantamount to involuntary commitment, the foster child is a ward of the state:

Absent parents or guardians to protect his rights and to make decisions as to treatment, and unable to make such decisions himself, [the foster child] could have looked only to the City to ensure that protection. Certainly, "an individual's liberty is not less worthy of protection merely because he has consented to be placed in a situation of confinement."²⁰²

Nor is an individual's interest in safety less worthy of protection merely because her *parents* have surrendered her into state custody. There is no plausible basis,

195. 457 U.S. 307 (1982).

196. 109 S. Ct. at 1005-06.

197. See *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1337 (1989); *Doe v. New York Dep't of Social Servs.*, 670 F. Supp. 1145, 1173 (S.D.N.Y. 1987) (traumatized involuntarily and voluntarily committed foster children subjected to overnight placements in New York City do not challenge the Commissioner's continued right to custody over them, but rather the conditions of that custody).

198. *Doe*, 670 F. Supp. at 1176.

199. *Id.* at 1179. Special Services for Children (SSC) in New York City is responsible for locating placements for children in their care while the children wait in field offices in each of the five boroughs. If a "regular" stable placement cannot be found, SSC tries to get an "overnight" placement for the child. The next morning the child is returned once again to the field office to await another placement, either a stable one or another overnight. Each time a child gets a new overnight placement, she spends part of the day in the field office. If by 5 p.m. workers have not located an overnight placement, they then look for a "rest stop" for the child—a bed for the night. If they cannot locate even that by 10 p.m., the child is sent to the Emergency Services for Children office to sleep. In July of 1986, officials estimated that 300-400 children already had been subjected to the overnight program, many of them repeatedly. Subsequently even more children suffered overnight placements. *Id.* at 1152-54. The court found the Commissioner's practice of placing already traumatized children in the night-to-night program to be inconsistent with the stated purposes of the foster care system in general, and the goals for PINS, abused and neglected children, juvenile delinquents, and voluntarily placed children specifically. *Id.* at 1175.

200. See *supra* notes 171-75 and accompanying text.

201. 568 F. Supp. 1132 (E.D.N.Y. 1983). *Wilder* recognized the substantive due process claim of a man who grew up in New York's foster care system. *Id.* at 1134. During the years of his childhood, he was routinely administered debilitating psychotropic drugs to control his periodically violent behavior rather than provided with adequate psychiatric treatment and rehabilitation. *Id.*

202. *Id.* at 1137 (quoting *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 485 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983)).

therefore, for the Fourth Circuit's ruling that Charles Milburn enjoyed no right to safety while in state custody just because his parents "voluntarily" placed him there in the first place.

The *Milburn* court further ruled that while Charles was in foster care, in a home selected, licensed, and supervised by the State of Maryland, he nonetheless was not even in the "custody" of the State of Maryland, but rather was in the custody of his foster parents, who were not state actors.²⁰³ The Fourth Circuit's offhand²⁰⁴ effort to put Charles Milburn on the wrong side of *DeShaney*'s custody line makes no legal sense. It is true that foster parents have temporary physical possession and that the state has delegated to them the right to make small daily decisions about the care of their foster children. "Custody," however, consists of a larger set of legal rights and responsibilities with respect to the child.²⁰⁵ Louisiana law, for example, defines "custody" as "the control of the actual physical care of the child" including the "right and responsibility to provide for the physical, mental, moral and emotional well-being of the child and all other rights and responsibilities . . . toward [this] child except those pertaining to property."²⁰⁶ A Louisiana court concluded that the consequences of the state agency's acceptance of this custodial responsibility could not be evaded merely because the government chose to fulfill it by contracting out the immediate physical care of the child to a foster home.²⁰⁷ A New York court observed that foster care placement "is a temporary arrangement designed as an alternative to institutionalized care, and the County agency continues to be the legal custodian of the child."²⁰⁸ The foster parent does not assume all the obligations of a parental relationship, but only those responsibilities assigned by the agency as required by law.²⁰⁹ Similarly, the State of Maryland, rather than Charles Milburn's foster parents, was responsible for the boy's board, medical care, clothing, and supervision of his placement.²¹⁰ Charles's foster parents also had no legally cognizable right either to determine where and with whom he would live or to keep him if the State of Maryland unilaterally chose to remove him from their care.²¹¹ It may be defensible to argue that this kind of placement in

203. *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 476 (4th Cir.), cert. denied, 110 S. Ct. 148 (1989). For authorization to establish foster care for children taken into custody either by voluntary parental agreement or by involuntary court order, see MD. FAM. LAW CODE ANN. § 5-525 (Supp. 1989).

204. The court's assertion is unadorned either by citation or further explanation. *Milburn*, 871 F.2d at 476.

205. See, e.g., *Vonner v. State*, 273 So. 2d 252 (La. 1973) (state agency owed enforceable nondelegable duty to five-year-old placed with foster parent who killed him).

206. *Id.* at 256. (emphasis in original).

207. *Id.*

208. *Andrews v. County of Otsego*, 112 Misc. 2d 37, 43, 446 N.Y.S.2d 169, 173 (N.Y. Sup. Ct. 1982) (county may be held liable for negligent placement or supervision of foster care; foster parent is not beneficiary of intrafamily tort immunity and may be liable for negligence toward foster child). The child in this case was voluntarily placed in the custody of the agency by his mother. *Id.* at 38, 446 N.Y.S.2d at 170.

209. *Id.* at 173; see also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 826-28 (1977) (New York system gives agency supervisory powers indicating foster parent does not have full authority of legal custodian).

210. *Milburn*, 871 F.2d at 477.

211. See *supra* notes 55-57 and accompanying text. The state as legal custodian may remove

an individual home is not the *kind* of custody envisioned by the Supreme Court's test in *DeShaney*, and that an institutional setting and close confinement is required to trigger the protections of the due process clause.²¹² It is extremely difficult to accept the contention that Charles Milburn was not in state custody at all.

Finally, the *Milburn* court ruled that the foster parents who had "custody" of Charles were not state actors.²¹³ Because the Fourth Circuit devoted most of its rather spare analysis to this issue, it is important to understand the significance of that ruling. Because the fourteenth amendment is directed at the states, it can only be violated by conduct that may be characterized fairly as state action.²¹⁴ The foster parents directly caused the injury to young Charles. If they are state actors, it is unnecessary to talk about the *Youngberg* right to safe conditions of confinement or about how *DeShaney* limited to those in state custody the state's affirmative duty to protect someone from the violence of *private parties*. State actors who *themselves* abuse a child directly deprive him of an interest in freedom from bodily injury that is protected by the due process clause and are therefore proper defendants.²¹⁵ Furthermore, if it can be shown that the *supervising agency* maintained a practice, custom, or policy of reckless indifference to

foster children from placements for both good and bad reasons. Neglected siblings E.G. and O.G. had been in eight different placements since they entered the foster care system at ages three and six. *B.H. v. Johnson*, 715 F. Supp. 1387, 1391 (Ill. 1989). It was alleged that Illinois DCFS threatened to remove them from their latest foster home if the foster parent continued to "cause trouble" by insisting on speech therapy for a physical handicap that resulted from the initial parental neglect. *Id.* Thirteen-year-old J.E. was removed from the one foster family with whom he was able to form a bond. *Id.* at 1390.

