1-1-1988

Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect

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UNSAFE HAVENS: THE CASE FOR CONSTITUTIONAL PROTECTION OF FOSTER CHILDREN FROM ABUSE AND NEGLECT

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Introduction

In a midwestern community not long ago, a one-year-old girl who required constant medical attention for epileptic seizures was sent by a state child welfare department to a foster home known by the state to be inadequate.[1] In fact, the caseworker assigned by the state to supervise the home had recommended that the department not use this "marginal" setting except on a temporary, short-term basis. Children sent to this home in the past had been "ill clothed" and had not received attention for medical problems. The warning was ignored. When the child's caseworker reported that the foster parents were not bringing the child to her scheduled medical appointments, again the child welfare department did not respond. Finally, after two and one-half years and pressure from the child's physician, the child was removed from the foster home. By this time, the child, now three and one-half, had not received treatment for her epilepsy and was also experiencing other medical problems.[2] Even after an official finding of abuse by the state was registered against the home for its failure to care for this child, the state

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I am grateful for the thoughtful editorial assistance and encouragement of Professor Donald L. Doernberg. I am also grateful for the assistance of Professors Norman B. Lichtenstein, M. Stuart Madden, David Rudenstine, Barbara Salken and Merril Sobie. I also wish to express my appreciation for the research assistance of Susan DeGeorge, Talay Hafiz, Shelley Halber and Laura Hurwitz. Finally, I am thankful for the support and encouragement of my wife, Thea Stone.

[1] G.L. v. Zumwalt, 564 F. Supp. 1030 (W.D. Mo. 1983) (cited in D. Caplovitz & L. Genevie, Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by The Division of Family Services 86–87, case 5.2 (July 21, 1982) (unpublished report)).

[2] The child was experiencing constant diarrhea and had not been toilet trained. In addition, she was so emotionally deprived that, although she was three and one-half, she had not been taught how to kiss. *Id.* at 87.

continued to use the foster home without interruption as a placement for abused and neglected children.

In the same state, another foster child was assaulted while in foster care. The state knew of the attack, but did nothing. Within four months, the child was sexually abused by the foster father in the same home.[3] In a third foster home, a four-year-old girl was whipped by her foster mother and made to stand with her hands extended over her head for thirty minutes. The child was being punished for being dirty. Although the caseworker determined that the child had been beaten, and reported this to her superiors, no action was taken and the child was returned to the home.[4]

In another part of the country, a troubled young boy who wet his bed was placed in a foster home. The foster mother, frustrated at her inability to control his behavior, sought help from the state's child welfare agency. Her pleas were ignored. The situation deteriorated until one night the foster mother forced the child to "drink his urine."[5]

None of these cases received public attention, nor were any of them the subject of reported court decisions or large damage awards. Each, however, is an example of the stark reality of life in foster homes[6] for too many of the nation's half-million[7]

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[3] *Id.* at 87, case 5.3.

[4] *Id.* at 89, case 5.6.

[5] Gil, *Institutional Abuse of Children in Out-of-Home Care*, 3 Child and Youth Services 7, 10 (1981).

[6] Foster family care is distinguished from institutional care and adoption in that "the foster family care is designed to be temporary and to offer the child care in a family setting." A. Kadushin, Child Welfare Services 425 (1967). In this Article, the term "foster care" is used to refer to foster family care arrangements.

Once it is determined that a child can no longer remain in her original home, state law usually places the child in the custody of the state or local department of child welfare. R. Horowitz & H. Davidson, Legal Rights of Children 358 (1984). The child welfare agency normally selects and licenses adults to serve as foster parents. *Id.* at 361–65. The foster family then often enters into a contractual arrangement with the agency that requires the foster parents to care for the child under the direction and supervision of the agency. *Id.* A typical foster family is a middle-aged, working or lower-middle class family that owns its own home and has agreed to undertake the responsibility of foster care parenting out of either a need for extra cash or an altruistic desire to help needy children. Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 599, 610 (1973) [hereinafter Mnookin, *In Whose Best Interest?*]; A. Gruber, Children in Foster Care: Destitute Neglected . . . Betrayed 151–74 (1978); T. Festinger, No One Ever Asked Us . . . A Postscript to Foster Care 270–71 (1983).

[7] For the years 1977 to 1983, estimates have varied from 273,913 to 502,000. T. Tatara, *Characteristics of Children in Substitute and Adoptive Care: A Statistical Sum-*

foster children. This Article assesses constitutional rights of foster children to protection. In the last twenty-five years, the number of children in foster care has increased fivefold.[8] The foster care program now ranks with prisons, mental institutions and juvenile detention and treatment centers as a major state-operated custodial program.[9]

The Article argues that foster children have an equal, if not greater, claim to federal judicial protection from harm while in state care than do institutionalized persons who are already accorded significant protections.[10] Yet, in stark contrast to

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mary of the VCIS National Child Welfare Data Base 30, table 2 (1985). In 1983, the latest year for which data are available, the American Public Welfare Association estimated that 447,000 children were served by the nation's foster care system. *Id.* at 32, table 3. Of that number, sixty-nine and one-half percent were sent to foster family homes. *Id.* at 62. The remainder resided in group homes or institutions. *Id. See also* F. Kavaler & M. Swire, Foster-Child Health Care 1 (1983); Children's Defense Fund, Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care 2 (1978); Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, 20 Fam. L.Q. 255, 275 (1986).

[8] Besharov, *Foster Care Reform: Two Books for Practitioners* (Book Review), 18 Fam. L.Q. 247 (1984) [hereinafter Besharov, *Foster Care Reform*]. Three major reasons have been offered to explain the expansion in the use of foster care. R. Mnookin, In the Interest of Children 69 (1985) (decrease in use of institutions for abandoned and neglected children) [hereinafter Mnookin, In the Interest]; Besharov, *The Misuse of Foster Care: When the Desire to Help Outruns the Ability to Improve Parental Functioning*, 20 Fam. L.Q. 213, 215 (1986) (increase in births to young single mothers unable to raise their children) [hereinafter Besharov, *The Misuse of Foster Care*]; Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 Fam. L.Q. 151, 153–55 (1983) (increase in child abuse and neglect reporting systems) [hereinafter Besharov, *Child Protection*]. Almost eight times as many children are reported to state officials as suspected victims of abuse or neglect than were reported in 1960. *Id.* at 151. Still, it is likely many children who ought to be in substitute care are not, either because their cases are not reported or because of the failure of the child welfare system to respond to legitimate pleas for protection of endangered children. *Id.* at 161 (estimates 50,000 cases of observable injuries not reported in 1979).

It is also likely, however, that some children go into foster care unnecessarily. Children's Defense Fund, *supra* note 7 at 15–18 (lack of family services). Mnookin, *In Whose Best Interest?*, *supra* note 6, at 619–20 (vagueness of statutes permits class, race, and lifestyle biases to affect decisions).

[9] *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 174, chart 307 (107th ed. 1987) (503,601 state and federal prisoners). *Id.* at 171, chart 301 (223,551 held in jails). *Id.* at 100, chart 159 (220,700 mental health inpatients). *Id.* at 171, chart 299 (51,402 juveniles in public custody, 34,112 in private custody). *Id.* at 99, chart 158 (132,235 in-state facilities for the mentally retarded).

[10] Other commentators have surveyed problems in foster care. Two articles offer arguments for a foster child's right to safety. *See* Donella, *Safe Foster Care: A Constitutional Mandate*, 19 Fam. L.Q. 79 (1985); Comment, *Child Abuse in Foster Homes: A Rationale for Pursuing Causes of Actions [sic] Against the Placement Agency*, 28 St. Louis U.L.J. 975 (1984). Other articles have considered issues such as the standards for placement, the right of foster children and foster parents to remain together, and

scores of decrees entered to protect institutionalized persons from physical harm, there is but one reported federal case[11] that has enforced by injunctive decree a constitutional right of foster children to protection from harm while in foster care.

The six sections of this Article present the case for direct federal court involvement in aiding foster children who are at risk of abuse and neglect while in foster care. Section I discusses the extent of abuse and neglect in foster care as well as the structural causes of this maltreatment. It also explains the inevitable failure of the political branches of government to confront the problem. Section II describes the constitutional right to safety and surveys the judicial treatment of that right, including the lack of development of the right for children in foster care. Section III discusses differences between children in foster family care and institutionalized persons, and argues that none of the differences can account for the failure to accord foster children the benefits of the right to safety. Section IV explores the appropriate remedy for the right to safety for foster children, and it demonstrates that damage remedies are inadequate because their availability is severely circumscribed by a variety of immunity doctrines, and because even if they were available, monetary awards deflect attention from the root causes of abuse and neglect of foster children. This section presents the case for structural injunctions as the most practical remedy.

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the entitlement of foster children to permanence through either a prompt return home or adoption. *See, e.g.*, Besharov, *The Misuse of Foster Care*, *supra* note 8; Dobbs, *Foster Care and Family Law: A Look at* Smith v. OFFER *and the Constitutional Rights of Foster Children and Their Families*, 17 J. Fam. L. 1 (1979); Mnookin, *In Whose Best Interest?*, *supra* note 6; Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. Cal. L. Rev. 633 (1981); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 623 (1976).

[11] G.L. v. Zumwalt, 564 F. Supp. 1030 (W.D. Mo. 1983) (consent decree). A case is now pending in federal court that squarely presents the issue of whether or not foster children are entitled to injunctive relief designed to vindicate their right to be protected from harm. L.J. v. Massinga, Civ. No. 84-4403 (D. Md. filed Dec. 1984). On July 27, 1987, a preliminary injunction was granted in that case. *See infra* note 169. The case now awaits final trial and disposition. In addition, a class action raising the issue of the constitutional right of foster children to safety is now pending before a state court. Janet T. v. Morse, S-359-86 WNM (Sup. Ct. Vt. filed Aug. 29, 1986). Thus, it seems likely that in the near future courts will be required to determine for the first time whether it is appropriate to assert jurisdiction to fashion structural injunctive decrees for the protection of foster children.

Section V discusses whether federal courts are the appropriate forum to address the right to safety for foster children. Until the 1960's, federal courts declined to become involved in cases involving custodial conditions because of a self-imposed abstention policy called the "hands-off" doctrine.[12] Under that doctrine, courts deferred entirely to the judgments of administrators.[13] The awakening of interest in the rights of the confined led to the erosion of that doctrine.[14] In 1974, the Supreme Court announced definitively that the hands-off doctrine was inconsistent with constitutional principles, saying that "there is no iron curtain drawn between the Constitution and the prisons of this country."[15] Since then, lower federal courts have almost routinely intervened on behalf of the institutionalized, at least when necessary to protect against the most severe conditions of confinement.[16] Section V concludes that federal courts should also be the appropriate forum for foster care right-to-safety cases, and argues that none of the judicially created abstention doctrines bar them.

The final section of the Article proposes five basic guidelines which, if followed, would maximize the potential effectiveness of district courts in making foster care safe. The Article concludes that federal judicial involvement offers the promise of benefitting children in foster care by materially improving a system that thus far has resisted reform. Without judicial scrutiny, the abuse and neglect that many children suffered in their

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[12] *See* Comment, *Beyond the Ken of Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963). *See also infra* notes 112–113 and accompanying text.

[13] Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. Davis L. Rev. 31, 56 (1985) (citing cases).

[14] *See, e.g.*, A. Neier, Only Judgment: The Limits of Litigation in Social Change 170–71 (1982).

[15] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974). Professor Zeigler dates the demise of the hands-off doctrine a decade earlier, to Cooper v. Pate, 378 U.S. 546 (1964). *See* Zeigler, *supra* note 13.

[16] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (prison); Morgan v. Sporat, 432 F. Supp. 1130 (S.D. Miss. 1977) (juvenile detention facility); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental hospital); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (institution for the mentally retarded); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970) (prison).

original homes will continue after the state places them in foster care. For these children, the temporary, substitute family system imposed on children in foster care by the state will not be a haven, but a hell.

I. The Problem of Abuse and Neglect in Foster Home Placements

Foster care is intended to provide a temporary, safe haven for children whose parents are unable to care for them.[17] Too often, however, this purpose is not realized. Frequently, foster children are exposed to abuse and neglect by foster parents, and to serious injury due to the failure of the system itself to provide for stable care, or to attend to the children's medical problems. The failure of foster care programs to follow appropriate minimum standards that would ensure the care and protection of children has led to increased rates of foster care abuse and neglect. Despite the considerable costs, to both the children affected and to society generally, the political process has been unresponsive to calls for reform of foster care systems.

A. Types of Abuse and Neglect

Whatever the reason for placement, foster children have not had a normal upbringing. By definition, the bonds to a foster child's permanent family have been disrupted. Foster children suffer disproportionately from serious emotional, medical and psychological disabilities.[18] To compound matters, it is well-established that they are at high risk of further maltreatment while in foster care.[19] Foster children, therefore, are especially vulnerable individuals, prone to become victims unless special

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[17] Child Welfare League of America, Standards for Foster Family Services 8 (1975); Musewicz, *supra* note 10, at 637.

[18] A. Gruber, *supra* note 6, at 182; D. Caplovitz & L. Genevie, *supra* note 1, at 37, table 2.3; P. Ryan, Analyzing Abuse in Family Foster Care: Final Report 59 (1987).

[19] P. Ryan, *supra* note 18, at 59 and authorities cited therein; Vera Institute of Justice, Foster Home Child Protection 31–32 (Feb. 1981) (unpublished report) (Children who were abused in foster care were three times as likely to have entered foster care because of parental abuse than children who were not abused); D. Caplovitz & L. Genevie, *supra* note 1, at 100 (Children with several emotional, intellectual or physical difficulties tended to be at higher risk of abuse or neglect).

care is taken to protect them. Two broad categories of mistreatment of these children have been identified.

1. Foster Family Abuse and Neglect

No one knows how many children are abused or neglected while in foster care,[20] but the problem is more widespread than is currently acknowledged. Children in foster family care have been reported severely beaten[21] and killed.[22] In addition, cases in which children have been subjected to bizarre punishments[23] or parental neglect[24] are common.

Foster children seem peculiarly vulnerable to sexual abuse. This is a special problem because, by definition, there is no permanent kinship bond in foster care. As a result, the traditional incest taboo does not operate.[25] The lack of permanent ties[26] combined with the cultural and class gaps that often exist between foster families and foster children, also can create an explosive environment in which expressions of verbal hostility often erupt.[27]

While foster care has been frequently criticized for other reasons, some observers claim that, at the very least, children

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[20] Vera Institute of Justice, *supra* note 19, at 43. *See also* P. Ryan & E. McFadden, National Foster Care Education Project: Preventing Abuse in Family Foster Care 11, 14 (1986).

[21] Vera Institute of Justice, *supra* note 19, at 8–9 (use of belts, switches, electric cords, dog leashes, bread boards and broomsticks).

[22] *See* Vonner v. State Dep't of Pub. Welfare, 273 So. 2d 252 (La. 1973) (foster child beaten to death); D. Caplovitz & L. Genevie, *supra* note 1, at *94–95*, case *5.14* (child killed by foster mother's boyfriend); Vera Institute of Justice, *supra* note 19, at v (foster child beaten to death by his foster mother).

[23] B. Warren & G. Bardwell, *G.L. v. Zumwalt, Case Record Monitoring, April 11, 1983 through June 30, 1984: Final Report* 52–54 (Apr. 24, 1985) (unpublished report on file with author) (children forced to stand in the center of a room for up to thirteen and one-half hours at a time, made to use a tin can for a toilet, locked in a basement, toilet-trained by being forced to stand with their pants over their heads); D. Caplovitz & L. Genevie, *supra* note 1, at 88, case 5.4.

[24] D. Caplovitz & L. Genevie, *supra* note 1, at 64 (children received only two meals a day and bitten by bedbugs); Vera Institute of Justice, *supra* note 19, at 13–14 (children smelled of "urine and vomit" and were "continually hungry").

[25] P. Ryan, *supra* note 18, at 60. An additional factor accounting for the higher level of sexual abuse in foster care is that a large number of foster children were sexually abused in the past. *Id.* at 105. *See also* B. Warren & G. Bardwell, *supra* note 23, at 53–54, case 549.

[26] *See supra* note 6 and accompanying text.

[27] B. Warren & G. Bardwell, *supra* note 23, at 54, 64, cases 549, 536, 660 (citing cases in which foster parents have called their child a "dummy," said, "I feel sorry for you," and talked negatively about the child's mother).

in foster care are protected from a high risk of abuse and neglect of the type just described.[28] The evidence, however, does not bear out these hopes. One study reported that the rate of substantiated abuse and neglect in New York City foster family care was more than one and one-half times that of children in the general population.[29] A national survey of foster family abuse and neglect, completed in 1986 by the National Foster Care Education Project, revealed rates of abuse that, at their highest, were over ten times greater for foster children than for children in the general population.[30]

As high as the reported rate is, a much higher level of abuse and neglect actually occurs than that officially reported. In 1979, a San Francisco group undertook a project to educate child welfare officials in a six-county area to discover unreported abuse occurring in foster care homes.[31] Within a two-year period, seventy-five cases of either physical abuse and neglect or

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[28] *See* Mnookin, *In Whose Best Interest?*, *supra* note 6, at 632.