212. See *supra* notes 120-28 and accompanying text; cf. *Eugene D. v. Karman*, 889 F.2d 701, 710-11 (6th Cir. 1989) (child placed in foster care arguably not in custody in the sense of *Youngberg v. Romeo*, 457 U.S. 307 (1982)), *cert. denied*, 110 S. Ct. 2631 (1990).

213. *Milburn*, 871 F.2d at 479.

214. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); see also *Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating public accommodations section of the Civil Rights Act of 1875 on grounds Congress has no power under the fourteenth amendment to regulate private action).

The fourteenth amendment reads in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

215. See *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (the right of personal security is among the historic liberties protected by the due process clause, and is implicit in the concept of ordered liberty enshrined in the history and the basic constitutional documents of English-speaking peoples) (citing *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)). The protections of the due process clause, both substantive and procedural, therefore, may be triggered through affirmative abuse by state agents, such as shooting an inmate or shackling a mental patient. *DeShaney*, 109 S. Ct. at 1006 n.8. "It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Ingraham*, 430 U.S. at 674. The state cannot hold and physically punish foster children without due process either. Child abuse, moreover, is deliberate conduct that easily satisfies any state-of-mind requirement in the fourteenth amendment. See *Daniels v. Williams*, 474 U.S. 327, 334 (1986) (fourteenth amendment cannot be violated by merely negligent conduct).

Although "the child's liberty interest in avoiding corporal punishment while in the care of public school authorities" may be "rooted in history" and "subject to historical limitations" such as the concept of justification, *Ingraham*, 430 U.S. at 675, the child's interest in avoiding abuse at the hands of foster parents is subject to no such countervailing interest. Even in the school corporal punishment context, several circuits have recognized that excessive corporal punishment may violate substantive due process rights of school children. See *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). But see *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1343 (1989).

abuse by their subordinates (foster parents who are state actors), the state agency also will be a proper defendant under section 1983's doctrine of municipal liability.²¹⁶

The Rehnquist Court has made it more difficult to satisfy the fourteenth amendment's "state action" requirement, as illustrated by the cases cited in the Fourth Circuit's *Milburn* opinion.²¹⁷ In particular, it has stiffened the nexus test, which requires that the state be involved to "some significant extent" with the otherwise private party's actions.²¹⁸ The Court of Appeals for the Fourth Circuit emphasized that the contract for foster care between the state and Charles Milburn's foster parents left daily parenting decisions to the foster parents.²¹⁹ There was no intimate relationship between the state and the foster parents, nor was there detailed guidance or regulation of their conduct.²²⁰ The Court declared that the State of Maryland was not responsible "for the specific conduct of which the plaintiff complains," that is, the physical abuse itself.²²¹ The Fourth Circuit continued:

[The State] exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster children is not traditionally the exclusive prerogative of the State. Thus, under the analysis of *Blum*, . . . which synthesized the previous cases on the subject, the Tuckers should not be considered state actors.²²²

216. See, e.g., *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3rd Cir. 1988) (on remand from the Supreme Court to be considered in light of its ruling in *DeShaney*). In *Stoneking* a high school band teacher sexually assaulted a student who went to his home on official school business. School officials knew about but had covered up prior incidences of sexual abuse by this teacher. *Id.* at 722. The Third Circuit distinguished this case from *DeShaney* because the abuse here was at the hands of the teacher, who was a state agent. The school district and supervisors were responsible for their own acts under color of state law that constituted a practice, custom, or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, shown by their concealing complaints of abuse and discouraging student complaints about such conduct. *Id.* at 725. This claim represented an independent basis of liability unrelated to the *DeShaney* issue, and along the lines of *City of Canton v. Harris*, 109 S. Ct. 1197 (1989) (municipality may be liable if its deliberate indifference to training its police force results in constitutional injury to a citizen). *Stoneking*, 882 F.2d at 725. The child stated a claim against the school district because she alleged that the municipal defendant with deliberate indifference to the consequences established and maintained a policy, practice, or custom that directly caused her constitutional harm. *Id.*

217. *Milburn*, 871 F.2d at 477-78 (discussing 1982 trilogy of state action cases: *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school whose income is derived mostly from public sources and which is regulated by public authorities not considered state actor when it discharged certain employees); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (state action through creditor's use of state's *ex parte* summary attachment proceeding); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (privately owned nursing homes receiving reimbursements from state for caring for Medicaid patients were not state actors when Medicaid patients sued them claiming violation of their procedural due process rights arising out of transfer from skilled nursing facilities to less expensive health related facilities)); see *Hamilton, Section 1983 and The Independent Contractor*, 74 GEO. L.J. 457 (1985); *Schneider, The 1982 State Action Trilogy*, 60 NOTRE DAME L. REV. 1150 (1985).

218. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (state action where restaurant leased from and located within building owned and operated by state parking authority refused to serve African-American patron because of his race).

219. *Milburn*, 871 F.2d at 477.

220. *Id.*

221. *Id.* at 479. This statement, of course, overlooks an important element of the complaint: the state's alleged misconduct in failing to protect the child from this abuse. See *infra* notes 234-37 and accompanying text.

222. *Milburn*, 871 F.2d at 479 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)); cf.

The Fourth Circuit pushes the strictures of the new state action cases beyond reasonable limits. Charles Milburn's foster parents are not akin to the private school in *Rendell-Baker v. Kohn*,²²³ which fired some employees allegedly without affording them procedural due process and in retaliation for their exercise of first amendment rights. Nor are they similar to the nursing home proprietors in *Blum v. Yaretsky*,²²⁴ who transferred patients from skilled nursing facilities to less expensive facilities, causing them to receive lower Medicaid benefits from the government.²²⁵ The abuse inflicted by Charles Milburn's foster parents goes straight to the heart of the state's role in determining the boy's

Campbell v. City of Philadelphia, Dep't of Human Servs., No. 88-6976 (E.D. Pa. July 18, 1990) (LEXIS, Genfed library, Dist file) (private agency is state actor because: 1) agency is under contract with the state to provide foster care services for children in the custody of the state; 2) majority of states delegate extensive responsibility for welfare of abused or neglected children to the state; 3) agency's contract with city required adherence to extensive regulations including licensing requirements and implementation of city's longterm plan for child in custody; 4) screening and choice of foster home was left entirely to the discretion of agency even though child remained in the legal custody of the state).

223. 457 U.S. 830 (1982).

224. 457 U.S. 991 (1982).

225. Cf. *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). A federal district court in New York grappled with the impact of the 1982 trilogy on the Second Circuit's old line of cases that consistently held "that private child care institutions falling within the definition of '[a]uthorized agencies]' under New York Social Services Law § 371(10) are acting 'under color of state law' for the purposes of § 1983." *Wilder*, 645 F. Supp. at 1315 (citing *Duchesse v. Sugarman*, 566 F.2d 817, 822 n.4 (2d Cir. 1977); *Perez v. Sugarman*, 499 F.2d 761, 764 (2d Cir. 1974); *Brooks v. Richardson*, 478 F. Supp. 793, 795 (S.D.N.Y. 1979)).

New York City's foster care program is operated by a welfare district within New York State that shares statutory responsibility with the state for approximately 17,000 children in need of care outside their homes. *Wilder*, 645 F. Supp. at 1301 n.7. The New York City Human Resources Administration carries out this function through its Special Services for Children agency, which in turn provides foster care to 6-10% of the children through its Direct Care program. *Id.* The rest of New York's foster children, however, are placed through 60 voluntary agencies, many of which have religious affiliation. *Id.* Approximately 70% of the children placed by SSC go into individual boarding homes, while the remaining 30% go to congregate care programs including group homes, group residences, institutions, and diagnostic reception centers. *Id.* About 90% of the per diem expenses of children placed by SSC with voluntary agencies is paid from a combination of federal, state, and city funds. *Id.*

In *Wilder* the plaintiff class of black Protestant children alleged that public funding goes to Catholic and Jewish agencies that discriminate against black children and segregate them on the basis of race and religion. *Id.* at 1302. They also claimed that the system was an establishment of religion and burdened the free exercise rights of Protestant children insofar as some of the religious agencies attempted to impose their beliefs and practices on children within their care who came from other religions or who had no religious affiliation. *Id.* The district court observed that the 1982 state action trilogy does not compel the conclusion that the religious agencies are not state actors. *Id.* at 1315. In contrast to the nursing home practices in *Blum*, the *Wilder* plaintiffs attacked the state regulatory scheme, which funded sectarian child care agencies and which matched children in need of foster care with those agencies on the basis of religion. *Id.* at 1302-03. The lawsuit, moreover, challenged the joint implementation of those state statutes by New York City and the religious agencies with whom it contracts. *Id.* at 1315. The New York district court observed that the United States Supreme Court in *Kohn* found it significant that the substantial state and federal regulations to which the private school was subject did not extend for the most part to personnel decisions. *Id.* (citing *Rendall-Baker v. Kohn*, 457 U.S. 830, 833-34, 841-42 (1982)). In contrast, the placement decisions made jointly by SSC and the voluntary agencies that allegedly give preference to white Catholic and Jewish children are the subject of considerable state and city regulation. *Wilder*, 645 F. Supp. at 1315. As a result, at least some of the challenged agency conduct must constitute state action: "Plainly, an agency's decision relating to the acceptance and care of a child placed with the agency by SSC, where the State and City remain ultimately responsible for the child's welfare, . . . and where the agency's decisions are directly circumscribed by state and/or city regulations, contain 'a sufficiently close nexus [with] the State . . . so that the action of the [agency] may be fairly

fate.²²⁶ The state took and retained legal custody of the child for the purpose of protecting him because his natural parents were unable to care for him themselves. In fulfillment of that responsibility, the state entrusted *physical* custody only to foster parents whom it identified, licensed, approved, and supervised.²²⁷ The state retained the authority to remove Charles from the foster home at any time.²²⁸ Foster care exists to protect the child—the very function that the state delegated to the purportedly private parties.

The Supreme Court has ruled unanimously that a physician who spends only part of his time providing medical services to inmates under contract with the prison system is “a person who may fairly be said to be a state actor,” and who may be sued for an eighth amendment violation due to his deliberate indifference to an inmate’s serious medical needs.²²⁹ Justice Blackmun observed that “it is only those physicians authorized by the State to whom the inmate may turn.”²³⁰ In other words, the inmate was entirely dependent upon the state for his necessary medical care. As a result, it was immaterial that the doctor was employed through a contractual arrangement that did not make him an ordinary state employee, and it was equally immaterial that the private sector traditionally provides medical services.²³¹ Instead the Court found the *relationship* among the state, the physician, and the prisoner to be most significant:

Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to [the inmate]; the State delegated that function to [the doctor]; and [he] voluntarily assumed that obligation by contract.²³²

To hold otherwise would leave the state “free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to ‘private’ actors, when they have been denied.”²³³ Similarly, children removed from their natural parents’ custody may turn only to the foster parents provided by the state. If foster children are met with abuse instead of care and protection, the foster parents may fairly be said to be state actors who therefore are liable to suit under section 1983 for fourteenth amendment violations of personal security.

Taylor and Milburn, however, also contain a different constitutional claim

treated as that of the State itself.” *Id.* at 1315 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

226. *Cf. Wilder*, 645 F. Supp. at 1315 (distinguishing *Kohn* because extensive state regulation of the private school did not extend for the most part to the personnel issue in dispute).

227. *See supra* notes 203-08 and accompanying text.

228. *See supra* note 211 and accompanying text.

229. *West v. Atkins*, 108 S. Ct. 2250, 2258-59 (1988).

230. *Id.* at 2259.

231. *Id.* & n.15.

232. *Id.* at 2259.

233. *Id.* at 2259 n.14 (quoting *West v. Atkins*, 815 F.2d 993, 998 (4th Cir. 1987), *rev’d*, 108 S. Ct. 2250 (1988)).

in addition to the complaint lodged against the foster parents for their abuse. That issue, as illuminated by *Estelle v. Gamble*,²³⁴ *Youngberg v. Romeo*,²³⁵ and *DeShaney v. Winnebago Department of Social Services*,²³⁶ is whether the state agencies that took custody of Kathy Jo Taylor and Charles Milburn and placed them in foster care had an affirmative obligation to safeguard the children in their care from the violence of private parties. If so, it would not matter if the foster parents proved to be private parties rather than state actors. The Supreme Court established just such an affirmative duty in *Youngberg*, the case of the institutionalized mentally retarded man who needed protection from violence inflicted by himself and by other patients, but it found no such constitutional obligation in *DeShaney* to protect from abuse by his natural father a child who was not in state custody. The *DeShaney* Court, of course, specifically reserved judgment on whether foster care would meet its new "custody" test.²³⁷ It does not matter whether Charles Milburn's foster parents were state actors for the resolution of this unfinished business left by *DeShaney*. Assuming for the sake of argument that foster parents are private parties, all that matters is whether the state is constitutionally obligated to protect a child who is in the state's legal custody and whom it has placed in foster care from the violence of those third parties.

V. LISTENING TO THE CHILDREN'S STORY: WHY FOSTER CARE IS "CUSTODY" UNDER *DESHANEY*

As constitutional jurists we should listen to two kinds of voices: In our professional lives, we must strain to hear properly what the Supreme Court is telling us about the Constitution; we note the explicit message of their ruling and also listen for its overtones, which tell us even more about the boundaries of the decision.²³⁸ We should attend as well to what the real children before the bench can tell us about the realities of life in the state's foster care system.²³⁹ In this way, we will not draw unnecessary lines which are not grounded in experience and also are not required by the logic of the Court's *DeShaney* opinion.

234. 429 U.S. 97 (1976).

235. 457 U.S. 307 (1982).

236. 109 S. Ct. 998 (1989).

237. *Id.* at 1006 n.9.

238. My colleague Jim Herget was comparing theological and legal argument in a class on Jurisprudence. He commented that in our first year of law school we are not taught to reject arguments, but only to function within presuppositions that are accepted, much like in theological argument. I do not mean to imply here that constitutional thinkers must swallow whole the presuppositions of Supreme Court decisions such as *DeShaney*. We can and should argue with the Court's postulates, for example, that the Constitution is a charter of negative liberties only that does not reach into a clearly defined private sphere. At the same time, in our role as common lawyers we explore the limits of precedent.

239. Recently, legal writers have been reminding us of the importance of "legal storytelling," and of listening to the narratives of outsiders whose viewpoints are not commonly considered by interpreters of the law. See, for example, the Michigan Law Review symposium on "Legal Storytelling" that was inspired by Richard Delgado. Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2075 (1989). The majority in *DeShaney* clearly was not listening to the same story that made Justice Blackmun exclaim over "poor Joshua" or that caused Justice Brennan to focus on the many actions of the state, rather than on its inaction. It would be even more unfortunate to refuse to listen to the stories about the lives of children caught up in today's troubled state foster care system.