[29] Vera Institute of Justice, *supra* note 19, at 63–64 (49 abused children per 1,000 in general population and 77 per 1,000 for children in foster family care).

[30] The number of complaints ranged from 3 per 1,000 homes to 67 per 1,000 homes. Substantiated abuse complaints ranged from 1.2 per 1,000 to 27 per 1,000. P. Ryan & E. McFadden, *supra* note 20, at 11. According to the United States Department of Health and Human Services, the rate of maltreatment of children in 1978 for those 34 states reporting on the subject was 2.55 per 1,000. Department of Health and Human Services, National Analysis of Official Child Neglect and Abuse Reporting 10–11, Table 2 (1978).

Unfortunately, the reported statistics on foster family abuse studies are not widely known. Comment, *supra* note 10, at 976 ("Statistics indicate that the percentage of abused children who suffer at the hands of foster parents is 'miniscule,' a mere 0.3%. . . .") (quoting Note, *The Challenge of Child Abuse Cases: A Practical Approach*, 9 J. Legis. 127, 139 (1982)). The statistic that only .3 percent of all reported abuse cases involve foster parents is not terribly illuminating for several reasons. First, it represents only the raw number of substantiated abuse cases involving foster children, without comparison to the number of foster parents generally. Therefore, it does not supply the relationship between the number of foster parents and those who are abusive, a figure that is relevant where, as here, one is interested in knowing the risk of abuse to any given foster child. Obviously, the overwhelming majority of American children are not cared for in foster homes.

Second, the percentage does not disclose how many foster children were abused by foster parents. Since multiple placements are not rare, see *infra* note 38 and accompanying text, and since many foster homes are not closed despite reports of abuse and neglect, *see supra* notes 1, 5 and 8 and accompanying text, it is reasonable to assume that there is a greater than one-to-one relationship between abusing foster parents and abused foster children.

Third, the report deals with only substantiated cases of foster parent abuse and neglect. This statistic does not include children who are harmed by "program" abuse. *See infra* note 35 and accompanying text.

[31] Gil, *supra* note 5, at 8.

sexual abuse were reported from the area. In the past, "virtually no reports had been documented" through the official child abuse reporting system.[32] Another study found that one state foster care agency neglected to report sixty-three percent of the cases of suspected child maltreatment to the central registry of child neglect, even though such reports were mandated by state law.[33]

The actual amount of abuse and neglect may be much greater than anyone imagines. One study attempted to account for unreported or uninvestigated abuse and neglect in assessing the risk of abuse and neglect in foster boarding home care. The study concluded that forty-three percent of the children studied had been placed in an unsuitable foster home, and that fifty-seven percent of the children in the foster care system who were examined were at serious risk of harm while in foster care.[34]

2. *Program Abuse*

Another equally dangerous form of mistreatment results when the foster care system itself fails to provide children with a stable and secure home setting, or when it does not provide for the child's medical, psychological and emotional needs. This type of mistreatment has been termed "program abuse."[35]

a. Stability of Care

Children entering foster care placement inevitably experience the pain of separation from their family setting no matter how inadequate that setting has been.[36] The substitute experi-

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[32] *Id.* at 8–9.

[33] D. Caplovitz & L. Genevie, *supra* note 1, at 83–84, table 5.1. The study also reported that in over forty percent of the cases, the agency did not so much as undertake an internal investigation to determine whether or not the suspicion of abuse reported by its own caseworker was true. *Id.* at 84–85. A follow-up study three years later revealed that the same agency failed to report, for external investigation, seventy-four percent of the suspected incidents of child mistreatment in the sample group. B. Warren & G. Bardwell, *supra* note 23, at 50–51, chart 3.

[34] D. Caplovitz & L. Genevie, *supra* note 1, at 59–69, 82–98. The study based these calculations upon an examination of over 800 case records maintained for 194 randomly selected foster children placed in care within a five year period prior to March of 1981. *Id.* at 96.

[35] Gil, *supra* note 5, at 10.

[36] *Id.*

ence created in its place compounds that trauma if it does not provide a stable home environment.[37] Unfortunately, foster home placements are frequently extremely unstable. Often foster children are shuffled from home to home without any opportunity to form an attachment with an adult caretaker. Stays in four or more foster homes are common.[38] Aside from the trauma entailed by this movement, the likelihood that the child will be abused at some time during his stay increases with each move.[39]

b. Medical Care

As the substitute parent, the child welfare program assumes responsibility for the child's medical and psychological care.[40] All children need medical care, but the need is acute for foster children who are less healthy than any other identifiable group of youngsters in the United States.[41] The provision of treatment cannot await the end of a foster care placement.

Nevertheless, medical care systems for foster children are inadequate "to manage effectively even simple and common child health problems."[42] For example, a comprehensive study of the medical status of foster children found that many of the pre-school age foster children studied had not received vaccinations for the prevention of childhood diseases.[43] Fourteen percent had received no medical examination upon admission to foster care, and the average physical exam was incomplete.[44] Forty-seven percent of the children had visual problems that

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[37] D. Fanshel & E. Shinn, Children in Foster Care: A Longitudinal Investigation 137 (1978).

[38] *See* D. Caplovitz & L. Genevie, *supra* note 1, at 20–24; Children's Defense Fund, *supra* note 7, at 41; A. Gruber, *supra* note 6, at 67–68.

[39] *See, e.g.*, Vera Institute of Justice, *supra* note 19, at vi (reporting that twenty-eight percent of victims of foster family abuse had been in three or more foster homes as compared to only thirteen percent of foster children generally).

[40] Child Welfare League of America, *supra* note 17, at § 3.10.

[41] F. Kavaler & M. Swire, *supra* note 7. The authors undertook an extensive independent evaluation of the physical condition of 668 New York City foster children. *See also* A. Gruber, *supra* note 6, at 73 (Massachusetts); D. Caplovitz & L. Genevie, *supra* note 1, at 35–37 (Kansas City).

[42] F. Kavaler & M. Swire, *supra* note 7, at 149.

[43] *Id.* at 143. These findings have been confirmed. *See, e.g.*, D. Caplovitz & L. Genevie, *supra* note 1, at 41–43.

[44] F. Kavaler & M. Swire, *supra* note 7, at 142.

had not been evaluated by an optometrist.[45] Over forty percent needed dental care but had not been to a dentist.[46] Only one-fourth of the children who had identifiable emotional or developmental problems had received treatment.[47] When children had received medical attention, it often was inadequate. For example, sixty-one percent of the children who received glasses were given inadequate prescriptions.[48] Based upon these data the authors concluded that "[t]he system for providing health care to foster children is woefully inadequate both in New York State and in the country."[49]

In light of the high level of both foster family abuse and neglect and program abuse, "[t]he assumption that a child is removed from an abusive or neglectful home and placed in a safe environment can no longer be taken at face value. . . ."[50] Indeed, the threat of abuse and neglect of children in foster family care must be considered to be "acute and widespread."[51] Given the state's responsibility to these children, this situation is inexcusable.[52]

B. The Causes and Costs of Maltreatment

Although all of the facets of abuse and neglect of foster children have not been examined, enough is known to dispel notions that foster care maltreatment is inevitable or that responsibility for maltreatment rests entirely with foster parents. Instead, there is a growing body of evidence that links foster family abuse and neglect to the state child welfare agencies that fail to meet minimum professional standards.[53] Such standards

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[45] *Id.* at 146.

[46] *Id.*

[47] *See also* D. Caplovitz & L. Genevie, *supra* note 1, at 38; A. Gruber, *supra* note 6, at 89, 183.

[48] F. Kavaler & M. Swire, *supra* note 7, at 146.

[49] *Id.* at 185. *See also* Shor, *Health Care Supervision of Foster Children*, LX Child Welfare 313, 318 (1981) (Maryland foster care agencies).

[50] Gil, *supra* note 5, at 8.

[51] P. Ryan & E. McFadden, *supra* note 20, at 14.

[52] *See also* Vera Institute of Justice, *supra* note 19, at 64.

[53] *See* Child Welfare League of America, *supra* note 17; American Public Welfare Association, Standards for Foster Family Systems for Public Agencies (1975). *See also* Cavara & Ogran, *Protocol to Investigate Child Abuse in Foster Care*, 7 Child Abuse and Neglect 287, 293 (1983); P. Ryan, *supra* note 18, at 7; Vera Institute of Justice, *supra* note 19, at 33–34.

require the careful screening and licensing of potential foster care applicants,[54] training of those who are chosen for the job,[55] careful matching of foster children with foster parents,[56] and regular, continual supervision by competent caseworkers[57] of the foster care placement.[58] Supervision by trained caseworkers fulfills two crucial functions. First, it allows the agency to meet its "obligation to ascertain whether the child is receiving care in accordance with accepted standards, and in relation to his needs."[59] Second, supervision promotes the competence of foster parents by relieving anxieties aroused by the child's behavior, increasing understanding of the child by supplying information and promptly providing supportive help. Training, casework support and consultation with social workers are often esential for foster parents to understand and guide foster children. Absent these forms of state back-up, foster parents can find the behavior of foster children "baffling or inexplicable," or may feel they are in an endless "struggle for control."[60] Professional standards also provide for the elimination of foster home

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[54] *See, e.g.,* American Public Welfare Association, *supra* note 53, at 55–56; Child Welfare League of America, *supra* note 17, at § 4.16; Vera Institute of Justice, *supra* note 19, at 33.

[55] Foster children are not easy to handle, because often they have been sexually or physically abused in the past. They present their caretakers with patterns of behavior that are extremely upsetting and provocative to persons not prepared to cope with them. Compliance with professionally recognized standards would require the availability of training programs for foster parents. Child Welfare League of America, *supra* note 17, at § 4.4. *See also* American Public Welfare Association, *supra* note 53, at 64; P. Ryan, *supra* note 18, at 99–100, 105, recommendations 2, 15; Vera Institute of Justice, *supra* note 19, at 33–36.

[56] The failure of a foster care agency seriously to consider prior to placement whether a particular child should live with a particular set of foster parents is often the direct cause of the maltreatment of foster children. Child Welfare League of America, *supra* note 17, at § 3.9. *See also* Vera Institute of Justice, *supra* note 19, at 36–37.

[57] *See, e.g.,* American Public Welfare Association, *supra* note 53, at 64; Child Welfare League of America, *supra* note 17, at § 4.4; P. Ryan, *supra* note 18, at 105–06, recommendations 17–19; Vera Institute of Justice, Protection of Children in Foster Family Care: A Guide for Social Workers (March 10, 1982) (unpublished article); P. Ryan, *supra* note 18, at 3.

[58] Child Welfare League of America, *supra* note 17, at § 4.27. The Child Welfare League standards require that the agency maintain personal contact with the child once a month for the first year, after which personal contact every other month may be sufficient. *Id.* at § 4.28. Regular supervision is also stressed in the literature of foster family abuse and neglect. *See, e.g.,* American Public Welfare Association, *supra* note 53, at 65; P. Ryan, *supra* note 18, at 103, recommendation 11; Vera Institute of Justice, *supra* note 19, at 39–42.

[59] Child Welfare League of America, *supra* note 17, at § 4.27.

[60] P. Ryan, *supra* note 18, at 59–60.

overcrowding,[61] strict bans on improper punishment,[62] and prompt referrals for outside investigation of all suspicions of maltreatment by foster parents.[63]

Failure to follow professional standards results in increased foster family abuse and neglect. One study connected the lack of training of foster parents, foster home overcrowding, the failure to match foster children with appropriate parents and the failure to visit foster homes regularly with the abuse of foster children.[64] Another study linked the failure to refer allegations of abuse and neglect to the proper authorities for investigation and the failure to follow up on suspicions of abuse with the continuation of foster child abuse.[65]

These failures of the foster care system, and the corresponding abuse and neglect of foster children, have a serious, detrimental effect on society. Injuries inflicted upon foster children will not heal easily since often the abused foster children have already been harmed in their permanent homes.[66] Society has a humanitarian interest in the prevention of such unnecessary suffering, and a strong utilitarian interest in reducing crime and dependency. A negative foster care experience does little to advance these interests; indeed, it contributes to later antisocial and dependent behavior.[67] Then-Justice Rehnquist described the significance to society of protecting children from

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[61] Child Welfare League of America, *supra* note 17, at § 4.7.

[62] Vera Institute of Justice, *supra* note 57, at 17–20 (Condoning corporal punishment raises the risk of severe injury to foster children. In addition, foster children are more likely to interpret physical punishment as rejection which, in turn, reinforces their poor self image.).

[63] Gil, *supra* note 5, at 8. *See also* P. Ryan, *supra* note 18, at 107–08, recommendation 22.

[64] Vera Institute of Justice, *supra* note 19, at 2.

[65] Gil, *supra* note 5, at 9. *See also* Office of the City Council President, The Foster Care Pyramid: Factors Associated with the Abuse and Neglect of Children in Foster Boarding Homes 2, 53–55, 60–64, 69–73 (1982) (study found that inadequate home studies, reference checks and procedures to decertify deficient foster homes correlated with abuse and neglect).

[66] Vera Institute of Justice, *supra* note 57, at 5–7 (citing J. Segal, *Child Abuse: A Review of Research Families Today* 1 (1979)). *See also* Comment, *supra* note 10, at 979 (and authorities cited therein).

[67] R. Flowers, Children and Criminality 101 (1986) (and authorities cited therein); D. Gurak, Center for Policy Research, Foster Care Experience Among Incarcerated Adults 19 (June 1977) (unpublished report). By contrast, there is evidence that foster children who have had a satisfactory experience in foster care fare as well as children in the general population. T. Festinger, *supra* note 6, at 199–209.

abuse: "[C]hildren who are abused in their youth generally face extraordinary problems developing into responsible productive citizens. . . . Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance."[68] Nevertheless, the legislative and executive branches of government have not responded to calls for foster care reform.

C. The Failure of Reform: Legislative and Executive Default

Although severe deficiencies in the foster care system have been spotlighted almost from its start,[69] the American foster care system has developed a remarkable immunity to reform. It has been the subject of studies at the state and national level,[70] yet little appreciable improvement has resulted. In 1979, the president of the Children's Defense Fund, Marian Wright Edelman, concluded that the conditions in the foster care system of the United States remained a "national disgrace."[71] In the same year, the National Commission on Children in Need of Parents,[72] issued its unanimous verdict that "[w]ith some admirable exceptions, the foster care system in America is an unconscionable failure, harming large numbers of the children it purports to serve."[73] While these condemnations concern the full gamut of issues posed by the administration of foster care, the specific issue of abuse and neglect of foster children in foster family placements has not been overlooked.[74]

It is not difficult to understand why the American foster care system has been so roundly criticized. Foster care systems

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[68] Santosky v. Kramer, 455 U.S. 745, 789–90 (1982) (Rehnquist, J., dissenting).

[69] *See, e.g.*, A. Gruber, *supra* note 6, at 9 (1930 White House conference marking establishment of national foster care program); A. Kadushin, *supra* note 6, at 411 (citing Lewis, *Long-Time and Temporary Placement of Children* in Selected Papers in Casework 40 (1951) (by the 1950's foster care was failing to fulfill its purpose)); H. Mass & R. Engler, Jr., Children in Need of Parents (1959).

[70] Children's Defense Fund, *supra* note 7; National Commission of Children in Need Of Parents, Who Knows? Who Cares? Forgotten Children in Foster Care (1979); A. Gruber, *supra* note 6 (Massachusetts foster care system).

[71] Children's Defense Fund, *supra* note 7, at xiii.

[72] National Commission on Children in Need of Parents, *supra* note 70, at 4.

[73] *Id.* at 5.

[74] *See supra* notes 21–27, 29, 31–34, 64–65 and accompanying text. *But see supra* notes 28, 30 and accompanying text.

are administered by staffs that are "overburdened, poorly paid and often unprepared professionally"[75] for the difficult work they are called upon to perform. Lack of financial support has led to a system that is poorly organized and usually lacks even the most basic information about its own operation.[76] Foster parents as well receive inadequate financial and professional support. Payments offered to foster parents are often less than the cost of caring for the basic needs of the child; inadequacy of these payments adds financial stress to the burdens of being a foster parent.[77] Funding is especially important if foster care placements are to be made safe. Money is needed for additional trained social workers to screen carefully and regularly supervise foster homes, to train foster parents and to ensure that an adequate number of foster parents are available to avoid overloading foster homes with more children than they can handle.[78] Funds must also be allocated to hire medical personnel to supervise and implement a decent medical care system.[79] Abuse of children who come under the state's care for protection is the "inevitable result of inadequate funding."[80] Without additional aid, it would be almost impossible for change to occur even if there were a commitment to it by people in the system.

One must ask why foster care is "least favored by the legislature."[81] Here, too, the answer is not difficult to discern. Foster care is a service almost always reserved for the children of the poor,[82] and, in most states, foster care is disproportionately used by minority children[83] who, not unexpectedly, have encountered discrimination in the foster care system.[84] The dis-

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[75] National Commission on Children in Need of Parents, *supra* note 70, at 6.

[76] Lowry, *supra* note 7, at 257.

[77] National Commission on Children in Need of Parents, *supra* note 70, at 21. *See also* A. Gruber, *supra* note 6, at 172.

[78] *See supra* notes 54–61 and accompanying text.

[79] *See supra* notes 40–49 and accompanying text.

[80] Besharov, *Protecting Children from Abuse: Should It Be a Legal Duty?*, 11 U. Dayton L. Rev. 509, 546 (1986).

[81] Lowry, *supra* note 7, at 274.

[82] Mnookin, *In Whose Best Interest?*, *supra* note 6, at 607 and sources cited therein; F. Kavaler & M. Swire, *supra* note 7, at 47. *See* Lowry, *supra* note 7, at 257.

[83] National Commission on Children in Need of Parents, *supra* note 70, at 25. *Accord*, Children's Defense Fund, *supra* note 7, at 49–52; Lowry, *supra* note 7, at 257; Dobbs, *supra* note 10, at 4.

[84] *See, e.g.*, Player v. Alabama Dep't of Pensions and Security, 400 F. Supp. 249, 255 (M.D. Ala. 1975), aff'd, 536 F.2d 1385 (5th Cir. 1976) (finding black children in the

parate treatment of minorities also appears to mean that they run an even greater risk of abuse and neglect in foster care than other foster children.[85] While other parents experiencing difficulties with child rearing can rely on private school and paid professional support, the poor and the underclass must resort to their local child welfare agency.

It is difficult to imagine a more powerless group of people than foster children. They are largely unrepresented in the court proceedings that lead to their placement.[86] Living without the protection of their parents, they are completely at the mercy of the persons who may also be responsible for maltreating them.[87] They do not vote; they lack the developmental ability to organize. Their voices, assuming they are old enough to speak, cannot be heard. Whatever happens to them, therefore, happens outside of the zone of public scrutiny.

The pressure that exists for improvements in foster care systems focuses on issues other than maltreatment. Supporters of foster care reform, responding either to the concerns of natural parents, or to those of foster parents concerned about adoption, have concentrated on the states' over-reliance on foster care rather than on the issue of safety within the foster care system. Natural parents and their advocates have exerted pressure for preventive services that would limit the need for foster care by requiring the state to aid families in distress before taking a child away.[88] These services can include day care, homemaker services, parent training, transportation, clinical services and assistance in obtaining housing.[89] Advocates of

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Alabama foster care system were not given equal treatment in referrals to specialized placements); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986) (consent decree designed to ensure that all children, regardless of race or religion, are served by the New York City foster care system on a "first come-first served" basis). *See also* Children's Defense Fund, *supra* note 7, at 49–54.

[85] D. Caplovitz & L. Genevie, *supra* note 1, at 99–100, table 5.5 (black children are more likely to be abused or neglected in foster care).

[86] *See* R. Horowitz & H. Davidson, *supra* note 6, at 296–99, § 7.17, 368, § 9.06 (Foster children usually have no voice in voluntary placements. There are minimal or no procedural rights at periodic review proceedings.).

[87] *See supra* note 6 and accompanying text, and *infra* notes 203–04 and accompanying text.

[88] Wiltse, *Current Issues and New Directions in Foster Care*, in Child Welfare Strategy in the Coming Years 67 (A. Kadushin ed. 1978); Stein, *An Overview of Services to Families and Children in Foster Care*, in Foster Children in the Courts 420 (M. Hardin ed. 1983).

[89] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 423.2 (1987).

adoption have called for "permanency planning" designed to speed children though foster care by promptly returning them to their original homes, or, if that is not practicable, by terminating parental rights and placing the child for adoption.[90]

Yet even if these reforms are successful,[91] "there will always be some children—the orphans, the abandoned, and the severely abused—for whom substitute care outside of their homes will be necessary."[92] Coalitions for preventive services and permanency planning have not addressed the issue of maltreatment of foster children, perhaps because they would not be the direct beneficiaries of such reform. Without an ally who will materially or politically gain from the change, the plea for protection of those children who will end up in foster care will remain no more than a soft whisper. Whether the courts should fill this void must now be considered.

D. The Call for Judicial Involvement

Courts would provide a great benefit to society were they to become involved in foster care reform both by preventing the indignity of abuse and by protecting foster children's fu-

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[90] Maluccio & Fein, *Permanency Planning: A Redefinition*, 62 Child Welfare 195, 197 (1983). The call for permanency planning from the legal and social work communities has been loud and persistent. *See, e.g.*, Christoff, *Children in Limbo In Ohio: Permanency Planning and the State of the Law*, 16 Cap. U.L. Rev. 1 (1986) and sources cited therein; New York Task Force on Permanency Planning for Children in Foster Care, Permanency Planning: A Shared Responsibility (March 1986); Mnookin, *In Whose Best Interest?*, *supra* note 6, at 633–35.

[91] Advocates who have called for child welfare reforms in the areas of preventive services and permanency planning have begun to obtain at least some legislative results. In 1980, Congress passed the Adoption Assistance and Child Welfare Reform Act of 1980, Pub. L. No. 96–272, 94 Stat. 500 (provides financial incentives to encourage states to strengthen preventive services and permanency planning). *See* 42 U.S.C. § 675. For a comprehensive analysis of the provisions of the Act, see Allen, Golubock & Olson, *A Guide to The Adoption Assistance and Child Welfare Reform Act of 1980* in Foster Children in the Courts 577 (M. Hardin ed. 1983).

Legislative reform focusing on the promotion of a permanent family bond has also taken place at the state level. In 1976, California passed the Family Protection Act, S.B. 30, 1977 Cal. Legis. Serv. 977 (West), and in 1979, New York passed the Child Welfare Reform Act of 1979, 1979 N.Y. Laws 610, 611. *See* A. English, Foster Care Reform, Strategies for Legal Services Advocates to Reduce the Need for Foster Care and Improve the Foster Care System 83–97 (1981).

[92] A. English, *supra* note 91, at 4.

tures.[93] Yet, federal courts are understandably reluctant to become involved[94] in protracted endeavors, such as would be required in large scale institutional reform of this kind, unless they perceive that the need to do so is great. Some have argued that federal courts should not intervene in such matters unless intervention is necessary to protect the rights of "discrete and insular" minorities[95] who lack access to the normal political process.[96] As one commentator put it: "The judicial obligation to enforce the rights of the politically powerless is at the heart of the American political system."[97] Expressed differently, federal judicial intervention is appropriate when important constitutional rights are implicated, when the institution itself has proven resistant to change through more traditional legislative or executive means, and where the change requested is "critical to the quality of American life."[98] The case for the exercise of judicial discretion to ensure protection of foster children is compelling under any of these formulations.

As discussed below, the right to protection occupies a critical niche in our system of government; it has historic roots in our philosophical conception of the fundamental role and justification for government's existence.[99] If any group in society is denied the right to protection, it is difficult to imagine how it can enjoy any other right. Yet, foster children are powerless to obtain the right for themselves.[100] Involvement by the federal

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[93] T. Festinger, *supra* note 6, at 262–64. *See also* Besharov, *The Misuse of Foster Care*, *supra* note 8, at 218–19, (quoting M. Wald, Protecting Abused/Neglected Children: A Comparison of Home and Foster Care Placement 12–13 (1985)).

[94] The power of a federal court to grant affirmative relief is discretionary. Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 Harv. C.R.-C.L. L. Rev. 367, 385–86 (1977); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193 (1978). *See generally* D. Dobbs, Law of Remedies 108–11 (1973).

[95] The term "discrete and insular minorities" was first used by Chief Justice Stone in his now famous footnote in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), to describe those groups that most require judicial protection in order to enjoy their constitutional rights. *See also* J. Ely, Democracy and Distrust 73–179 (1980); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L.J. 1287 (1982).

[96] *See* J. Ely, *supra* note 95, at 135–36; R. Mnookin, In The Interest, *supra* note 8, at 37–41; Swygert, *In Defense of Judicial Activism*, 16 Val. U.L. Rev. 439, 443 (1982).

[97] Comment, *supra* note 94, at 386.

[98] Zeigler, *supra* note 13, at 39.

[99] *See infra* notes 106–110 and accompanying text for a discussion of the historic roots of the right to safety.

[100] Professor Mnookin has observed that children as a group may not qualify for

courts in advancing the right to protection is thus consistent with the notion of the limited intervention of the federal judiciary.

An additional motivation justifying judicial involvement in foster care reform is the long history of solicitude to the needs of children. Children, because of their obvious dependency, need special protection.[101] As long ago as 1944,[102] the Supreme Court recognized the state's strong interest in safeguarding children from abuse.[103] This interest is reflected in a virtually unbroken line of Supreme Court opinions upholding state actions that might otherwise have been unconstitutional, but that were saved by the need to protect children.[104]

Having examined the nature and scope of the problem, the foster care system's resistance to change through the legislature or the executive, and the consistency of judicial involvement in foster care reform with principles of judicial intervention, the next section examines which substantive rights justify judicial involvement.

II. The Constitutional Right to Safety

In 1982, a unanimous court in *Youngberg v. Romeo* held that the state owes an "unquestioned duty" to provide reasonable safety for all residents of a state institution for the mentally

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special protection as a discrete and insular minority because of the "multitude of potential and part-time spokesmen [sic] for children." Mnookin, In The Interest, *supra* note 8, at 41. Whatever may be said of children generally, however, foster children are a discrete and insular minority, especially where a claim for which they have no obvious allies is concerned.

[101] Mnookin, In the Interest, *supra* note 8, at 31.

[102] Prince v. Massachusetts, 321 U.S. 158 (1944).

[103] *Id.* at 168–69 (upholding law that prohibited children from selling magazines in a public place).

[104] New York v. Ferber, 458 U.S. 747 (1982) (upholding New York law prohibiting knowing promotion of sexual performance by children even if it is not obscene); H.L. v. Matheson, 450 U.S. 398 (1981) (upholding notification and consultation barriers to the exercise of the right to an abortion for an immature minor which would be unconstitutional if applied to an adult); Ginsberg v. New York, 390 U.S. 629, *reh'g denied*, 391 U.S. 971 (1968) (upholding criminal statute prohibiting sale to minors of material that would not be obscene if sold to adults).

Taken together, these decisions establish a right unique to children to be protected from "endangering surroundings and influences." S. Davis & M. Schwartz, Children's Rights and the Law 73 (1987).

retarded.[105] Unquestioned though the right may be, recognition of its existence developed quite slowly and it continues to lack clear standards defining its scope. Nevertheless, the right to safety has deep roots in American legal and philosophical thought. This section briefly traces the origin of the right, its development in lower federal courts and in the Supreme Court, and provides a brief comment on the standards that courts have used to determine whether or not the right has been violated, and concludes with a discussion of the application of the right to foster children.

A. The Development of the Right to Safety

1. The Origin of the Right

The right to safety for the institutionalized invoked by Justice Powell in *Youngberg* can be traced as far back as Blackstone, Cooke and Hobbes—progenitors of modern American law—all of whom recognized that the first function of government is protection of the governed. In *Leviathan*, Hobbes' seminal seventeenth century work, Hobbes asserted that government's primary purpose and responsibility is protection. This is so, he wrote, because men live under governments for their own preservation.[106] In *Calvin's Case*,[107] Cooke, Chief Justice of the King's Bench, explained the basic terms of the modern social compact: in exchange for "true and faithful ligeance" the government undertakes the duty of protection.[108] And Blackstone ranked the "right to personal security" as the primary right each citizen possesses.[109] The right to personal security "consists in . . . uninterrupted enjoyment of . . . life . . . limbs . . . body . . . health, and . . . reputation."[110]

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[105] 457 U.S. 307, 324 (1982). While there were two concurrences in addition to the majority opinion in *Youngberg*, the Court did not divide on this issue. *See infra* text accompanying note 145.

[106] T. Hobbes, Leviathan (1651).

[107] [1608] 4 Co. Rep. 1 (K.B.).

[108] *Id.* at 4b.

[109] 1 W. Blackstone, Commentaries 129.

[110] *Id.* at 300. This conception of the centrality of the right of protection has not changed in modern times. In 1918, Justice Oliver Wendell Holmes authored an article identifying four conditions that make up the "necessary elements in any society." O.W.

2. *The Early Prison Cases*

Despite its deep jurisprudential underpinnings, the right to safety has been recognized only recently as an enforceable constitutional right of the institutionalized. Although the Sixth Circuit suggested that the government had a duty to protect prisoners from assault or injury,[111] as late as 1944, the hands-off doctrine effectively precluded litigation to enforce this right.[112] The hands-off doctrine was a judicially created concept that commanded federal courts to abstain from examining prison matters,[113] as prisons were considered the exclusive domain of the Congress and of the state governments.[114]

By the late 1960's and early 1970's, however, federal courts, responding to the Supreme Court's receptive approach to civil rights cases, slowly began to lower the barrier to judicial review of institutional conditions. During that time period, several courts held that inmates have an eighth amendment right to be protected from harm.[115] The eighth amendment's "evolving stan-

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Holmes, *Natural Law*, in Collected Legal Papers 310, 312 (1920). The most important of these, in Holmes' view, was "some protection for the person." *Id.* In Miranda v. Arizona, 384 U.S. 436 (1966), Justice White stated that "[t]he most basic function of any government is to provide for the security of the individual and of his property." *Id.* at 539 (White, J., dissenting). In a report to the American Bar Association in 1981, Chief Justice Warren Burger identified "protection and security" as a "theme [that] runs throughout all history." W. Burger, Annual Report to the American Bar Association 2 (Feb. 8, 1981) *reprinted in* 67 A.B.A. J. 290 (1981). For a thorough account of the historic underpinnings of the right to safety and its roots, see Willing, *Protection by Law Enforcement: The Emerging Constitutional Right*, 35 Rutgers L. Rev. 1, 22–54 (1982).

[111] Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).

[112] The hands-off doctrine was invoked even where inmates' safety was at stake. *Ex parte* Pickens, 101 F. Supp. 285, 287, 290 (D. Alaska 1951) (The complaint alleged that the facility was overcrowded and unsanitary, and that given the locked exits, a coal stove presented an inescapable situation in the event of a fire. The court considered conditions a "fabulous obscenity" but dismissed the complaint.).

Two recent cases dealing with the right to safety in penal facilities may foreshadow a return to considering such complaints non-justiciable. *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986), discussed *infra* note 153.

[113] Comment, *supra* note 10, at 507. The pull of the doctrine was so strong that even claims of racial discrimination were not cognizable. *See* United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953). *See also* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962).

[114] *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), *cert. denied*, 348 U.S. 859 (1954).

[115] *See* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (use of a strap to beat prisoners as a disciplinary measure violated the eighth amendment's proscription against cruel and unusual punishment). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark.

dards of decency" were violated when prison officials failed to manage their system in a way which minimized the high risk of violence in the prison. The standards for application under the eighth amendment varied: some courts based relief from unsafe prison conditions on a visceral "shocking to the conscience" test;[116] others based their interpretations on the observation that the state must exercise ordinary care in the custody of prisoners.[117]

In 1974, Justice White sounded the Supreme Court's death knell to the "hands-off" doctrine in a single line: "[T]here is no Iron Curtain between the Constitution and the prisons of this country."[118] With the demise of the "hands-off" doctrine, lower courts were free to consider right-to-safety cases without jurisdictional hindrance. As time passed, lower courts established that the right to safety followed an inmate into prison. Those decisions explain that the right protects inmates not only from deliberate abuse by their keepers, but also from conditions which make inmates open to violence by their fellow inmates.[119]

1970), Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (standards for adjudicating the right to safety in a prison context: "(1) whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm.").

[116] Meredith v. Arizona, 523 F.2d 481, 483 (9th Cir. 1975); Holt v. Sarver, 309 F. Supp. 362, 380 (E.D. Ark. 1970).