A recent opinion by a federal district court in Illinois illustrates what life is like for children who live under the custody of the state in the modern foster care system.²⁴⁰ In *B.H. v. Johnson*,²⁴¹ a class of children who "are or will be in the custody of the Illinois Department of Children and Family Services (DCFS) and who have been or will be placed somewhere other than with their parents"²⁴² filed suit alleging violations of their substantive due process right to be "free from arbitrary intrusions upon their physical and emotional well-being while directly or indirectly in state custody."²⁴³ Fifteen thousand children were in the custody of the DCFS at the time the complaint was filed. The plaintiffs alleged facts²⁴⁴ that painted, in the words of the district court judge, "a bleak and Dickensian picture of life under the auspices of the DCFS."²⁴⁵

The district court permitted the complaint to tell its own story—the story of the children who were the named plaintiffs.²⁴⁶ Their narratives included accounts of unsuitable placements not only in mental hospitals, detention centers, group homes, shelters, and other institutions,²⁴⁷ but also in a number of individual foster homes that formed part of an incredible series of multiple placements.²⁴⁸ Caseworkers were allegedly grossly overloaded,²⁴⁹ and the system "had all but ceased to provide essential services to children, their parents and foster parents."²⁵⁰ These defaults were driving foster parents out of the system.²⁵¹ Without sufficient foster parent participation, the system turned to

240. The foster care system is in such bad shape in New York that an audit by the state comptroller disclosed that children have been placed with foster parents who were "emotionally unstable, suicidal, violent, and financially unable to provide the youths with a clean place to live and necessities such as drinking water." Forer, *supra* note 1, at 21. In 1987, Judge Daniel D. Leddy of New York Family Court told the New York Times, "It's gotten to the point where we're sending kids home to bad circumstances because foster care is such a terrible alternative." *Id.* A two-year old boy in Philadelphia died of brain injuries two months after being placed in the foster care of a convicted rapist who had lied about his criminal record on his application to provide foster care for \$18.55 a day. *Id.* The child's family members had reported suspected abuse earlier, but were ignored by the agency. *Id.*

241. 715 F. Supp. 1387 (N.D. Ill. 1989).

242. *Id.* at 1389.

243. *Id.* at 1405. They also asserted a right to be provided with adequate food, shelter, clothing, medical care, and a minimally adequate training to secure these basic constitutional rights.

The court also ruled that the plaintiff class stated a cause of action under 42 U.S.C. § 1983, and the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620-28, 670-76, to enforce their right to a case review system and individualized case plans. *B.H.*, 715 F. Supp. at 1405. The court dismissed additional claims: equal protection; procedural due process for violations of state statutory provisions; and remaining substantive due process claims including an alleged right to placement in the least restrictive setting and a right to sibling visitation. *Id.* Although it recognized the foster child's right to safety, the federal district court rejected any asserted constitutional right to an optimal level of care and treatment, which would provide parental and sibling visitation, stable placements in the least restrictive settings possible, or adequate casework. *Id.*

244. The allegations were taken as true for purposes of a motion to dismiss, with reasonable inferences drawn in favor of the plaintiffs. *Id.* at 1389.

245. *Id.*

246. *Id.* at 1389-91.

247. *Id.* at 1389.

248. As of 1986, some 4,300 of those children had been in six or more placements. *Id.* at 1390-91.

249. *Id.* at 1391-92.

250. *Id.* at 1392.

251. *Id.*

"warehousing of children for months or years in unsuitable and dangerous shelters maintained by DFCS."²⁵² Once in state custody, children were subject to the state's formidable power of placement. As a result, at the discretion of state authorities, children endured a succession of placements, suffered from bad placements, and even were removed from *good* foster homes.²⁵³ The *B.H.* complaint reflects systemic problems in a program that affects 15,000 children under the care and control of the State of Illinois each year.²⁵⁴

Because the *B.H.* suit survived the defendants' motion to dismiss, Illinois foster children may continue to seek reform of the "Dickensian" way of life they suffered under the auspices of the DFCS.²⁵⁵ The stakes in the *B.H.* class action lawsuit, together with the far-reaching settlement reached after the Supreme Court let stand the Eleventh Circuit's decision in *Taylor v. Ledbetter*,²⁵⁶ remind us of the importance of lawsuits concerning foster children's right to safety.²⁵⁷ The consent decree entered in Kathy Jo Taylor's lawsuit stipulated significant reforms in Georgia's foster care system: It absolutely prohibited corporal punishment by any foster parent; it directed caseworkers to attempt first to place children with relatives; it mandated screening of potential foster parents; it required caseworkers to visit face-to-face with each foster child at least once a month; it required the state to investigate any suspected abuse or mistreatment of a foster child and to act within forty-eight hours; and it provided for an exchange of detailed information about and between the foster child and the foster parents.²⁵⁸

Lawsuits like the Illinois class action or Kathy Jo Taylor's case address widespread abuses in a significant area of government intervention. As Professor Mushlin has observed, the modern foster care system is as large as other

252. *Id.*

253. *Id.* at 1390.

254. *Id.* at 1389.

255. *Id.*

256. 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S. Ct. 1337 (1989).

257. See First, "Poor Joshua": *The State's Responsibility to Protect Children from Abuse*, 23 CLEARINGHOUSE REV. 525 (1989). Curry First is the Litigation Director at the Legal Aid Society of Milwaukee and was guardian ad litem for Joshua in the *DeShaney* case. First commented on the difficulties raised by *DeShaney* for child protection advocates. *Id.* at 534. The decision may foreclose examination of government officials' often egregious neglect of their responsibilities to protect the welfare of children who cannot protect themselves. The Joshua DeShaneys and the Lisa Steinbergs illustrate the massive problem of child abuse, as well as a bureaucratic unwillingness on the part of the state and local agencies to perform their duties. The *DeShaney* decision makes it difficult to "apply direct incentives to social service agencies to correct or improve their behavior. It will also be hard to punish these agencies for negligence that truly shocks the conscience." *Id.* First commented that this result flies in the face of common sense and of the principle of accountability of governmental entities. *Id.* My thanks to Rhonda Gerson, Director of Aid to Victims of Domestic Abuse in Houston, Texas for sending me this article.