[117] Muniz v. United States, 280 F. Supp. 542, 546 (S.D.N.Y. 1968). This theory is derived from common law doctrine that places a duty upon prison officials to provide for the protection of prisoners who are placed in their charge. *See* Restatement (Second) of Torts § 20 (1965); W. Prosser & W. Keeton, Torts 1048 (5th ed. 1984). In Estelle v. Gamble, 429 U.S. 97 (1976), the Court similarly found that prison authorities have a constitutional duty to provide prisoners with medical care: "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" *Id.* at 104, (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Several lower federal courts have utilized this theory as a basis for affording prisoners relief from rampant prison violence. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Grubbs v. Bradley, 552 F. Supp. 1052, 1122 (M.D. Tenn. 1982).

[118] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1973).

[119] *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982); Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

Extensive relief has been granted, effectuating that right. Among the types of relief ordered are (a) increases in staff, *see, e.g.*, Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 650 F.2d 555 (5th Cir. 1981), *aff'd in part and rev'd in part*, 666 F.2d 854 (5th Cir. 1981), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982); (b) improvements to staff training programs, *see, e.g.*, Grubbs v. Bradley, 552 F. Supp. 1052, 1128 (M.D. Tenn. 1982); and (c) classification of inmates by dangerousness, *see, e.g.*, Jones v.

3. The Right in Other Institutional Settings

While the right to safety was first articulated in the context of prisons, and has been most fully developed there, it has been implemented in other institutional settings as well. In 1973, a federal district court held that a class of residents of the Willowbrook State School for the Mentally Retarded had the right "to reasonable protection from harm."[120] The court distinguished this right to safety from a right to treatment, which it declined to recognize. Courts since have followed the Willowbrook decision, applying it in other institutionalized settings as well. It is now firmly established that the mentally ill and retarded,[121] residents of state juvenile training schools,[122] suspects in police custody[123] and pretrial detainees[124] have a constitutional right to protection.

Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981); Grubbs v. Bradley, 552 F. Supp. 1052, 1060 (M.D. Tenn. 1982).

In some cases, in order to ensure the right to protection, courts have ordered modifications to the structure of an institution or, if necessary, that the institution, or some part of it, be closed. *See, e.g.*, Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978); Martino v. Carey, 563 F. Supp. 984 (D. Or. 1983) (court ordered progress reports on renovations and their impact on violative conditions); Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983).

See also Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 Drake L. Rev. 101 (1985–86); Plotkin, *Serving Justice: Prisoners' Rights to be Free From Physical Assault*, 23 Clev. St. L. Rev. 387 (1974); Note, *Inmate Assaults and Section 1983 Damage Claims*, 54 Chi.-Kent L. Rev. 596 (1977).

[120] New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 758 (E.D.N.Y. 1973). *See* New York Association for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (consent decree encompassing protection from harm caused by physical injury as well as from conditions causing the deterioration, or preventing the development, of an individual's capacities), *modification denied*, 551 F. Supp. 1165 (E.D.N.Y. 1982), *aff'd in part and rev'd in part*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

See also D. Rothman & S. Rothman, The Willowbrook Wars (1984).

[121] *See, e.g.*, Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984); Association for Retarded Citizens v. Olson, 561 F. Supp. 473 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 4th Div. 1974), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977).

[122] Santana v. Collazo, 533 F. Supp. 966 (D.P.R. 1982), *modified*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); Pena v. New York State Div. for Youth, 419 F. Supp. 203 (S.D.N.Y. 1976), *aff'd*, 708 F.2d 877 (2d Cir. 1983); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

[123] City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245 (1983).

[124] Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981).

As in prison cases, the right is most frequently implemented by courts in class action suits seeking injunctive relief, rather than in individual suits for damages where the plaintiff's claim often founders on one or more of the various immunity doctrines.[125] The injunctive relief that has been granted has provided significant reforms in several institutional contexts. Courts have ordered institutions for the mentally retarded or ill to make structural improvements,[126] decrease their population,[127] hire more staff,[128] institute staff training programs[129] and provide training of residents.[130] In pretrial detention decisions, courts have been willing to close jails where deemed necessary to ensure safety.[131]

Since the eighth amendment does not apply outside the context of prison,[132] courts have relied on different theories to support the right to safety for those in non-penal institutions. The due process clause of the fourteenth amendment is most frequently invoked. For confinement to meet constitutional stan-

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[125] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (The Court rejected the previous standard which permitted a finding of liability based on proof that the official acted in bad faith. Instead, the Court held that the individual must prove that her clearly established constitutional right was violated by the defendant). Given the uncertainty as to the standard governing the right to safety, see *infra* notes 149–153 and accompanying text, this is a difficult burden indeed. Harper v. Cserr, 544 F.2d 1121, 1124 (1st Cir. 1976). *But see* Gann v. Schramm, 606 F. Supp. 1442 (D. Del. 1985) (official immunity denied where officials at state mental hospital violated the well-known constitutional right to a safe environment for those involuntarily committed to mental institutions).

[126] Rone v. Fireman, 473 F. Supp. 92, 132 (N.D. Ohio 1979) (physical improvements in the facility to provide an appropriate environment for the mentally retarded).

[127] Woe v. Cuomo, 638 F. Supp. 1506, 1517 (E.D.N.Y. 1986) (enjoining additional patients from being admitted to the Bronx Psychiatric Center); New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715, 717 (E.D.N.Y. 1975) (requiring sharp reduction in the population of Willowbrook to a capacity of 250 beds or less).

[128] *See, e.g.*, New York State Association For Retarded Children v. Rockefeller 357 F. Supp. 752, 769 (E.D.N.Y. 1973).

[129] *Id.* at 768 (consent decree increased staffing and training provision). *See also* Rone v. Fireman, 473 F. Supp. 92, 133–34 (N.D. Ohio 1979).

[130] In the Willowbrook case, the consent decree mandated individually designed instruction for residents. New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 31 (2d Cir. 1979) (programs to include education, physical therapy, speech pathology and audiology services). *See also* Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 494 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983).

[131] *See, e.g.*, Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 689–90 (D. Mass. 1973) (Charles Street Jail deemed unfit by failing to meet a standard of "basic humanity toward men" and ordered replaced).

[132] Ingraham v. Wright, 430 U.S. 651, 664 (1977) (the eighth amendment was "designed to protect those convicted of crimes").

dards, the conditions of confinement must bear some relationship to its purpose.[133] If, as in the case of the mentally ill, confinement is to treat and protect, the deprivation of liberty lacks constitutional support when it fails to advance those purposes.[134]

4. The Supreme Court's Treatment of the Right to Safety

Although the Supreme Court has not decided a prison case in which it awarded relief which focused directly on the right to safety,[135] it has endorsed lower court orders that provided affirmative relief on that ground. In *Bell v. Wolfish*[136] and *Rhodes v. Chapman*,[137] the Court approved a number of lower federal court opinions that granted relief from "deplorable" conditions in some of the country's oldest and worst prisons and jails.[138] Several of these lower court orders had implemented the right to safety.[139]

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[133] Some states base the institutionalization on the *parens patriae* theory. *Parens patriae* refers to the inherent power of a state to "provid[e] care to its citizens who are unable . . . to care for themselves." Addington v. Texas, 441 U.S. 418, 426 (1979). *See, e.g.*, Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977) (The court cited approvingly the language of the doctrine, but did not explicitly mention *parens patriae*). For a history of the *parens patriae* theory, see Custer, *The Origins of the Doctrine of* Parens Patriae, 27 Emory L.J. 195 (1978); Rendleman, Parens Patriae*: From Chancery to the Juvenile Court*, 23 S.C.L. Rev. 205 (1971). The Supreme Court has imposed constitutional limits on the doctrine by holding that when the state exercises this power it must take steps to ensure that the exercise of the state's power bears some relationship to its purpose. Jackson v. Indiana, 406 U.S. 715 (1972).

[134] Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd on other grounds*, 451 U.S. 1 (1980).

[135] The Supreme Court has denied relief in two individual damage claims involving the right to safety in prisons and jails. *See infra* note 153.

[136] 441 U.S. 520 (1978).

[137] 452 U.S. 337 (1981).

[138] *Bell*, 441 U.S. at 539 n.20; *Rhodes*, 452 U.S. at 345 n.11, 346–47, 352 n.17.

[139] The *Rhodes* majority cited with approval the following lower court decisions that had granted relief which included implementation of the right to safety in prison: Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (per curiam).

In *Bell*, the majority, without specification, approved of lower court decisions which "have condemned . . . sordid aspects of our prison systems." 441 U.S. at 562. *See also* Hudson v. Palmer, 468 U.S. 517, 526–27 (1984); Hutto v. Finney, 437 U.S. 678, 681 (1978); Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970).

In 1982 the Supreme Court explicitly recognized the right to safety in the context of institutionalized mentally retarded persons. *Youngberg v. Romeo*[140] was a damage action brought on behalf of a thirty-three-year-old retarded man with the mental capacity of an eighteen-month-old child. Romeo, confined involuntarily to the Pennhurst State Hospital, was "injured on numerous occasions, both by his own violence and by the reactions of other [inmates] to him."[141] Romeo's mother brought suit on his behalf against Pennhurst's director and two supervisors, alleging at least sixty-three incidents of violence against him. In an amended complaint, Romeo sought compensation for the failure to be protected and provided "treatment or programs for his mental retardation."[142]

Following a jury verdict for the defendants, Romeo appealed to the Third Circuit, complaining that the trial court's charge defined his rights as stemming only from the eighth amendment. The trial court, drawing on the Supreme Court's eighth amendment cases, had charged that liability would not attach for Romeo's injuries unless the defendants had been "deliberately indifferent" to his needs.[143] The Third Circuit reversed, holding that Romeo's right to safety was found in the fourteenth amendment, not the eighth, and that only "substantial necessity" could justify abridging it. The court also held that the right was broad enough to encompass Romeo's claim for treatment.[144]

Although the Supreme Court vacated and remanded the decision by the Third Circuit, the majority nevertheless held that the right to safety for the institutionalized was an "unquestioned duty" of the state and was one of the "essentials of care that the state must provide."[145] Justice Powell observed: "[W]hen a person is institutionalized—and wholly dependent on the state . . . [there is] a duty to provide certain services."[146] The majority included the right to safety within the "historic

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[140] 457 U.S. 307 (1982).
[141] *Id.* at 310.
[142] *Id.* at 311.
[143] *Id.* at 312 n.11 (citing Romeo v. Youngberg, 644 F.2d 147, 155, 160, 169 (3d Cir. 1980)).
[144] 644 F.2d 147, 156, 160, 164.
[145] 457 U.S. at 324.
[146] *Id.* at 317.

liberty interests" essential to ensure a person's bodily integrity from unnecessary invasion by the state, thus qualifying the right to safety for substantive protection under the due process clause.[147] The right survives involuntary commitment, and since the mentally retarded, unlike convicts, have not been guilty of any wrongdoing, the Court intimated that their rights may be even greater than those of prisoners.[148]

While the Court had little difficulty identifying the right to safety as a substantive due process entitlement of the involuntarily confined, it struggled to articulate a clear standard for determining when the right had been violated. The Court rejected the "deliberate indifference" standard used in prison right-to-safety cases and by the district court in *Youngberg*.[149] On the other hand, the Court rejected the Third Circuit's "substantial necessity" test as well.[150] It is not entirely clear what test the Court adopted in its place. Justice Powell stated that courts should balance "the liberty [interest] of the individual" in safety against "the demands of an organized society."[151] Restrictions on liberty that are "reasonably related to legitimate government objectives" are not unconstitutional even if they result in a "lack of absolute safety."[152] Just what "relevant state interests" Justice Powell had in mind for this balance are not readily apparent from his opinion.[153] Despite the uncertainty

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[147] *Id.* at 315–16.
[148] *Id.* at 321–22.
[149] 457 U.S. at 321–22.
[150] *Id.* at 322.
[151] *Id.* at 310.
[152] *Id.* at 319–20.
[153] The Court postulated that the denial of training might violate Romeo's right to safety if training were necessary to relieve his aggressive behaviors. The standard the Court used to make the determination of the amount of training required is whatever "an appropriate professional would consider reasonable to ensure his safety." *Id.* at 324. The Court thus attached a "presumption of correctness" to the judgment of the "qualified" persons in charge of Romeo's care.

It is by no means clear how such a standard applies in a typical class action right-to-safety case that arises from a lack of proper supervision, staff, or training, or from the failure to classify individuals by dangerousness or to erect more structures for safe confinement. *See supra* notes 126–30 and accompanying text. These conditions occur because of a lack of funds to operate an adequate facility and a generalized lack of concern for the welfare of the inmates. Since such conditions normally are not the product of distinct professional judgments concerning the treatment to be given a specific individual, it is not easy to determine from the Court's opinion the standard a court should apply in a typical right-to-safety case.

In two recent decisions, Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986), the Court held that negligent failure to protect an inmate

about the appropriate standard, the Court's opinion leaves little doubt that a constitutional right to safety is included in the notion of substantive due process, which is applicable not only to prisoners but also to retarded persons who depend upon the state for the necessities of life, and who are, supposedly, confined for their own welfare. Is there any inherent reason for this right to be limited to those dependent on the state by reason of their institutionalization? The next subsection briefly explores that question.

5. The Development of the Right to Safety Beyond Institutional Walls

Inspired perhaps by *Youngberg*, the lower federal courts have recently expanded the boundaries of the right to safety beyond institutional walls. In *Jensen v. Conrad*,[154] for example, the Fourth Circuit, in dicta, noted that the state owes a constitutional duty to protect a child who had been reported to state child protection workers as abused. There arose a duty to take steps to prevent further harm from occurring, the court held, from the moment the state became aware of the child's plight.[155]

The Seventh Circuit has also recognized this right to safety.[156] That court had held that the Constitution protects persons who, while not in state custody, are nevertheless placed by the state in a position of danger and then left defenseless. When the state, by its actions, throws a person in such a "snake-pit," the fourteenth amendment's guarantee of due process is triggered.[157] *White v. Rochford*[158] is a classic example of this idea. On a cold day the Chicago police stopped a car driven by a man transporting his two young nephews and cousin. The uncle was arrested and taken by police escort to the station for processing, but the car and the children were left on the shoulder

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from harm while incarcerated does not violate the due process clause. Curiously, neither the *Daniels* nor *Davidson* majority cited or addressed *Youngberg*.

[154] 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

[155] 747 F.2d at 194.

[156] Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

[157] *Bowers*, 686 F.2d at 618.

[158] 592 F.2d 381 (7th Cir. 1979).

of a busy eight-lane expressway despite the uncle's pleas. After exposure to the cold, the children decided to flee. Luckily, they escaped with their lives. The two older children were traumatized, but not physically injured. The five-year-old, an asthmatic, was hospitalized for one week following the incident. The children sued, seeking damages for their emotional and physical injuries. The Seventh Circuit held that these facts, if true, violated the right to safety even though the children were not in state custody: "[Leaving] helpless minor children subject to inclement weather and great physical damage without apparent justification . . . [is] a patently clear intrusion upon personal integrity."[159] From the opinions it is not unreasonable to expect that the Supreme Court would recognize some constitutional right to safety for those not in state custody, but the question is not free from doubt and it is by no means clear what the parameters of that right would be.[160]

B. The Lack of Development of the Right to Safety in the Foster Care Field

Although the right to safety is well-established for other persons in state custody such as prisoners, mentally ill and retarded persons, foster children have not yet received much benefit from the right. *G.L. v. Zumwalt*[161] is the only case in which final relief was provided to a class of foster children predicated on a constitutional right-to-safety theory,[162] and that case has limited precedential value because it was a consent

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[159] *Id.* at 384.

[160] Several recent Circuit Court decisions further complicate this question. *Compare* DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298 (7th Cir. 1987) (reckless failure by welfare authorities to protect a child from a parent's physical abuse did not violate the Constitution) *and* Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986) (no liability imposed on state for murder committed by inmate furloughed from the House of Corrections who independently conceived of and executed the murder) *and* Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) (swimmer suffered no constitutional deprivation due to insufficient numbers of lifeguards or inadequately trained lifeguards) *with* Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1265 (1986) ("When a municipality puts an individual in a position of danger from private persons and then fails to protect that individual, it cannot be heard to say that its role was merely a passive one.").

[161] 564 F. Supp. 1030 (W.D. Mo. 1983).

[162] *See supra* note 11 and accompanying text.

decree issued prior to trial.[163] There is only one case in which damages were awarded to a foster child based on the right to safety.[164] In addition, there are no reported decisions granting final injunctive relief to protect foster children from abuse and neglect in foster home placements. The limited case law suggests a judicial reluctance to accept the notion that foster children should be beneficiaries of this right.