258. *Progress in Georgia*, *supra* note 3, at 4. Lawsuits such as *Taylor* (involving a Georgia child care agency) also may invite media attention and indirectly spur legislative action. The *Atlanta Journal-Constitution* published a series called *Suffer the Children* that revealed that 51 children died in Georgia in 1988 while under care of the state's Child Welfare Department, but that the reasons for the deaths were unknown because the state's confidentiality laws shielded that information from exposure. *Id.* at 3. Legislative initiatives followed in 1989 and 1990. See *Georgia Officials Take Dramatic Action for Improving State Child Welfare System*, JUSTICE FOR CHILDREN NEWSLETTER, Feb. 1990, at 3. The Governor of the State also announced the creation of a precedent-setting statewide academy to train public and private officials to work with abused and troubled youth.

major state-operated custodial programs such as prisons, mental institutions, or juvenile centers, which have been the subject of scores of decrees entered to protect institutionalized persons from physical harm.²⁵⁹ Individual foster home placement, moreover, is entwined with other forms of state placement that may be more institutional in character. As illustrated by the *B.H.* facts, the state may move children in its custody unilaterally among a number of placement options, and may resort to a more institutionalized choice if there are problems in its foster home program.²⁶⁰ There is good reason to recognize a foster child's right to safety comparable to the protection enjoyed by other adults and children in other forms of state custody.²⁶¹ A definition of "custody" that excludes foster children also precludes the kind of lawsuit that has markedly improved conditions in other state-operated custodial programs.²⁶²

On the other hand, we need not worry about exposing state agencies to unlimited liability for circumstances that they cannot closely control. As it has developed in the lower courts for foster children,²⁶³ or in other contexts,²⁶⁴ the right to safety is not an absolute guarantee. The *B.H.* court held that the controlling standard for determining the rights of foster children is one taken from *Youngberg*, whether "professional judgment in fact was exercised."²⁶⁵ In *Taylor*, the Eleventh Circuit required proof of "deliberate indifference" by state officials who were charged with failing to protect children in foster care.²⁶⁶ The court of appeals acknowledged that "the contacts between actors in the foster home situation are not as close as in the penal institution."²⁶⁷ This suggested that it would be more difficult to infer deliberate indifference from a failure to act to protect a foster child: "A child abused while in foster care . . . will be faced with the difficult problem of showing actual knowledge of abuse or that

259. *Mushlin*, *supra* note 2, at 201. He argued that the most appropriate and perhaps the only practical way to change foster care systems is through § 1983 suits seeking structural injunctions. *Id.* at 202, 244-80 (presenting case for structural injunctions as most practical remedy).

260. *See supra* notes 244-53 and accompanying text.

261. To recognize such a right for children involuntarily taken into state foster care custody while rejecting it for children who have been voluntarily placed, but who are housed and treated identically, would constitute a denial of equal protection of the laws. *See supra* note 175 and accompanying text.

262. *See, e.g., Robertson, Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 *DRAKE L. REV.* 101, 103 (1985).

263. *E.g., Taylor*, 818 F.2d at 797 (deliberate indifference standard); *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 790 (2d Cir. 1981) (same), *cert. denied*, 464 U.S. 864 (1983).

264. *E.g., Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (eighth amendment violated only when state officials deliberately indifferent to serious medical needs of prisoner); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (mental patient's fourteenth amendment right to safety is violated only when conduct of state officials shows such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base decision on such a judgment).

265. *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (quoting *Youngberg*, 457 U.S. at 321).

266. *Taylor*, 818 F.2d at 795-96. The *Taylor* court followed *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983), and adopted the analysis of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), in which the Supreme Court held that prison officials who show deliberate indifference to a prisoner's serious illness or injury violate the eighth amendment's prohibition against the infliction of cruel and unusual punishment.

267. *Taylor*, 818 F.2d at 796.

agency personnel deliberately failed to learn what was occurring in the foster home."²⁶⁸ Whether characterized as a failure to exercise professional judgment or as deliberate indifference, the standard will not be easy to meet²⁶⁹ and should allay any concerns about unlimited state liability.²⁷⁰

The foster child's right to safety can be justified within the framework of the Supreme Court's analysis in *DeShaney* and in light of its other decisions that concern children. Whether or not we find it persuasive, the operative image in *DeShaney* is its portrayal of a child who remains in the custody of his natural parent, in the privacy of his own family, as a free individual at large in the "free world."²⁷¹ In light of other cases, however, this clearly means something different for children than it does for adults. The Court repeatedly has said that children are never free—they are always in someone's custody.²⁷² What then

268. *Id.*

269. See generally McCoy, *Due Process and Judicial Deference to Professional Decisionmaking in Human Service Agencies*, 35 SYRACUSE L. REV. 1283 (1984) (Youngberg's "failure to exercise professional judgment" standard unduly deferent to professional judgment).

270. Insofar as deliberate indifference and the failure to exercise professional judgment are different, a case could be made for the less rigorous standard. I have argued elsewhere that the standard of "deliberate indifference" is a solution to the "razor's edge" dilemma (the choice between moving too slowly to protect the child and moving too quickly to intrude into family privacy interests) in a case like *DeShaney*, where the state has failed to protect a child from abuse at the hands of his own parent. See *DeShaney in Context*, *supra* note 18, at 721-28. At present, the Supreme Court has foreclosed that issue by requiring *custody* as a condition of a cause of action for the state's failure to protect a child from abuse. *DeShaney*, 109 S. Ct. at 1006.

The state's failure to protect children from abuse at the hands of state-selected and supervised foster parents, on the other hand, presents no such sensitive dilemma. The state has intruded already and moves children freely from and among foster homes. Properly applied, Youngberg's "failure to exercise professional judgment" standard may be more appropriate. The Court intended that test to be more generous than the "deliberate indifference" necessary to violate the eighth amendment. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("Involuntarily committed patients are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."). On the other hand, the Court has ruled that the fourteenth amendment may not be violated by mere negligence. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). It has not established the requisite standard as of yet. *DeShaney*, 109 S. Ct. at 1007 n.10.

In practice, under current § 1983 doctrine, there are other formidable obstacles any foster child would have to overcome to prevail against a state agency or its officials. The defense of qualified immunity protects individual officers. They are liable only if their conduct violates law that was clearly established at the time of their acts. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See, e.g., *Eugene D. ex rel. Olivia D. v. Karman*, 889 F.2d 701, 708, 710-11 (6th Cir. 1989) (social workers entitled to qualified immunity because handicapped foster child's constitutional right to be protected from bodily harm at the hands of a state-licensed foster parent not established with sufficient particularity at the time of the incidents at issue), *cert. denied*, 110 S. Ct. 2631 (1990). For an analysis of the difficulties of recent immunity doctrine, see Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 980-1008 (1989).

The Court also has held that there is no vicarious liability under § 1983. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). To hold a government liable, plaintiffs must establish that the practice, custom, or policy of the government entity caused the deprivation of rights. *Id.* Given the current Court's grudging doctrine of "municipal liability," this unfortunately is very difficult. See Oren, *supra*, at 995-1000; *DeShaney in Context*, *supra* note 18, at 729-30. It would be better to hold child welfare agencies responsible for foster care problems than to impose liability on individual caseworkers. See *DeShaney in Context*, *supra* note 18, at 728-29.

271. See *supra* text accompanying notes 99-122.

272. *Schall v. Martin*, 467 U.S. 253, 265 (1984). The Texas Court of Criminal Appeals recently questioned the limits of "[t]he old adage that a child, by virtue of his age, has no right to freedom but only a right to custody since he is presumably under constant parental control." *Lanes v. State*, 767 S.W.2d 789, 797 (Tex. Crim. App. 1989). Even though a child "is or should be under constant

does a child's freedom consist of and how may a state act to deprive that child of her "liberty," thus triggering the protections of the due process clause?

The natural family is composed of parents and children living as a single unit ostensibly free from the legal coercion of the state.²⁷³ The Court has been willing in the past to assume an identity of interests between parents and children in that situation.²⁷⁴ "[A]bsent a finding of neglect or abuse," parents therefore retain significant decision-making powers for their children, including the substantial, if not the dominant role in commitment of children to state institutions.²⁷⁵ The child in the custody of her own family is cared for by her natural protectors²⁷⁶ who have the authority and presumptively possess the ability to make decisions on her behalf and in her best interests. Consequently she *is* in free society (as free as it ever gets for children).