Taylor v. Ledbetter[165] illustrates this trend. On behalf of a two-year-old girl, plaintiff sued the Gwinnett County, Georgia Department of Family and Children's Services for severe injuries that occurred while the child was in foster care. Plaintiff alleged that the child had been beaten by her foster mother and then given an overdose of unnecessary medication which caused her to become permanently comatose. The suit claimed that defendants had violated the child's constitutional right to safety by failing to investigate adequately the foster home before placing the child, by failing to supervise the foster home, and by failing to provide complete medical information to the child's physicians.[166]

The original panel in *Taylor* affirmed the district court's dismissal of the complaint for failure to state a claim upon which relief could be granted. The court characterized plaintiff's arguments as "reflect[ing] a misunderstanding of the role of federal courts."[167] Although the injuries to the child were obviously "serious," the court expressed its belief that "[f]ederal courts should exercise great caution in becoming involved in the decisions of state and local officials charged with the custody and welfare of children."[168] Thus, the court articulated what

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[163] Generally, a consent judgment is binding only on the parties to the action. Green v. International Business Mach. Corp., 37 Ill. App. 3d 124, 345 N.E.2d 807 (1976). The Supreme Court, therefore, recently indicated that the provisions of a decree, even in a civil rights case, need not be fashioned strictly in accordance with governing law. Local 93, International Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3077 (1986). *See also* Comment, Local Number 93, International Association of Firefighters v. City of Cleveland*: A Consent Decree Is Not an Adjudicated Order for Purposes of Title VII*, 20 Akron L. Rev. 547 (1987).

[164] *See supra* note 11 and *infra* notes 175–180 and accompanying text.

[165] 791 F.2d 881 (11th Cir. 1986), *aff'd in part, rev'd on rehearing*, 818 F.2d 791 (11th Cir. 1987) (en banc).

[166] 791 F.2d at 882.

[167] *Id.* at 883.

[168] *Id.* at 884. The opinion made no mention of *Youngberg*. Indeed, it referred to

amounted to another federal abstention doctrine. Although the Eleventh Circuit, sitting en banc, recently reversed the panel decision and held that the complaint should not have been dismissed, it left for further proceedings whether or not the child's claim "constitutes a liberty interest protected by the due process clause."[169]

Only in the Second Circuit has the right to safety been squarely recognized and enforced in the foster care context. In *Brooks v. Richardson*, the first reported case to discuss this issue, a district judge in the Southern District of New York refused to dismiss the pro se complaint of a mother who maintained that her child had been abused and neglected for over five years while in foster care.[170] The claim survived a motion to dismiss because "[a] child who is in the custody of the state and placed in foster care has a constitutional right to at least humane custodial care."[171] The court noted that the purpose of foster care is to protect the child from harm in his permanent

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the "deliberate indifference" standard which the Supreme Court in *Youngberg* specifically rejected as insufficient for persons not convicted of crime. 457 U.S. at 312 n.11. In Atchley v. County of DuPage, 638 F. Supp. 1237 (N.D. Ill. 1986), and Gibson v. Merced County Dep't of Human Resources, 799 F.2d 582 (9th Cir. 1986), two other right-to-safety claims were rejected. In *Atchley*, the claim was rejected because the defendant was responsible for committing the child to foster care but did not have responsibility to supervise the foster home in which the injury occurred. 638 F. Supp. at 1240. In *Gibson*, the court assumed, without deciding, that a foster child has a constitutionally protected right to be free from harm. 799 F.2d at 589. However, the court found no denial of the right since the defendant's act of removing the child from the home of the foster parents, without their consent, appeared reasonable.

[169] Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (en banc). In addition to the *en banc* opinion in *Taylor*, two recently decided cases granting preliminary relief to foster children indicate that the pendulum may now be swinging in the direction of recognition of the constitutional rights of children in foster care to safety. In Doe v. New York City Dep't of Social Services, 86 Civ. 4011 (MJL) (S.D.N.Y. Sept. 24, 1987) (granting motion for preliminary injunction), the court determined that the failure to obtain foster home placements immediately for children taken into state custody and the housing of these children overnight in social services offices violated plaintiffs' constitutional rights. Slip op. at 101. In L.J. v. Massinga, No. JH-84-4409 (D. Md. July 27, 1987) (granting motion for preliminary injunction), the court held that the plaintiffs, children in the Baltimore foster care system, were likely to prevail on their claims that they had a right to safety under Title IV-B and IV-E of the Social Security Act and the fourteenth amendment. Slip op. at 27–30. Pending final determination, the court awarded relief requiring the defendants to monitor foster homes, to provide appropriate medical care to foster children, to refer complaints of mistreatment for investigation, and to submit a plan to the court for the review of the continued licensing of any foster home in which a child had been maltreated. *Id.* at 53–54.

[170] Brooks v. Richardson, 478 F. Supp. 793 (S.D.N.Y. 1979).

[171] *Id.* at 795.

home. Given this purpose, the court stressed that it would be "ludicrous if the state, through its agents, could perpetrate the same evil"[172] that the placement in foster care was designed to prevent.

It was not until the Second Circuit's decisions in *Doe v. New York City Department of Social Services*[173] however, that a court actually awarded damages in a disputed case involving the right to safety. A foster child who had been beaten and sexually abused by her foster father sued, claiming that her plight had been or should have been known to the foster care agency responsible for her care.[174] In *Doe I*, the circuit court reversed a jury verdict for the defendants on the grounds that the district court had incorrectly instructed the jury on the plaintiff's constitutional rights.[175] In *Doe II*,[176] the court again reversed the trial court, this time for improperly setting aside a $225,000 jury verdict.[177] Although it found for plaintiff, the *Doe* court did not identify the source of the constitutional right it invoked and it did not discuss the rationale for finding that the right applied in a foster care setting in either of its two opinions. The Court of Appeals referred to attributes of foster care that it intimated might render the application of right-to-protection concepts developed in the prison field unduly burdensome to foster care administrators. The court distinguished foster care from other institutions on several grounds.

First, other institutions have "closer and firmer lines of authority running from superiors [to] subordinates . . . than

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[172] *Id.* at 796.

[173] 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) (*Doe I*) and 709 F.2d 782, *cert. denied*, 464 U.S. 844 (1983) (*Doe II*).

[174] For a graphic description of the facts, see Doe v. New York City Dep't of Social Services, 649 F.2d 134, 137–40 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

[175] The *Doe I* court held that the lower court "erroneously conveyed the impression that deliberate indifference and negligence were mutually exclusive[,]" *id.* at 143, when in reality, repeated acts of negligence could be perceived as "evidence of indifference." *Id.* at 142. The Second Circuit also attached great significance to the defendants' failure to comply with their statutory duty to report allegations of abuse for investigation. This failure, the court held, could constitute deliberate indifference to plaintiff's welfare. *Id.*

[176] 709 F.2d 782, *cert. denied*, 464 U.S. 844 (1983).

[177] On remand, the jury found for plaintiff, but the same district judge set aside the verdict leading to the second appeal. Again, the Court of Appeals reversed, this time holding that there was sufficient evidence "of deliberate indifference respecting one very significant aspect of her welfare, the protection from abuse" to sustain the verdict. *Id.* at 790–92.

[those that] exist in the foster care context, particularly in respect of [sic] the relationship between agency personnel and the foster parent."[178] In addition, the court asserted that information is not as easily gained about the treatment of foster care children as it can be in other settings since there are only "occasional visits" to foster homes by agency social workers.[179] Finally, the court attached significance to the relationship between foster parents and foster care agencies which the court felt was less "unequivocally hierarchical than is the case with prison guards and a warden."[180]

Despite these supposed differences, the *Doe I* court applied the deliberate indifference standard adopted by the Supreme Court for eighth amendment prison claims. The court apparently did not feel the need to articulate a standard that would accord foster children greater protection than prisoners. Indeed, the weight of the court's logic cuts in the opposite direction.

A curious kind of constitutional vacuum, therefore, seems to exist with respect to foster children. Aside from a single and largely unexplained damage award, and a solitary consent decree, foster children remain the sole identifiable group held in the grip of the state still not accorded the benefits of the fundamental constitutional protection of safety.[181] Several factors may account for this strange state of affairs.

First, as even the *Doe* court suggested, foster care is seen as a particularly benevolent service run by the state with the best of intentions.[182] Prisons, jails, mental institutions, and homes for the retarded have long been regarded as dumping grounds for persons who are despised by society.[183] It is relatively easy for the judicial mind, once freed from the shackles of the hands-off doctrine, to imagine abuses taking place in these

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[178] *Doe I*, 649 F.2d at 142.

[179] *Id.*

[180] *Id.*

[181] *See supra* notes 119, 121–24, 164 and accompanying text.

[182] The *Doe* court observed that where the child is placed in a foster home, there is a tendency "to respect the foster family's autonomy and integrity [and to] . . . minimize intrusiveness, given its goals of approximating a normal family environment for foster children." 649 F.2d at 142.

[183] *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1299 (E.D. Pa. 1977) (quoting W. Wolfensberger, The Origin and Nature of Our Institutional Models 3 (1975)) *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd on other grounds*, 451 U.S. 1 (1980).

dark places; the same is not true for foster care. When children are taken from their parents out of an expressed concern for their welfare, and, following removal, are placed in a seemingly normal home for care by civilians who have volunteered for the job, one is not automatically concerned. The supervision of the placement is done not by wardens or jailers, but by social workers, the very epitome of a helping profession.[184] It is hard to grasp the idea that here, too, abuses can occur, and that when they do they are largely unchecked by the state.

Second, flowing from the idea that only good intentions are at work in the foster care field, is the corollary notion that decisions with regard to foster care require a type of decision-making skill which is not appropriately the subject of judicial review. After all, the job of a foster care agency involves nothing less than child rearing, a discipline whose complexity has generated scores of theories and occupied the attention of numerous scholars. It may have been this thought that motivated the Supreme Court in a case involving the due process rights of a foster child and a foster parent to remain together, to declare that foster care administration involves "issues of unusual delicacy . . . where professional judgments regarding desirable procedures are constantly and rapidly changing."[185]

Even in *Doe*, these factors surfaced and influenced the court's decision. The court stated that given the goal of establishing a normal home for the child the court should "minimize intrusiveness" into the foster family.[186] The Ninth Circuit exercised a similar caution when it proclaimed a "need for flexibility [in foster care] in order to accomplish what is best for [the] child."[187]

Third, in addition to the courts' reluctance to entertain right to safety cases, litigators do not seem to press claims to safety in foster care with the same vigor that they exert in the prison

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[184] *See* Wyman v. James, 400 U.S. 309, 322–23 (1971). H. Ginott, Between Parent and Child 215–16 (1965).

[185] Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 855 (1977). There is a parallel between this reasoning and underlying concepts of judicial and prosecutorial immunity, such as that expressed by the Court in Imbler v. Pachtman, 424 U.S. 409 (1976), and Stump v. Sparkman, 435 U.S. 349 (1978).

[186] *Doe I*, 649 F.2d at 142.

[187] *Gibson*, 799 F.2d at 589.

and mental health fields. Their hesitancy may be accounted for by the fact that there are fewer public interest lawyers working in the foster care field than in the other fields where this issue has been litigated,[188] and the few that are in the field have primarily chosen to concentrate on other pressing issues which foster care administration raises, including questions of permanency planning and preventive services, often to the exclusion of right-to-safety concerns. Success in a right-to-safety case will not provide a permanent home for the children, only a safer placement while they remain in temporary care.[189] Thus, both the dearth of lawyers pursuing the issue and the reluctance of the courts to entertain the claims have combined to create a barrier between foster children and the constitutional promise of safe custodial conditions. It is now necessary to consider whether any principled reasons exist that might render the right to safety inapplicable to foster children.

III. The Search for a Principled Basis for Withholding the Right to Safety

There are three possible explanations for denying a constitutional right to safety to foster children while providing it to other groups or persons cared for by the state. First, children in foster family care are not institutionalized. Second, foster children come into state care voluntarily. Finally, foster children may be subject to the Supreme Court's ruling in *Ingraham v. Wright*,[190] which held that school children do not have an eighth amendment right to be protected from physical harm by their custodians. This section analyzes whether any of these proposed differences between foster children and other groups provide a

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[188] In 1980, there were approximately 700 public interest lawyers working in 117 public interest law centers. Mnookin, In the Interest, *supra* note 8, at 45. Less than seven percent of these lawyers concern themselves with children's issues, a number smaller than a "medium-sized law firm in Denver, Colorado." *Id.* at 49.

[189] *See supra* notes 170–174 and accompanying text, and *infra* notes 200–201 and accompanying text. Public interest lawyers in other fields are not always put to such a hard choice. If public interest lawyers in the prisoners' rights field, for example, were forced to choose between litigation that would lead to the release of some of their clients because of invalid convictions or litigation to improve the living conditions of all of their clients while they are in prison, there might never have been the extensive case law on prison reform.

[190] 430 U.S. 651 (1977).

principled basis for a determination that foster children are not eligible for the constitutional protection of the right to safety, and demonstrates that they do not.

A. Custody Without Institutionalization

Children in foster family care do not reside in large communal custodial settings like prisons or mental institutions.[191] Moreover, because of their age, children in foster care would be under the control of an adult whether or not they were placed in foster care. In this sense, children in foster care differ from institutionalized adults who, but for their confinement, would be free to do what they wished and live where they pleased.

These factors were important to the Supreme Court in *Lehman v. Lycoming County Children's Services*,[192] which held that a foster child was not in "custody" for purposes of the habeas corpus jurisdiction of the federal court. The case arose when a mother brought suit, on behalf of her three sons, to challenge the constitutionality of a Pennsylvania statute under which the state obtained custody of her children and terminated her parental rights.[193] Without reaching the merits, the Court held that habeas corpus did not lie because the children "are not prisoners . . . [who] suffer any restrictions imposed by a state criminal justice system."[194] Justice Powell for the majority stated that foster children:

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[191] *See supra* note 6 and accompanying text.

[192] 458 U.S. 502 (1981).

[193] Ms. Lehman placed her three sons in the custody of the Lycoming County Children's Services Agency, which placed them in foster homes. She visited her sons monthly, but did not request their return for three years, at which time the Lycoming County Children's Services Agency initiated parental termination proceedings. The district court terminated her parental rights based on Ms. Lehman's "limited social and intellectual development" and her "five-year separation from the children." *Id.* at 504. The Pennsylvania Supreme Court affirmed the ruling. *Id.* at 505.

Ms. Lehman sought review in the United States Supreme Court by a writ of certiorari rather than by appeal. Review was denied. Lehman v. Lycoming County Children's Services, 439 U.S. 880 (1978). She then sought a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254 in the United States District Court of the Middle District of Pennsylvania, requesting a declaration of invalidity of the Pennsylvania statute under which her parental rights were terminated, a declaration that she was the children's legal parent, and an order releasing the children into her custody. *Id.* at 505–06. The district court dismissed the petition, without a hearing, on jurisdictional grounds. This dismissal was affirmed by the Third Circuit, sitting en banc. *Id.* at 506.

[194] *Id.* at 510.

> are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children.[195]

In *Child v. Beame*,[196] the district court made a similar observation in the course of dismissing a foster child's claim to a constitutional right to adoption. The court stated that:

> the attempt to equate the child plaintiff's status while in the foster care of the state with those who are taken into custody under a civil commitment because of mental illness, physical retardation, incorrigibility or similar causes is somewhat farfetched. The civilly committed have been deprived of their liberty by the state while the state's action in taking the child plaintiffs into foster care, whether with an institution or foster parent, is not a deprivation of liberty. The state has merely provided a home in substitution for the one the parents failed to provide.[197]

These cases, however, do not stand for the proposition that foster children are insufficiently deprived of liberty to invoke judicial review of the conditions of their care. First of all, neither *Lehman* nor *Child* were challenges to the living conditions of foster care. Instead, both courts were confronted with claims that questioned the very presence of the children in foster care.[198] In *Child*, the court made this distinction clear when it noted that "plaintiffs do not question the living conditions in

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[195] *Id.* at 510.

[196] 412 F. Supp 593 (S.D.N.Y. 1976).

[197] *Id.* at 608.

[198] In both *Lehman* and *Child*, the complaints were not related to the conditions of the foster care placement, but to the fact or duration of placement, respectively. In *Lehman*, the fact of placement in foster care was at issue since plaintiff's parental rights were terminated upon her request to have her children released to her from foster care. In *Child*, plaintiff children alleged a deliberate policy of keeping children in foster care settings without seeking adoptive homes. 412 F. Supp. at 596.

their foster homes."[199] But in a right-to-safety case, the plaintiff does not rely upon a liberty claim of restricted movement, as was the case in both *Lehman* and *Child*. Rather, the claim concerns the substantive due process liberty interest in being held safely.[200] The key to the existence of a right to safety lies in the recipient's dependence upon the state for the maintenance of a safe living environment,[201] not in the recipient's assertion that the state cannot restrict his liberty at all.