Parents of children in foster care, however, possess neither the authority nor the presumptive ability to protect their offspring. Some family problem, often neglect or abuse, makes it necessary for the state to supplant the parental role. Even if the foster child's family is disrupted by an economic or medical crisis, rather than abuse or neglect, the end-result is the same. Foster care commitment is an admission that the parents are incapacitated in some way to play the role of natural protector. Instead, the state assumes that responsibility, either by agreement with the parents, or through court order. Once the state deprives a foster child of her liberty by taking the child into its legal custody and displacing the role of those natural protectors, however, she no longer lives in free society, regardless of whether she dwells in a state institution or in a state-sponsored foster home.²⁷⁷

parental authority," the Texas court declared that "this comprises an entirely different form of custody than that of State detention. No one seriously argues anymore that State custody in any way approximates the family environment." *Id.* As a result, although cognizant of the rehabilitative and treatment-oriented spirit of the juvenile justice system, the Court was unwilling to approve an arrest of a juvenile without probable cause in order to take his fingerprints. *Id.* at 803.

273. This assumes an undivided marital family in which the state has not been called on to determine custody rights between parents or between parents and nonparents. Typically, once invoked to allocate custody rights in a divided family, family courts retain continuing jurisdiction over the minor child until the age of majority. *See, e.g.,* TEX. FAM. CODE ANN. § 11.05(a) (Vernon 1986) (continuing exclusive jurisdiction over all parties and all matters provided for in subchapter in connection with the child). In this situation, however, the court exercises its *parens patriae* powers to make decisions in the child's best interest, but it does not supplant the natural family, it merely allocates the parental role between the competing parties and serves as a referee in disputes that arise over that allocation. *See, e.g., id.* §§ 14.01-14.04 (on the court appointment, powers, and responsibilities of managing conservators (custodians with full parental powers and responsibilities) and possessory conservators (individuals with partial parental powers and responsibilities including visitation rights and the obligation of support)).

274. *E.g., Parham v. J.R.*, 442 U.S. 584, 602-03 (1979). *See supra* notes 185-93 and accompanying text. *But see Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (refusing to assume identity of interests between parents and mature minors seeking to make reproductive decisions).

275. *Parham*, 442 U.S. at 604.

276. *Id.* at 602.

277. *See Campbell v. City of Philadelphia*, Dep't of Human Servs., No. 88-6976 (E.D. Pa. July, 18, 1990) (LEXIS, Gefed library, Dist file) (once state removed two-year-old from "free society" by the exercise of its power and placed her in a foster home, the state had an affirmative obligation to protect her from mistreatment by foster parents). *But see Parham*, 442 U.S. at 618-19, where the Court refused to establish a different rule when the civil commitment initially was sought by the state welfare agency that had custody of the child rather than by the child's own parents. They did,

As we have seen, once children are in the foster care system, the state may determine placement virtually at will,²⁷⁸ just as Georgia decided that Kathy Jo Taylor would be placed in the hands of dangerous strangers rather than with capable kin;²⁷⁹ and just as Maryland selected abusive foster parents for Charles Milburn, and left him in their charge for two years despite a series of injuries caused by their mistreatment;²⁸⁰ and just as Illinois bounced children through a series of foster home and institutional placements.²⁸¹ This discretion may be virtually unfettered even in so-called "voluntary" foster placements.²⁸² The state retains the continuing responsibility to supervise placements it chooses.²⁸³ Legally and practically, the state *replaces* the natural parents as the child's sole source of protection. The state therefore has imposed a limitation on the foster child's "freedom to act on his own behalf" through the agency of his natural parents.²⁸⁴ Foster children are entirely dependent on the state. The state already has pierced the veil of family privacy and stepped over the boundary between private and public that is marked by the custody line in *DeShaney*.²⁸⁵

however, acknowledge that the agency would not do as good a job of ensuring long term review of the commitment and speedy return to the outside world as naturally protective parents would do. *Id.* at 619-20.

278. See *supra* notes 56-57 and accompanying text. The state's need to reserve its absolute right to regain physical custody of children placed in foster care, at least in order to return them to their natural parents, has been used to justify limiting the procedural due process rights of foster parents. See *Smith v. Organization of Foster Families for Organization and Reform*, 431 U.S. 816, 846-47 (1977).

279. See *supra* notes 6-7 and accompanying text.

280. See *supra* notes 22-26 and accompanying text.

281. See *supra* notes 244-48 and accompanying text.

282. Agencies have the authority to maintain children in an institutional setting or to place them out and board them in foster homes. The typical contract with the *foster parents* expressly reserves the right of the agency to remove the child on demand. *Smith v. OFFER*, 431 U.S. 816, 826 (1977).

283. See *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 477 (4th Cir.), *cert. denied*, 110 S. Ct. 148 (1989); *Taylor v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987) (*en banc*), *cert. denied*, 109 S. Ct. 1337 (1989); GA. CODE ANN. § 49-5-3(12) (Supp. 1989) ("legal custody"); GA. COMP. R. & REGS. r. 290-2-12-.08 (1989) (foster care services); see also *supra* notes 208-10 and accompanying text.

284. *DeShaney*, 109 S. Ct. at 1006.

285. For these purposes, it is immaterial that the Court has ruled that with respect to jurisdiction for federal habeas corpus, children "are in the 'custody' of their foster parents in essentially the same way, and to the same extent as other children are in the custody of their natural or adoptive parents." *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502 (1981). Justice Powell reasoned that unlike those confined to institutions, foster children are not usually restrained. *Id.* Ms. Lehman had placed her sons in the custody of the county, which placed them in foster homes, and did not request their return for three years. The agency then initiated parental termination proceedings. *Id.* at 504. After the mother's parental rights were terminated, she sought but was denied review by petition for certiorari to the Supreme Court. She then sought a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254, but the district court dismissed the petition on jurisdictional grounds, and the Supreme Court affirmed. *Lehman*, 458 U.S. at 505-06.

Lehman resolved a question of statutory construction of the Federal Habeas Corpus Act rather than defined "custody" for constitutional purposes. See *Artist M. v. Johnson*, 726 F. Supp. 690, 699 (N.D. Ill. 1989) (*Lehman* does not control because habeas case addressed set of concerns different from those relevant to right to protection). More importantly, it was a challenge to the confinement itself, rather than to the conditions of confinement as in the right-to-safety cases. See *Mushlin*, *supra* note 2, at 234-37. In limiting *Estelle* and *Youngberg* to "custodial" situations, the *DeShaney* Court emphasized dependency on the state, and was not concerned with freedom of movement. *DeShaney*, 109 S. Ct. at 1005-06. Inmates in prison and mental patients in hospitals are dependent on the state to protect them; so too, foster children are dependent on the state which, by assuming legal custody, thereby supplants the protective role of the natural parents.

We should remember also that many children are in foster care because of the modern state's policy of decriminalizing child abuse.²⁸⁶ When an abusive parent (or functional stepparent) threatens the safety of a child, state officials generally do not arrest or remove the adult perpetrator, as would be the case in assaults committed outside of the parent-child relationship.²⁸⁷ Rather, the state prefers to "rehabilitate" the family through in-home supervision.²⁸⁸ Upon failure of that option, the state may turn to foster care as a court of last resort. State policy, therefore, permits an abusive parent to stay in free society in the privacy of his or her family, while imposing foster care on children who cannot be protected at home. The foster child is unable to remain in free society and instead passes into state custody, exercised through the agency of a foster home. This loss of liberty results from the state's affirmative decision to treat child abuse differently from other invasions of physical security.

In the foster care situation, moreover, it is much clearer that the state's actions have thrown the child into the "snake pit"²⁸⁹ and that it cannot be said, as the Court said about Joshua DeShaney, that the state "played no part" in the creation of the dangers that the child faced in the "free world" outside of state custody, nor did anything "to render him any more vulnerable to them."²⁹⁰ The state actively removed Kathy Jo Taylor from her natural family, where she might have been safe, or at least safer, and forced her into the custody of abusive strangers.²⁹¹ In the plentitude of its discretion, the state placed Charles Milburn in a foster home that it selected and supervised, and it *kept* him there long after the dangerousness of the environment had become clear.²⁹² Although causation must still be established, the state's role in creating the danger is quite clear. Foster care, therefore, may be distinguished from the seemingly more passive role of the state²⁹³ in *DeShaney*.

286. See *DeShaney in Context*, *supra* note 18, at 705-08.

287. See, e.g., *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, 505 (3d Cir. 1985) (in disregard of advice of examining physician, county agency treated abusive boyfriend of mother as part of the family unit and failed to invoke the state's procedures for protective custody of abused children; boyfriend and mother criminally charged only after the little girl died following further abuse); *Jensen v. Conrad*, 747 F.2d 185, 188 (4th Cir. 1984) (criminal charges against abusive mother not brought after initial abuse caused protective services supervision of mother's custody, but only after additional abuse led to death of baby), *cert. denied*, 470 U.S. 1052 (1985). California recently enacted legislation that would permit police to remove the adult abuser from the home instead of the child. See *supra* note 47.

288. D. BESHAROV, *supra* note 44, at 76.

289. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1979); cf. *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 355-56 (11th Cir. 1989) (distinguishing *DeShaney* where state played no role in creating the danger); *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (distinguishing situation of woman stranded by impoundment of her vehicle in high-crime area where she was raped, from *DeShaney*, where state played no part in creating the dangers that Joshua faced nor in making him more vulnerable to them).

290. *DeShaney*, 109 S. Ct. at 1006.

291. *Taylor*, 818 F.2d at 792.

292. *Milburn*, 871 F.2d at 474-75.

293. But see *DeShaney*, 109 S. Ct. at 1008, 1010-11 (Brennan, J., dissenting) (cataloging the actions the state did take with respect to Joshua DeShaney).

VI. CONSTITUTIONAL CLAIM OR ORDINARY TORT: DIVIDING THE WHEAT
FROM THE CHAFF

The constitutional tort (section 1983 or *Bivens*-remedy²⁹⁴) cases of the 1980s displayed the Supreme Court's desire to find a way to distinguish between an ordinary tort and a genuine abuse of government power. To that end, in 1981 in *Parratt v. Taylor*²⁹⁵ the Court adopted a special rule for "random and unauthorized" deprivations of procedural due process rights.²⁹⁶ The Court deplored the federalization of ordinary torts.²⁹⁷ It ruled that when a state agent "deprives" a citizen of "property" or "liberty" in a manner and at a time that cannot be anticipated, constitutional tort liability for procedural violations may be precluded if the state provides an adequate after-the-fact common-law remedy.²⁹⁸ In 1990 a bare majority in *Zinermon v. Burch*²⁹⁹ refused to interpret the *Parratt* "adequate state remedy" rule broadly. The Court rejected the contention that in every case where state officials departed from established practices without authorization, they could escape section 1983 liability so long as the state provided tort remedies.³⁰⁰

294. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (victim of fourth amendment violation by federal narcotics agents may sue the officers for money damages in federal court).

295. 451 U.S. 527 (1981) (overruled in part, not relevant here, by *Daniels v. Williams*, 474 U.S. 327 (1986)).

296. *Id.* at 541 (1981) (overruled in part, not relevant here, by *Daniels v. Williams*, 474 U.S. 327 (1986)); see also *Zinermon v. Burch*, 110 S. Ct. 975, 990 (1990) (*Parratt* rule does not apply to a foreseeable and predictable deprivation of liberty where predeprivation process is due); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (*Parratt* rule applies to intentional deprivations of property); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (*Parratt* rule not applicable to deprivation worked by established state procedure).

297. *Parratt*, 451 U.S. at 544; see also *id.* at 550 (Powell, J., concurring) (cautioning that a new rule allowing actions for nonintentional acts by state officials would lead to many more tort claims in federal court).

298. *Id.* at 542-44.

299. 110 S. Ct. 975 (1990).

300. *Id.* The Court decided 5-4 that the *Parratt/Hudson* "adequate state remedy" rule for limiting procedural due process claims does not apply to an individual's complaint that he was deprived of due process rights when a Florida state mental institution informally admitted him as a "voluntary" patient although he was incapable of giving informed consent at the time. *Id.* at 989. Justice Blackmun's majority opinion rejected the idea that in every case where the deprivation is caused by an unauthorized departure from established practices, state officials could escape § 1983 liability so long as the state provided tort remedies. *Id.* at 990. By a narrow margin, and with some questionable distinctions, the Court preserved a constitutional tort remedy for the deprivation of the mental patient's substantial liberty interest in freedom from confinement. *Id.* at 989-90.

Justice O'Connor's dissent acknowledged the serious deprivation of liberty involved, but nonetheless found no fourteenth amendment violation. *Id.* at 990 (O'Connor, J., dissenting). She would apply the *Parratt* doctrine to any procedural due process claim in which state officials departed from authorized state procedures and acted wrongfully, either recklessly or deliberately. *Id.* at 991-93 (O'Connor, J., dissenting). She accused the majority of going a long way toward making the fourteenth amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 996 (O'Connor, J., dissenting) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

As the majority correctly observed, the breadth of the dissent's formulation is inconsistent with the holding of *Monroe v. Pape*, 365 U.S. 167 (1961) (overruled in part, not relevant here, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)), that § 1983 reaches abuses of state authority that are forbidden by the state's statutes or constitution or are torts under the state's common law. *Zinermon*, 110 S. Ct. at 990 & n.20. The two viewpoints in *Zinermon* demonstrate

After the "adequate state remedy" limitation proved insufficient to contain civil rights litigation,³⁰¹ in 1986 the Court imposed a state-of-mind requirement on the fourteenth amendment.³⁰² In *Daniels v. Williams*³⁰³ and *Davidson v. Cannon*,³⁰⁴ the Court reaffirmed the concern about federalizing tort law expressed in Justice Powell's concurring decision in *Parratt*.³⁰⁵ *Daniels* involved a prison inmate's slip-and-fall case against the warden in a state that provided no "adequate state remedy" in tort.³⁰⁶ *Davidson* was a fourteenth amendment suit by an inmate alleging that prison officials failed to protect him from an anticipated assault.³⁰⁷ In order to avoid the ordinary tort trap, the Court declared in these cases that something more than negligence is required to violate fourteenth amendment due process rights.³⁰⁸ Concurring in *Daniels*, but dissenting in *Davidson*, Justice Blackmun agreed that the former did not implicate constitutional rights, but he saw an abuse of government power in the latter situation, even where mere negligence was alleged.³⁰⁹

Finally, in 1989 in *DeShaney* the Court attacked the ordinary/constitutional tort conundrum from another quarter, by repudiating the "special relationship" doctrine.³¹⁰ The Court held that while special relationships might create state law causes of action, they do not produce an affirmative constitutional duty to provide children or anyone else with protective "services."³¹¹ The Court offered "custody" instead as the test of constitutional liability.³¹²

The cases of the 1980s unfortunately failed to articulate a coherent and satisfactory basis for drawing the line between ordinary torts and genuine abuses of governmental power. There may not be a simple way to divide the constitutional wheat from the ordinary tort chaff under all circumstances. Litigation on behalf of foster children, however, passes what a colleague of mine calls the "smell test":³¹³ it exudes a constitutional essence that is not shared by many of the other kinds of cases decided in the wake of *DeShaney*.³¹⁴ In foster care cases

that the Court remains divided about how to distinguish constitutional violations from ordinary torts.