For example, prisoners cannot choose who they want to provide needed medical care, what they will eat, or with whom they will share their living quarters. These decisions, made by their keepers, will, in large measure, determine the quality of their lives. It is this dependence on the state for the very essentials of life, not the fact of institutionalization, that has prompted the courts to recognize the entitlement to safety in the institutional context.[202]

Foster children, like prisoners, rely on the state for shelter, clothing, food, and freedom from physical abuse or neglect. Although they may not be held in large institutional settings, they are just as dependent on the state for their needs as are prisoners. This similarity is not diminished because the state chooses to act through private agents in the foster care context. Surely, if the state maintained a group home for children on state property, providing two adults per child, it would be most difficult to distinguish the children's situation from that of prisoners. In that circumstance, the state, having institutionalized the children, would presumably be compelled to comply with the constitutional requirements, including the right to safety, applicable to institutionalized persons generally.[203] Regardless of the locus of confinement, the sole purpose for the state's intervention into the children's lives is protection.[204] Both the

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[199] *Id.* at 608.

[200] *See supra* notes 145–148 and accompanying text.

[201] Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison officials to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical . . . torture. . . . In less serious cases, denial of medical care may result in pain and suffering.")

[202] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd on other grounds*, 451 U.S. 1 (1980).

[203] *See supra* note 146 and accompanying text.

[204] *See, e.g.*, Conn. Gen. Stat. Ann. § 17-38a (West 1987) ("The public policy of

rationale for foster care placement and the dependence on the state emphasize the absurdity in excluding foster children from the constitutional protection from harm merely because they are not institutionalized in the traditional way.

Lehman's discussion of the liberty implications of foster family placement is inapposite to a right-to-safety analysis for another reason: *Lehman* dealt solely with a question of statutory, not constitutional, construction. There the issue for decision was whether a foster child's movement was sufficiently restricted such that a federal habeas corpus petition would lie. The Court held that, for purposes of habeas corpus, the children were not in "custody,"[205] and that the mother, therefore, could not seek a federal court order to obtain their release from care. A right-to-safety case involves a different issue. In contrast to a habeas corpus petition, which is calculated to review the legality of custody, a right-to-safety case questions not the fact of confinement, but the conditions of confinement.[206] Thus, *Lehman* is not authority for the proposition that foster children lack a constitutional right to be protected, but only that the federal habeas corpus statute is not the way to assert such a right.

B. Voluntary Placement and the Right to Safety

The overwhelming majority of foster care placements are voluntary, meaning that the child's parents have consented to a

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[the] state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary. . . ."); Mass. Gen. Laws Ann. ch. 119 § 1 (West 1987); N.Y. Soc. Serv. Law § 395 (McKinney 1983) (a public welfare district shall be responsible for the welfare of children residing or found in its territory who are in need of public assistance, support and protection); Fla. Stat. Ann. § 409.145 (West 1986). *See also supra* note 17 and accompanying text. Courts have expressed this purpose as well. *See, e.g.*, Brooks v. Richardson, 478 F. Supp. 793, 795–96 (S.D.N.Y. 1979).

[205] *Lehman*, 458 U.S. at 511.

[206] In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court confirmed that the Civil Rights Act, 42 U.S.C. § 1983, can be used to challenge the conditions of confinement. Habeas corpus, 28 U.S.C. § 2241 (1966) is the appropriate device with which to challenge the propriety of confinement.

placement.[207] Consent to foster care occurs when physical or mental illness, economic problems or other family crises make it impossible for parents—particularly single mothers—to provide a stable home life for their children.[208] Often the consensual placement follows a state-sponsored investigation into conditions of a deteriorating home caused by these pressures. Other times, a parent may seek government help.[209] In either event, the normal concomitant of foster care for most children is the consent of their parents. In this sense, children enter foster care in a manner that is quite different from the means by which other groups normally enter state control. Prisoners, to take the most obvious example, do not as a routine matter ask to be imprisoned.[210]

The decision by the Supreme Court in *Youngberg* can be understood as supporting the notion that the distinction between voluntary and involuntary institutionalization is significant. In no fewer than eleven places in the majority opinion, Justice Powell stated that the due process right to safety which the Court was recognizing for the first time applied to the involuntarily committed.[211] Given the emphasis by the Court on the involuntary nature of the confinement, one must ask whether the entitlement to safety in foster care should depend on, or be

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[207] *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 921–22 (1975) (as many as 50% voluntary placements); A. Gruber, *supra* note 6, at 138 (Studies from New York and elsewhere estimate the percentage of voluntary placements between 50 and 90%. In Massachusetts, 58.8% of the placements are voluntary); Mnookin, *In Whose Best Interest?*, *supra* note 6, at 601; Musewicz, *supra* note 10, at 639; Information Services, Characteristics of Children in Foster Care, New York City Reports, table 11 (1976).

[208] Smith v. OFFER, 431 U.S. 816, 824 (1977).

[209] A. Kadushin, *supra* note 6, at 316. Voluntary placement in foster care is usually a two-part process. Initially parents and a local social service official enter a voluntary placement agreement (VPA), which sets forth the terms and conditions of a child's care and transfers the custody of the child from the parent to the authorized agency.

If a child will be in custody for more than 30 days, the social services official must obtain judicial approval of the VPA. The judge must be shown that the parents voluntarily and knowingly entered the VPA, that they were unable to provide adequate care at home, and that the child's best interests would be promoted by placement in foster care. Joyner v. Dumpson, 712 F.2d 770, 773 (2d Cir. 1983); Smith v. OFFER, 431 U.S. 816, 824 n.9 (1977).

[210] Even prisoners who voluntarily enter guilty pleas are not choosing to come under state control. A guilty plea voluntarily and intelligently given is a defendant's choice among several limited alternatives; it is a bargain with the prosecutor for what is seen as the "least bad" option. North Carolina v. Alford, 400 U.S. 25, 31–39 (1970).

[211] 457 U.S. at 310, 312, 313, 314, 315, 316, 318, 321, 322.

influenced by, the voluntary nature of most foster care placements.[212] For three reasons, it should not.

First, characterizing foster care placements as voluntary is highly questionable; certainly they are not voluntary for the person under care. The children themselves have no more choice about placement than an involuntarily committed prisoner or mental patient. They are rarely asked whether they desire to be in foster care,[213] and it is not clear that they should be asked. It is impossible to believe that all but a small percentage of children would have the maturity and ability to make an informed judgment.[214] No rational system would seek the consent of a three-year-old, for example, as a condition of undertaking his care. As then-Chief Justice Burger put it: "[M]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."[215]

Yet even the choice for the foster child's parent is largely illusory as well. Many parents reluctantly agree to relinquish custody temporarily in the face of a clear inability to care for their child by themselves.[216] This is particularly true of impecunious parents, since, unlike the middle class who can arrange for alternatives when family problems occur, "the poor have

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[212] Consent can sometimes make a difference. In Joyner v. Dumpson, 712 F.2d 770 (2d Cir. 1983), for example, the Second Circuit rejected a facial challenge to the loss of parental control entailed in the New York State scheme for voluntary foster care placement. The court relied in part upon the absence of evidence that consent was coerced and in part on the idea that the state could constitutionally condition consent to foster care on the diminution of parental rights. *Id.* at 777–82. But the court's ruling was limited. It made plain that if, on remand, plaintiffs' allegations of a "Dickensian portrait of the New York foster care system" were true, and if it was a system that "greedily grasps control over every child placed within its domain," the result might be different despite the presence of consent. *Id.* at 783. *Joyner*, therefore, does not support the argument that consent to placement, in and of itself, eliminates the obligation of the state to comply with the Constitution.

[213] In his study, Gruber found that twenty-seven percent of the children voluntarily placed in foster care were opposed to the decision. A. Gruber, *supra* note 6, at 141. The lack of weight of the child's preference is reflected in most state statutes dealing with foster care, where either the child's consent is not sought or is sought for limited purposes only after he reaches a certain age (commonly 14). *See, e.g.*, Minn. Stat. § 260.245; Ohio Rev. Code Ann. § 2151.353 (Baldwin 1987); N.J. Stat. Ann. § 30:4c-11 (West 1981); Mass. Gen. Laws Ann., ch. 119, § 23 (West 1958).

[214] One study found that almost half of all foster children were too young to understand the reasons that they were placed in foster care. A. Gruber, *supra* note 6, at 141.

[215] Parham v. J.R., 442 U.S. 584, 603 (1979).

[216] *See supra* notes 208–09 and accompanying text.

little choice but to submit to state-supervised child care when family crises strike."[217] Voluntariness of placement is illusory for another reason: the state social worker who investigated the home may have threatened the parent with the permanent loss of the child unless there was "consent" to temporary placement.[218] Whereas punitive and coercive techniques are usually expressly prohibited, pressure is often seen by the caseworker as legitimate. Thus the area between free choice and unacceptable coercion often is unclear.[219]

It is a small wonder that most parents in this predicament opt for voluntary placement. They must either consent to the placement, retaining some chance of having the child returned later, or refuse consent and face the prospect of defending a state-sponsored child protection proceeding in the local family court, which, if they lose, significantly diminishes the possibility of retaining parental rights.[220] Even in those cases where the consent is genuine, it cannot reasonably be understood to be a voluntary decision to expose a child to unsafe conditions.[221] Indeed, such a decision would constitute child abuse as that term is defined in most state laws.[222]

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[217] Smith v. OFFER, 431 U.S. at 834. *See also* Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 484 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983).

[218] Mnookin, *In Whose Best Interest?*, *supra* note 6, at 601.

[219] Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 12–13 (1973). *See also* Musewicz, *supra* note 10, at 639 (such parents are "frequently uneducated and without legal advice except for that offered by the social worker encouraging the placement").

[220] Mnookin, *In Whose Best Interest?*, *supra* note 6, at 601. *See also* Children's Defense Fund, *supra* note 7, at 18; Levine, *supra* note 219, at 23–24.

[221] The government may not condition the receipt of these, or any, benefits on the non-assertion of a constitutional right even if the benefits are considered a "mere privilege." L. Tribe, American Constitutional Law 510 (1978). *But see* Town of Newton v. Rumery, 107 S. Ct. 1187 (1987), where the Court held lawful a knowing and intelligent waiver of the right to file a civil rights complaint in exchange for dismissal of criminal charges.

[222] Such treatment would, for example, constitute neglect under New Jersey law: "Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: . . . failure to do or permit to be done any act necessary for the child's physical or moral well-being." N.J. Stat. Ann. § 9:6-1 (West 1976). *See also, e.g.*, Mass. Gen. Laws Ann. ch. 119 § 1 (West 1958); Conn. Gen. Stat. § 17-38a (West 1975). Federal standards also suggest that exposure to unsafe conditions constitutes abuse or neglect. Placing a child in such conditions, for example, falls within the definition of child abuse and neglect given in the Child Abuse Prevention and Treatment Act: "[C]hild abuse and neglect means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen . . . by a person who is responsible for the child's welfare under circumstances which

The second reason that the constitutional right to safety should not depend upon the voluntariness of the placement is that the right, as even the *Youngberg* Court appears to have recognized, is too basic to depend upon that factor alone. The Supreme Court's reasoning in *Youngberg* itself, notwithstanding its repeated use of the term "involuntarily committed," suggests that the right to safety encompasses the voluntarily as well as the involuntarily confined. Relying on precedent, the Court stated: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[223] "An individual's liberty is no less worthy of protection merely because he has consented to be placed in a situation of confinement."[224] If a person lost all claim to constitutional protection because he consented to confinement, "the state arguably could chain confined residents to their beds and administer wanton physical beatings without violating the constitution. This . . . represents a complete abdication of the state's constitutional duty to respect the rights of all its citizens to fundamental liberty."[225]

Third, the right to safety must apply to voluntary admissions because of the established constitutional principle that a state must administer constitutionally even those services which it only provides voluntarily.[226] Similar treatment by the Supreme

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indicate that the child's health or welfare is harmed or threatened thereby. . . ." 42 U.S.C. § 5102 (1982). This act and other federal child protection acts are discussed in D. Besharov, The Abused and Neglected Child: Multi-Disciplinary Court Practice 11–33 (1978).

[223] 457 U.S. at 315–16. Furthermore, "[among] the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright,* 430 U.S. at 673. *See also* Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 485 (D.N.D. 1982), *aff'd* 713 F.2d 1384 (8th Cir. 1983).

If Justice Powell really meant to limit the right to safety to the involuntarily confined, he picked a strange case in which to do it. Romeo was committed by court order on petition of his mother, his sole caretaker, who stated that she could no longer care for him. Chief Justice Burger, in his concurrence, was not wrong when he said that "the state did not seek custody of respondent; the family understandably sought the state's aid to meet a serious need." 457 U.S. at 329.

[224] Association for Retarded Citizens, 561 F. Supp. at 485.

[225] *Id. See also* Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1245 (2d Cir. 1984).

[226] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972). This principle has been relied upon in several cases dealing with voluntary and involuntary confinement. *See,*

Court of the state provision of education illustrates this principle. The Supreme Court has repeatedly held that there is no right to compel a state to establish a system of free education for its citizens.[227] However, the Court has also held that once it elects to provide such a system, it must administer that system in conformity with constitutional commands.[228] Similarly, although there is no recognized affirmative constitutional right to the provision of foster care,[229] the state, having chosen to provide the service, is obligated to administer it constitutionally.[230]

In short, since most children cannot consent to foster care, since few parents truly consent to foster care, since none consent to unsafe care for their children, since safety is too important to be bartered or dependent on the voluntary nature of the service, and since the provision of a service by the state must be administered constitutionally, the constitutional right to safety must follow all children into care regardless of whether or not their placement is voluntary.

C. Ingraham v. Wright *and the Constitutional Right to Safety*

Ingraham v. Wright[231] held that the eighth amendment does not protect school children from excessive corporal punishment.[232] The Court also held that children may be physically punished by their teachers without a prior due process hearing.[233] Taken together, these holdings might suggest that foster children also lack constitutional protection from physical abuse,

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e.g., Youngberg, 457 U.S. at 315–16; Society for Good Will to Retarded Children v. Cuomo, 737 F.2d at 1245–46.

[227] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29–39 (1973), and cases cited therein.

[228] Goss v. Lopez, 419 U.S. 565 (1975).

[229] *See* Child v. Beame, 412 F. Supp. 593, 602 (S.D.N.Y. 1976).

[230] *See* Society for Good Will to Retarded Citizens v. Cuomo, 737 F.2d 1239, 1246 (2d Cir. 1984). Indeed, most state foster care laws do not even discuss distinctions between voluntary and involuntary placement when dealing with the level of care to which the foster child is entitled. *See, e.g.*, N.Y. Soc. Serv. Law §§ 358a, 372a, 372c (Consol. 1978); Minn. Stat. Ann. § 257.071 (West 1982); Ohio Rev. Code Ann. § 3107.02 (Baldwin 1987); N.J. Stat. Ann. § 30.4C (West 1981); Mass. Gen. Laws Ann., ch. 119, § 23 (West 1969).

[231] 430 U.S. 651 (1977) (In a 5-4 decision, Justice White—joined by Justices Brennan, Marshall and Stevens—filed a sharp dissent in which they decried the majority opinion).

[232] *Id.* at 662–71.

[233] *Id.* at 672–82.

but such a result is not compelled by either the reasoning or result of *Ingraham*.

Ingraham does not foreclose right-to-safety cases for foster children because the rationale the Court used for holding that school children do not require constitutional protection from physical abuse does not apply to foster care. *Ingraham* placed great emphasis on the openness of the public schools and the watchfulness of school children's parents. Schools, the Court also pointed out, are not closed, twenty-four-hour-a-day institutions.[234] These factors, which the court found make mistreatment of school children unlikely, were contrasted with the case of prisons, where the eighth amendment does apply. Judicial scrutiny of penal conditions engendered by eighth amendment commands is important precisely because prisons are institutions not usually open to public view, and because, as a group, prison inmates are powerless and friendless.[235]

For purposes of constitutional protection and judicial intervention, foster children have more of the attributes of prisoners than of school children. Like prison, and unlike school, foster care is a total institutional setting. No school bell rings for foster children each day releasing them from care. Foster children, unlike school children, cannot rely on the watchful eyes of their parents to protect them from abuse; they are in foster care precisely because their parents cannot care for them.[236]

The Court in *Ingraham* also held that procedural due process protection is not required before corporal punishment may

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[234] *Id.* at 670. In an interview with Bill Moyers broadcast the evening before his resignation from the Supreme Court, Justice Powell, the author of the majority opinion, offered this additional insight into the Court's reasoning:

> I knew from my own experience in public education that the public schools are quite public in the sense that PTA's—Parent Teacher Associations—school board meetings are open to the public and parents come and testify before the school board. I've sat through some long evenings with parents complaining about this or that, that if there were any abuse of this provision of the Florida Statute (providing for corporal punishment) that pressure would immediately or promptly be brought on the particular school to correct it. And I just thought it was not a situation for the judicial system of our country to become involved in.

The Search for the Constitution, Interview with Justice Lewis Powell (PBS broadcast, June 25, 1987) (transcribed by author).