The *Parratt/Zinerman* line of cases applies only to procedural due process. The adequacy of state law remedies is irrelevant to the foster child's substantive due process claim of a right to safety. See *id.* at 983.

301. See *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (upon reflection, Justice Powell was correct in *Parratt*; mere negligence cannot work a deprivation in the constitutional sense).

302. *Id.* at 330.

303. *Id.* at 327.

304. 474 U.S. 344 (1986).

305. *Daniels*, 474 U.S. at 330-31.

306. The rule of *Parratt* therefore did not preclude a cause of action. *Id.* at 328-29.

307. *Davidson*, 474 U.S. at 345.

308. The negligence rule apparently applies whether the claim is for a procedural or for a substantive due process violation. See *id.* at 348.

309. *Id.* at 350 (Blackmun, J., dissenting).

310. *DeShaney*, 109 S. Ct. at 1006-07.

311. *Id.*

312. *Id.* at 1005-06.

313. Sidney Buchanan, Professor of Law at the University of Houston Law Center.

314. After *DeShaney* the Supreme Court immediately acted in a number of other cases involving a variety of circumstances under which it was asserted that the government has a duty to rescue citizens in danger. Columnist Linda Greenhouse discussed the series of "terse, unsigned orders,"

the state has placed children in the system wherever the state in its broad discretion chooses, and then has failed to protect the children in its custody. These circumstances are quite different from, for example, the state's ordinary tort-like failure to dispatch an ambulance to a caller who phoned the rescue service.³¹⁵ The foster child's right to safety is easily distinguishable from claims for a minimal level of government services founded on alleged special relationships,³¹⁶ a line of reasoning that the Court explicitly repudiated in *DeShaney*.³¹⁷

VII. CONCLUSION

The question that the Court reserved in *DeShaney* should be answered affirmatively.³¹⁸ Foster care does constitute the kind of custody that triggers the protection of the due process clause. When the state establishes and operates foster care systems, it acts affirmatively to supplant the (private) role of natural parents and to exercise (public) custodial power over foster children in order to keep them safe from abuse and neglect.³¹⁹ Foster children who allege that the

which, in the wake of *DeShaney*, tossed the issue of whether the Constitution ever imposes a duty to rescue back to the lower courts. Greenhouse, *Justices' Rulings Having a Ripple Effect on the Law*, N.Y. Times, March 9, 1989, at B14, col. 1. She noted that when the Supreme Court granted certiorari in *DeShaney*, their act effectively put on hold a number of cases raising similar issues. *Id.* By the time the decision was made, about eight similar cases were waiting. *Id.* In the wake of *DeShaney*, the Court vacated two Third Circuit decisions in which plaintiffs had prevailed, remanding for reconsideration in light of its decision, and denied certiorari in six other cases, leaving it for the lower courts to "figure out what common constitutional principles may apply to an almost endless array of human crises." *Id.* "If the lower courts are wrong," concluded Greenhouse, "the Supreme Court will eventually let them know." *Id.*

See *City of New Kensington v. Horton*, 109 S. Ct. 1334 (1989) (\$65,000 damages awarded against a city and a police officer who responded to a call at an after-hours club but failed to prevent the beating death of a patron), *vacating and remanding*, 857 F.2d 1463 (3d Cir. 1988); *Smith v. Stoneking*, 109 S. Ct. 1333 (1989), *vacating and remanding*, *Stoneking v. Bradford Area School Dist.*, 869 F.2d 591 (3d Cir. 1989) (permitting a suit to go forward by a high school student who was molested by a band teacher at his home). On remand, the Third Circuit found *DeShaney* distinguishable and reinstated the case again. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3d Cir. 1989).

The Supreme Court let stand another six decisions, denying certiorari in a panoply of cases including a claim against a city for failing to protect a woman who died after its rescue squad failed to dispatch an ambulance, *Archie v. City of Racine*, 109 S. Ct. 1337 (1989) (no cause of action), *denying cert.*, 847 F.2d 1211 (7th Cir. 1988).

In the months since, courts have relied on *DeShaney* in rejecting a number of claims to protection by victims of "private" violence: among them, a business owner's lawsuit against the police for failing to provide protection against burglaries, *Burgos v. Camareno*, 708 F. Supp. 25 (D.P.R. 1989), and a suit against the city for failing to inspect and find that an apartment had no smoke detectors, *Benson v. Kutsch*, 380 S.E.2d 36 (W. Va. 1989).

315. *Archie v. City of Racine*, 847 F.2d 211 (7th Cir.), *cert. denied*, 109 S. Ct. 1338 (1989).

316. See *DeShaney*, 109 S. Ct. at 1003. The Court situated the decision in Joshua DeShaney's case in the line of cases including *Harris v. McRae*, 448 U.S. 297 (1980) (states participating in Medicaid program have no obligation to fund abortions). See also *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3051 (1989) (*DeShaney* stands for the general proposition that there is no affirmative duty to provide governmental aid, even where life, liberty, or property is at stake).

317. 109 S. Ct. at 1004.

318. See, e.g., *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes), *petition for cert. filed*, No. 90-5235 (U.S. July 17, 1990).

319. See, e.g., *Lipscomb ex rel. DeFehr v. Simmons*, 884 F.2d 1242, 1246 (9th Cir. 1989) (by "removing children from their parents' custody, making them wards of the state, and placing them in foster care programs, the State of Oregon . . . assumed special constitutional obligations toward

state was deliberately indifferent to their safety or entirely failed to exercise professional judgment in protecting them are contesting the very basis for the exercise of government power over them. Children who are in the custody of state child welfare systems are entirely dependent on the state for the protection that otherwise should be supplied by parents in the "free world." Once in state custody, they have no place else to turn. The state has great power over them to hold them in safe or unsafe conditions or even to move them from safe to unsafe conditions. Foster children belong on the same side of the constitutional line as other helpless citizens in the hands of the state, such as prison inmates or institutionalized mental patients. Their claim too involves an abuse of government power.

them"), *reh'g granted*, 907 F.2d 114 (9th Cir. July 10, 1990); *Artist M. v. Johnson*, 726 F. Supp. 690, 699 (N.D. Ill. 1989).

[When Department of Children and Family Services] obtains an order to remove a child from his or her home and takes that child into protective custody it is surely exercising affirmative State power over that child to the extent that it must assume responsibility to provide for the child's basic needs. To hold otherwise would be to turn a blind eye on the realities facing a child who has been removed from home.

Id.