[235] *Ingraham*, 430 U.S. at 669.

[236] *See supra* notes 6, 8, 17, 87 and accompanying text.

be inflicted because physical punishment of school children is generally "unremarkable in physical severity."[237] Civil and criminal state remedies were more than adequate to control those few instances in which excessive punishment of school children did occur.[238] Unfortunately, the same cannot be said of foster care. The same factors that render foster care more akin to a prison or juvenile detention facility than a school also provide an environment in which serious abuse goes unchecked and may remain unknown to the outside world.[239]

The *Ingraham* Court limited itself to plaintiff's eighth amendment and procedural due process claims;[240] it expressly stated that it had no occasion to decide whether "corporal punishment of a public school child may give rise to an independent cause of action to vindicate substantive rights under the Due Process Clause."[241] Since the *Ingraham* record did not disclose widespread abuse, the issue was not before the Court. The problem of foster family abuse, however, does raise this unresolved issue.[242]

IV. The Search for a Remedy for Violence in Foster Care

It is well-established that for every right there should be a corresponding remedy.[243] It is particularly important to find an

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[237] *Ingraham*, 430 U.S. at 677.

[238] *Id.* at 672–82.

[239] As suggested *infra*, state tort remedies in this field are not adequate. *See infra* notes 245–73 and accompanying text.

[240] For a comparison of procedural due process and substantive due process, *see generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 324–25, 416–24 (2d ed. 1983).

[241] 430 U.S. at 679 n.47. This distinction explains how the Court in *Youngberg* could hold that the right to safety for the mentally retarded flows from the substantive provision of the fourteenth, and not from the eighth, amendment. 457 U.S. at 314–15 & n.16. The Court has similarly held that rights of pretrial detainees derive from the due process clause, not the eighth, amendment. *See, e.g.*, Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979).

[242] In a post-*Ingraham* decision, the Fourth Circuit held that school children have a substantive due process right to be protected from corporal punishment that amounts to "brutal and inhumane abuse of official power literally shocking to the conscience." Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). *See also* Doe "A" v. Special School Dist. of St. Louis County, 637 F. Supp. 1138 (E.D. Mo. 1986); Brooks v. School Bd. of Richmond, 569 F. Supp. 1534, 1536 (E.D. Va. 1983).

[243] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (The laws of the United States furnish remedies for the violation of vested legal rights.).

effective remedy for violence in foster care. Without the basic right to safety, the dignity of the foster child and his ability to develop into a mature, functioning adult are diminished.[244] This section canvasses the available remedies for foster care violence, and demonstrates that the structural injunction, not the damage action, offers the only effective remedy for violence in foster care.

A. The Unavailability of Damage Actions

Abused foster children are increasingly turning to state damage actions for compensation for the injuries that they have suffered. Some of these suits, which have survived pretrial dismissal,[245] reveal a formidable array of state tort law barriers to ultimate success. Foremost among these is the common law doctrine of sovereign immunity. In its purest form, the doctrine bars a suit against a state agency providing a governmental service.[246] Suits are permitted in the doctrine's more modern version, but only if the plaintiff can show that the governmental activity sued upon is ministerial rather than discretionary.[247] The theory of this distinction is that the state ought to be free to carry on its wide-ranging activities unimpeded by the risk of liability for decisions that involve its discretionary, policymaking functions.[248]

In jurisdictions that recognize the modern sovereign immunity doctrine, a key issue in a suit brought by an abused foster child is whether or not an agency's actions involved

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[244] *See supra* notes 66–68 and accompanying text.

[245] *See, e.g.*, Mayberry v. Pryor, 134 Mich. App. 826, 352 N.W.2d 322 (1984), *rev'd*, 422 Mich. 579, 374 N.W.2d 683 (1985) (summary judgment in favor of foster parents reversed); Zink v. Dep't of Health and Rehabilitative Services, 496 So. 2d 996 (Fla. App. 1986) (summary judgment in favor of the defendant reversed).

[246] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See generally* W. Prosser & W. Keeton, *supra* note 117, § 131 at 1044.

[247] *See, e.g.*, Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977). Despite important variations, all states retain immunity from suits that result from discretionary governmental activities. The variations are as follows: a few states retain total immunity from suit; some still preclude suits by individuals in courts, but have created administrative agencies that have the authority to decide claims against the state; others have consented judicially to suits in only a very limited class of cases. Most states, however, allow suits for non-discretionary activities that cause injury. W. Prosser & W. Keeton, *supra* note 117, § 131, at 1044.

[248] *Id.* at 1039.

discretionary decisionmaking. If the court finds that they did, sovereign immunity bars the suit regardless of the agency's negligence. The courts that have examined the issue have split on whether the conditions of foster care placement involve this judicially protected discretion. Several jurisdictions have held that there is no sovereign immunity,[249] because there is no discretion involved in the foster care supervision process. Others, however, have applied sovereign immunity.[250] These courts, pointing to the "delicate and complex judgments" required of foster care agencies,[251] and alluding to foster care as an altruistic governmental service[252] entitled to a high degree of judicial deference, have shielded agencies from "hindsight scrutiny by the courts."[253]

Even in jurisdictions that do not accord sovereign immunity to foster care agencies, however, recovery is difficult. The agency may escape liability by shifting its portion of the blame for the injury to the foster parents.[254] Having done so, it is then able to avoid responsibility for the injury under the doctrine of respondeat superior, on the ground that foster parents are not employees of the state.[255] The policy reasons that one court assigned for this result are revealing. That court held that the legislature could not have intended that foster parents be regarded as state employees because: "A legal theory conferring employee status on foster parents . . . would place an intolerable burden on the state and might well diminish the beneficial effect of the foster care program."[256]

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[249] *See, e.g.*, Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977); National Bank of South Dakota v. Leir, 325 N.W.2d 845 (S.D. 1982).

[250] Brown v. Phillips, 178 Ga. App. 316, 342 S.E.2d 786 (1986); Walker v. State, 104 Misc. 2d 221, 428 N.Y.S.2d 188 (1980); Pickett v. Washington County, 31 Or. App. 1263, 572 P.2d 1070 (1977); Jiminez v. County of Santa Cruz, 42 Cal. App. 3d 407, 116 Cal. Rptr. 878 (1974).

[251] Pickett v. Washington County, 31 Or. App. 1263, 1268, 572 P.2d 1070, 1074 (1977).

[252] *Id.* at 1268, 572 P.2d at 1074.

[253] *Id.*

[254] *See, e.g.*, Blanca v. Nassau County, 103 A.D.2d 524, 480 N.Y.S.2d 747 (1984), *aff'd sub nom.* Blanca C. By Carmen M. v. Nassau County, 65 N.Y.2d 712, 481 N.E.2d 545, 492 N.Y.S.2d 5 (1985); Parker v. St. Christopher's Home, 77 A.D.2d 921 (1980).

[255] *See, e.g.*, New Jersey Property-Liability Ins. Guar. Ass'n v. State, 184 N.J. Super. 348, 446 A.2d 189 (1982), *rev'd*, 195 N.J. Super. 4, 477 A.2d 826, *cert. denied*, 99 N.J. 188, 491 A.2d 691 (1984); Kern v. Steele County, 322 N.W.2d 187 (Minn. 1982).

[256] New Jersey Property-Liability Ins. Guar. Ass'n v. State, 195 N.J. Super. 4, 16, 477 A.2d 826, 833 (1984).

Even when sovereign immunity is not invoked, or blame is shifted to foster parent negligence, the courts have resisted finding negligent supervision by the agency. In *Koepf v. County of York*,[257] for example, the Supreme Court of Nebraska affirmed a directed verdict in favor of a foster care agency. In that case, a fourteen-month-old child had died from severe physical injuries inflicted by his foster parent. Four months prior to the child's death, the agency had been told that the foster mother was not emotionally stable and that she did not take good care of the child.[258] Expert testimony also revealed that the foster mother was on medication for "physiological depression and mental confusion."[259] Finally, there was testimony that three weeks before the child was killed, he appeared at a state court hearing with bruise marks on his body.[260] Despite this substantial evidence of agency negligence, the Nebraska Supreme Court agreed that this was still not enough evidence to submit the case to a jury.

Sovereign immunity, the unavailability of respondeat superior, and the courts' reluctance to find an agency negligent in its supervisory capacity make the opportunity for recovery against an agency slight. They do not preclude damage actions against the foster parents themselves, or the individual caseworker assigned to the case. The chance of recovery, however, is slim there as well.

In several jurisdictions, foster parents are immune from suit for negligent supervision of their foster children,[261] on the theory that foster parents stand in the place of permanent parents and therefore are entitled to the same family immunity.[262] If this "loco parentis"[263] doctrine of parental immunity is applied, no

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[257] 198 Neb. 67, 251 N.W.2d 866 (1977).

[258] Id. at 76, 251 N.W.2d at 872.

[259] *Id.*

[260] *Id.*

[261] Brown v. Phillips, 178 Ga. App. 316, 342 S.E.2d 786 (1986); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

[262] *In re* Diane P., 120 N.H. 791, 424 A.2d 178 (1980); Rutkauski v. Wasko, 286 A.D. 327, 143 N.Y.S.2d 1 (1955); Hush v. Devilbiss Co., 77 Mich. App. 639, 259 N.W.2d 170 (1977); Thomas v. Inmon, 268 Ark. 221, 594 S.W.2d 853 (1980).

[263] "Loco parentis" refers to a person "who intentionally accepts the rights and duties of natural parenthood with respect to a child not his own." *In re* Diane P., 120 N.H. 791, 424 A.2d 178 (1980) (citing Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947), *cert. denied*, 331 U.S. 850 (1947)). *See generally* 59 Am. Jur. 2d *Parent and Child* § 77 (1987).

judgment can be awarded for negligence against foster parents for their failure to maintain a safe home. Even if the parental immunity doctrine is not invoked, however, the chance of a recovery remains slight. Foster parents, normally drawn from the ranks of moderate-income families, are often judgment proof,[264] and as they are not considered state employees, the states do not indemnify them for judgments entered against them.[265]

Suits under state law against individual, state-employed caseworkers, while theoretically possible in states without sovereign immunity doctrines, also are not likely to succeed because state-employed caseworkers are generally judgment-proof.[266] Federal civil rights damage actions are unavailing as well, because the Supreme Court has approved several imposing eleventh amendment,[267] qualified immunity,[268] and *Monell*

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[264] *See* Cathey v. Bernard, 467 So.2d 9, 10 (La. App. 1985).

[265] New Jersey Property-Liability Ins. Guar. Ass'n v. State, 184 N.J. Super. 348, 446 A.2d 189, *rev'd*, 195 N.J. Super. 4, 477 A.2d 826, *cert. denied*, 99 N.J. 188, 491 A.2d 691 (1984).

[266] Note, *A Damages Remedy for Abuses by Child Protection Workers*, 90 Yale L.J. 681, 695 (1981).

[267] *See* Hans v. Louisiana, 134 U.S. 1 (1890) (state immunity); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984) (state immunity); Brandon v. Holt, 469 U.S. 464 (1985) (official immunity). For the latest version of the enormous controversy over the scope of the eleventh amendment, compare the majority decision written by Justice Powell with Justice Brennan's dissent in Welch v. State Dep't of Highways, 107 S. Ct. 2941 (1987). For a sampling of the scholarly debate, see Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984); Fletcher, *A Historical Interpretation of the 11th Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pts. 1 & 2), 126 U. Pa. L. Rev. 515 (1978), 126 U. Pa. L. Rev. 1203 (1978).

[268] An individual action for damages against a state official may be defeated because of a qualified immunity that shields the defendant from liability for good faith violations of constitutional rights, except those that were clearly established at the time of the conduct which forms the basis of the cause of action. Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also supra* note 125 and accompanying text. Given the lack of development of the right to safety for foster children, it is possible that a damage claim would fail on that ground, at least initially. Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (right-to-safety case against state officials for failure to protect a child from known risk of harm by parent dismissed because right to protection is not clearly established). *See also* Comment, *Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 Cornell L. Rev. 940 (1985).

doctrine[269] barriers to recovery in actions that charge violations of federal constitutional rights,[270] or "constitutional torts."[271]

Although there have been several recent ground-breaking opinions that appear to raise the possibility of liability,[272] the impediments to recovery remain formidable. The number of money recoveries for foster care abuse is minuscule compared to the extent of actual abuse, and in those few cases in which judgments have been obtained, the amount of the judgment is quite low. Research has uncovered only four cases in which damages have been awarded on state-created tort actions for foster care abuse. The judgments granted in these cases range from a low of $4,500 for the death of a foster child to a high of $46,000. The total amount obtained for all of these cases is a paltry $85,500.[273] Even if the outlook for damage actions were more promising, they have other serious drawbacks which make them unattractive vehicles for reform of the foster care system.[274] The next subsection explains why damage actions, even if theoretically obtainable, are not a promising avenue of reform.

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[269] In a constitutional tort action a municipality is not liable for acts of its employees unless the actions were pursuant to a deliberate municipal policy. Monell v. Dep't of Social Services, 436 U.S. 658 (1978). This is not to say that recovery is impossible, as the *Doe* case discussed earlier shows. *See supra* notes 173, 175–77 and accompanying text.

[270] For a discussion of the various barriers to recovery for constitutional tort actions, see Spurrier, *Federal Constitutional Rights: Priceless or Worthless? Awards or Money Damages Under Section 1983*, 20 Tulsa L.J. 1, 26 (1984).

[271] "Constitutional torts" is the term used by Professor Christina Whitman to describe such damage actions. Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 7 (1980).

[272] Several courts have rejected the doctrine of sovereign immunity and have allowed suits against states, counties, placement agencies or social workers to proceed. *See supra* note 249. Other courts have held that suits were not barred by parental immunity, since the foster parents were not considered to have *loco parentis* status. Andrews v. Ostego County, 112 Misc. 2d 37, 446 N.Y.S.2d 169 (1982); Mayberry v. Pryor, 422 Mich. 579, 374 N.W.2d 683 (1985).

[273] Vonner v. State Dep't of Pub. Welfare, 273 So. 2d 252 (La. 1973) (wrongful death, $4,500); Little v. Utah State Div. of Family Serv., 667 P.2d 49 (Utah 1983) (wrongful death, damages of $20,000 plus funeral expenses and costs); Cathey v. Bernard, 467 So. 2d 9 (La. App. 1985) (wrongful death and survival action, total of $15,000 awarded); Jenks v. State, 507 So. 2d 877 (La. App. 1987) (case settled for $46,000). A review of reported tort damage awards contained in *National Jury Verdict Review and Analysis* failed to disclose any unofficially reported judgments. Even when the *Doe* case—the only other known award—is added, the total recovery from the American legal system for the extensive amount of abuse and neglect in foster care is only $310,500.

[274] For a less pessimistic view of the case law, see Comment, *supra* note 10, at 979–84.

B. The Inadequacy of Damage Actions

Individual damage actions, even if available, are not useful mechanisms for obtaining reform. They tend to focus attention, myopically, on individual culpability for past actions instead of on detection and correction of institutional deficiencies that contribute to the maltreatment of foster children. By its nature, a claim for damages examines past wrongs. It seeks to compensate for an injury which has already occurred.[275] By contrast, an equitable action for an injunction seeks to prevent harm from occurring in the first instance.[276]

Because an individual damage action is concerned with the culpability of the assigned caseworker or foster parent for the abuse suffered by the child, rather than with the system itself, it is unlikely that a damage claim will bring attention to the root causes of the problem. It thus diverts attention from the real culprit in the drama: the state's failure to fund and maintain an adequate foster care system.

With the real problem obscured, two contradictory and unhelpful tendencies compete for attention. The first is to shift blame for the danger to children onto overworked caseworkers or poorly selected and ill-trained foster parents.[277] Such charges are often unfair as these people often lack the support or environment to do an acceptable job. Furthermore, this shift of focus diverts desperately needed funds from structural reform to individual payments that change nothing in the system.

Moreover, the fear of liability may influence qualified people who might otherwise be attracted to this form of public service to seek other kinds of work. Those who do enter or remain in the field may engage in what has been called "defensive social work,"[278] a term referring to practices followed because of a desire to avoid liability rather than to advance the interests of the children.[279] Workers in the system may find

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[275] *See* Restatement (Second) of Torts § 821 (B)(i) (1979); P. Schuck, Suing Governments 15 (1983).

[276] *See* Restatement (Second) of Torts § 821 (B)(i) (1979); Rothstein v. Wyman, 467 F.2d 226, 241 (2d Cir. 1972); P. Schuck, *supra* note 275, at 15–16.

[277] *See* D. Besharov, The Vulnerable Social Worker 15, 65, 133. *Cf.* Whitman, *supra* note 271, at 60.

[278] D. Besharov, *supra* note 277, at 138. *Cf.* Whitman, *supra* note 271, at 53.

[279] *See* D. Besharov, *supra* note 277, at 136–38.

themselves saddled with a conflict of interest: their understandable desire to avoid personal liability versus the best interests of the children dependent on their services. This second tendency is even more dangerous than the first as it may lead courts, reluctant to impose liability upon "vulnerable" caseworkers, foster parents, or agencies, to render decisions, such as *Koepf*,[280] that restrictively define the range of protections guaranteed to foster children.[281] Another form of defensive social work is immobilized decisionmaking. The whole system will collapse if liability precludes responsible decisionmaking in areas such as reporting and investigating suspected cases, the adequacy of foster parents, and termination of parental rights.[282]

The final casualty of a regime focused solely on the question of individual responsibility is the loss of public education that attends a more broad-based examination of societal fault in the foster care system.[283] For similar reasons, Professor Christine Whitman recommended that for civil rights actions generally, "the time has come to admit that equitable actions may be a [more] preferable form of judicial redress" than damage actions for the vindication of constitutional rights.[284] Thus, even if the chances of obtaining damage awards were better, individual damage actions, which operate only after the injury has occurred, are not useful mechanisms for obtaining the structural reform of foster care systems that is needed to ensure the right to safety in foster care. Examination of the structural injunction, undertaken in the next section, demonstrates its superiority as a form of relief in the foster care area.

C. The Structural Injunction

"Structural" or "institutional injunctions"[285] grant broad, detailed relief as a remedy to constitutional violations in the

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[280] Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977).

[281] *Cf.* Whitman, *supra* note 271, at 41–47.

[282] *Id.* at 138.

[283] D. Besharov, *supra* note 277, at 159.

[284] Whitman, *supra* note 271, at 47–48. *But see* Levine, *Social Worker Malpractice: A New Approach Toward Accountability in the Juvenile Justice System*, 1 J. Juv. L. 101 (1977).

[285] See, e.g., Rudenstine, *Institutional Injunctions*, 4 Cardozo L. Rev. 611 (1983) (using the term "institutional injunctions" to describe equitable orders entered in cases involving state and mental institutions); Chayes, *The Role of the Judge in Public Law*

operation of government-run services. The structural injunction focuses prospectively on changing organizational behavior.[286] Beginning with *Brown v. Board of Education*,[287] and coming to maturity in later school desegregation cases,[288] the structural injunction has since been used by federal courts in a wide variety of civil rights contexts.[289]

Structural injunctions have been the subject of substantial judicial[290] and scholarly[291] comment, and remain highly contro-

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Litigation, 89 Harv. L. Rev. 1281, 1281–84 (1976) (terming the cases "Public Law" litigation); Robertson, *supra* note 119, at 146 (terming the relief ordered "Structural Injunctions Directed at Inmate Violence"); Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) (terming the litigation "Structural Reform" litigation); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 49 (1979) (terming the cases "Institutional Reform" litigation); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 Harv. L. Rev. 626 (1981) (distinguishing cases seeking "complex enforcement" through a detailed injunction to "transform a social institution" from "discrete adjudication," which involves only an application of legal forms to particular instances of wrongdoing).

[286] Robertson, *supra* note 119, at 146, and authorities cited therein.

[287] 347 U.S. 483 (1954), 349 U.S. 294 (1955). *Brown* has been frequently mentioned as the progenitor of all modern structural injunction cases. *See, e.g.*, Rudenstine, *Judicially Ordered Social Reform*, 59 S. Cal. L. Rev. 451 (1986); Rosenberg & Phillips, *Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree*, 57 Ind. L.J. 425 (1982).

[288] *See* P. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (1985); Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 Yale L.J. 1700, 1709–12 (1986); Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 Yale L.J. 1811 (1986). Important desegregation cases of the last decade include Milliken v. Bradley, 418 U.S. 717 (1974); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[289] *See, e.g.*, Levy v. Urbach, 651 F.2d 1278 (9th Cir. 1981) (institution for treatment of persons suffering from leprosy); French v. Owens, 538 F. Supp. 910 (S.D. Ind. 1982) (prisons); Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977), *aff'd in part*, 527 F.2d 1041 (2d Cir. 1975) (jails); Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977) (juvenile detention facility); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) *aff'd in part*, 550 F.2d 1122 (8th Cir. 1977) (mental institution); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (institution for the mentally retarded); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *adopted*, 343 F. Supp. 279 (E.D. Pa. 1972) (special education).

[290] Compare, for example, the majority, concurring and dissenting opinions in Rhodes v. Chapman, 452 U.S. 337 (1981). At the close of the October 1986 term, four of the sitting justices generally opposed structural injunctions while four approved of them. Justice Scalia has yet to address this topic as a justice of the Supreme Court. Justice Powell's resignation will do nothing to lessen the controversy. For a discussion of the clash of views among the current justices, see Rudenstine, *supra* note 285. Lower federal judges have also addressed this topic. Lasker, *Judicial Supervision of Institutional Reform*, 5 Crim. Just. Ethics 2, 79 (1986); Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 L. and Hum. Behav. 145 (1982); Johnson, *Observation — The Constitution and the Federal District Judge*, 54 Tex. L. Rev. 903 (1976).

[291] Among the major works favoring the use of structural injunctions are A. Neier, *supra* note 14; Rudenstine, *supra* note 285; Eisenberg & Yazell, *The Ordinary and the*

versial. Opponents contend that they violate the separation of powers, erode federalism barriers, and compromise democratic principles. Supporters counter, often with arguments drawn from history, that the use of broad equitable federal injunctive powers does not represent a radical departure from the traditional judicial role. But the criticism most often uttered in opposition to this form of relief is that "courts lack the expertise and administrative capacity necessary to improve"[292] large bureaucratic governmental systems such as the foster care system.

No doubt there are serious impediments to effective implementation of a decree calling for safe treatment of foster children. Implementation may require substantial restructuring of a large, bureaucratic institution. Reform will require piercing the institutional veil, for unless the will to change is transmitted to the caseworkers who select and supervise the foster homes, and to the foster parents themselves, the right to safety will be a chimera.[293] Moreover, organizational and psychological change alone will be insufficient. Safety will come only at a price. Increased appropriations will be needed to hire and train more and better-qualified caseworkers and foster parents and to provide support services for foster parents and children.[294]

The only remedy that holds significant promise of accomplishing this feat is a structural injunction. In contrast to the limited possibilities for success with damage actions, the evidence suggests that structural injunctions do engender improvements. Of course, the benefits are not felt overnight; change is often measured by "inches and centimeters" rather than "leaps

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Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Fiss, *supra* note 285; Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 Harv. C.R.-C.L. L. Rev. 1 (1978). Works criticizing this form of relief include Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265; Diver, *supra* note 285; Mishkin, *Federal Courts as State Reformers*, 35 Wash. & Lee L. Rev. 949 (1978); Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661 (1978).

[292] Comment, *supra* note 94, at 388.

[293] *See supra* notes 277–78 and accompanying text. *See also* Lowry, *supra* note 7, at 279.

[294] *See also* Zeigler, *supra* note 13, at 40–42 (review of the authority that holds that inadequate resources cannot be used as an excuse to avoid compliance with constitutionally guaranteed rights).

and bounds."[295] The cases involving prison violence exemplify the successful use of structural injunctions.[296]

In a law review article, Professor James E. Robertson recently surveyed the results of four prison cases in which structural injunctions designed to reduce prison violence were obtained.[297] He found that with the passage of time and vigorous efforts at implementation, the decrees "result[ed] in a significant lessening of prison violence."[298] Similar results have been obtained in the implementation of structural injunctions dealing with other concerns. Prison systems in general have been reshaped,[299] and institutions for the mentally ill and the mentally retarded have been drastically altered.[300] Moreover, the available evidence on cases that have addressed educational issues indicates that compliance with judicially ordered reform is ob-

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[295] Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J.L. & Educ. 335, 355 (1981). *See also* Note, *The* Wyatt *Case: Implementations of a Judicial Decree Ordering Institutional Change*, 84 Yale L.J. 1338, 1356 (1975).

[296] A decree seeking to reduce prison violence is, if anything, more difficult to implement than one concerned with foster parent abuse and neglect. Prisons are typically populated with adults who have demonstrated a proclivity for extreme violence. Robertson, *supra* note 119, at 106. *See also* H. Toch, Police, Prisons and the Problems of Violence, 53 (1977), *cited in* Robertson, *supra* note 119. The existence of an active and violent prison subculture is well known and amply documented. *Id.* at 108–09 and authorities cited therein. If significant results can be obtained in that inherently volatile environment, then positive change should be possible in the more benign setting of foster family care. Although it is true that the state has less control over the happenings in a civilian foster home than in the highly regimented setting of a prison, there are ample means available for the control of violence in foster care. *See supra* notes 53–65 and accompanying text. If these safeguards are followed, there is every reason to believe that foster care mistreatment can be greatly minimized with less effort than would be required to achieve safety in prisons.

[297] Robertson, *supra* note 119, at 146–55.

[298] *Id.* at 154. *See, e.g.*, Feliciano v. Barcelo, 497 F. Supp. 14 (D.P.R. 1979). *Feliciano* involved the Puerto Rico prison system. In 1981–82, there were 49 deaths and 75 serious injuries in the Puerto Rico prison system. By 1983–84, the numbers had declined to one death and 17 serious injuries, one-seventh the rate prior to the judgment. Robertson, *supra* note 119, at 153, citing a letter from Cirilo Castro Penaloza, Acting Administrator, Administracion de Correccion, Puerto Rico (Undated, postmarked Feb. 1985); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.P.R. 1977), *remanded*, 599 F.2d 17 (1st Cir.), *aff'd*, 616 F.2d 598 (1st Cir. 1979), *cert. denied*, 449 U.S. 839 (1980).

[299] *See generally* M. Harris & D. Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings (1977).

[300] *See* D. Rothman & S. Rothman, *supra* note 120 (successful implementation of the Willowbrook remedial decree resulted in the community placement of half of the facility's residents; it also brought about positive changes in the state's policy regarding the care of retarded persons).

tainable.[301] In all these areas, the initial recalcitrance of defendants to obey the decree was overcome by patient, yet persistent, efforts by courts and by plaintiffs' attorneys.

Structural injunctions tend to bring benefits which are broader than those strictly related to literal compliance with court orders. The "focused compulsion"[302] engendered by a structural law suit causes policy makers to attend to problems that they would otherwise ignore.[303] Moreover, the cases themselves may "sensitize . . . the public . . . to the need for . . . reform."[304] By serving the traditional federal judicial role of the community's "sensitive conscience,"[305] the courts have stimulated other branches of government to act responsively to the needs highlighted by the decrees.[306] In the child welfare field, this "informing function"[307] of institutional litigation would be particularly valuable. Structural injunctions, despite the difficulty of enforcement, would "focus attention on the systemic nature of problems plaguing child welfare."[308]

Even if the potential benefits of the structural injunction were less clear, the case for granting structural injunctions would still be compelling. Given the lack of realistic alternatives,[309] it would be a default of constitutional responsibility for

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[301] M. Rebell & A. Block, Educational Policy Making and the Courts 65 (1982) (compliance achieved in most of 41 randomly selected education decrees not involving desegregation). The results of school desegregation decrees are less clear. *Compare* United States Civil Rights Commission, Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Schools, Letter of Transmittal (1976) (communities in which desegregation proceeds without major incident far outnumber those like Boston and Louisville) *with* H. Kalodner & J. Fishman, Limits of Justice: The Court's Role in School Desegregation (1978) (case studies of several school desegregation cases where the level of compliance was minimal). The spotty results in school desegregation cases may be explained by their high visibility and the tremendous amount of opposition they receive.

[302] Rebell, *supra* note 295, at 344 n.26.

[303] Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 Ala. L. Rev. 271, 273–79 (1981).

[304] Comment, *supra* note 94, at 392. *See also* Jacobs, *The Prisoners' Rights Movement and Its Impacts: 1960–80*, in N. Morris & M. Tonry, Crime and Justice: An Annual Review of Research 459 (1981).

[305] Weinstein, *supra* note 290, at 151.

[306] Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 463 (1977). For an example of how this phenomenon has already occured in foster care litigation, see *infra* note 388 and accompanying text.

[307] A. Neier, *supra* note 14, at 237.

[308] D. Besharov, *supra* note 277, at 159. *See also* Lowry *supra* note 7, at 275.

[309] *See supra* notes 81–92.

the courts not to attempt to enforce foster children's crucial constitutional right to safety. One commentator, who surveyed the somewhat disappointing results of the federal courts' efforts to achieve desegregation in our nation's schools, observed not long ago that "[f]or all the faults that have characterized adjudication, it is not possible to conceive of a constitutional system in which no institution of government is prepared to declare and enforce constitutional rights."[310] Structural injunctions are clearly the remedy of choice for the problem of violence in foster care. The question arises as to the appropriate forum for assertion of such claims. The next section addresses that question.

V. The Search for a Forum

Both federal and state courts have jurisdiction to entertain right-to-safety cases.[311] But, if a structural injunction is the preferable remedy to enforce the right to safety against foster care violence, federal courts are the better forum in which to vindicate that right. Federal courts historically have been called upon to protect the constitutional rights of citizens from encroachments by state officials. While state courts have in recent years become more active participants in the dialogue of constitutional adjudication,[312] they lack the institutional attributes necessary to overcome the bureaucratic and political obstacles to the achievement of a safe foster care system. This section discusses the superiority of federal courts as a forum for right-to-safety cases and explains why two abstention doctrines that operate to close federal courts to some claims—the domestic relations exception and the *Younger v. Harris* doctrine—are not applicable to right-to-safety cases.

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[310] H. Kalodner & J. Fishman, *supra* note 301, at 23.

[311] Maine v. Thiboutot, 448 U.S. 1, 11 (1980) (section 1983 actions may be brought in the state courts). *See also* Martinez v. California, 444 U.S. 277, 283 n.7 (1980); M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses and Fees 15 (1986).

[312] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Collins, *Looking to the States*, Nat'l L.J., S-2 (Sept. 29, 1986). *See also* Recent Developments in State Constitutional Law (P. Bamberger ed. 1985).

A. The Superiority of Federal Courts

Since the passage of the fourteenth amendment and the Civil Rights Act of 1871, federal courts have been seen as the "fundamental protectors of . . . federal rights."[313] The primary basis for confidence in the federal courts in this role is the protection provided by the Article III requirement of lifetime appointment for federal judges.[314] This requirement largely insulates the federal judiciary from the political process, giving federal judges the level of independence needed to counter the majoritarian tendencies—expressed through elected officials[315]—to tolerate a substandard system of foster care. Since state judges often lack this electoral independence,[316] they are subject to political pressures that dilute their ability to order and supervise reform of state institutions, such as the foster care system.[317] Unlike a case where a single individual is raising a single constitutional issue, the judge in a foster care reform case is asked to oversee the fundamental restructuring of a major social service system in order to guarantee an entire class essential constitutional rights.[318]

Staying power and independence are central to redressing the injustices of foster care systems. The deficiencies in foster care are not easily correctable; they arise in large part because of bureaucratic inertia and a lack of commitment by elected officials to the allocation of sufficient resources to provide the services truly needed to protect the children in care. It is all too easy for legislators to forget the needs of foster children when

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[313] M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 1 (1980). *See also* Pulliam v. Allen, 466 U.S. 522, 541 (1983) (continued to recognize the importance of a federal forum for the protection of federal rights); Mitchum v. Foster, 407 U.S. 225 (1972) (reemphasized that federal courts play a crucial role in the protection of federal rights); Whitman, *supra* note 271, at 24 n.114 (citing Allen v. McCurry, 449 U.S. 90, 105 (1980). *See also* Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987).

[314] U.S. Const. art. III, § 1 ("The judges . . . shall hold their offices during good behavior."). *See also* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1127–28 (1977) (removal only by impeachment means maximum insulation from majority pressures).

[315] Neuborne, *supra* note 314, at 1127–28.

[316] State judges are ordinarily elected for a fixed term. *See generally* Neuborne, *supra* note 314, at 1122.

[317] Neuborne, *supra* note 314, at 1127–28 and authorities cited therein.

[318] *See supra* notes 302–08 and accompanying text.

lobbyists press them for more popular services such as police, fire protection and education.

There are other reasons why federal courts provide a superior forum to state courts for foster care right-to-safety cases. First, state judges, as a group, are less likely to be as familiar with federal law as federal judges are.[319] Most of the state judge's time is spent adjudicating claims that arise solely under a particular state's laws. In contrast, federal judges spend the bulk of their time adjudicating federal claims. For this reason, federal judges have much greater familiarity with federal constitutional problems.[320] Second, federal judges tend to have what Professor Neuborne terms a "psychological set"[321] that disposes them to be more receptive to constitutional claims. They are "heirs of a tradition of constitutional enforcement."[322]

Without the familiarity with federal law, support and time, environment of receptivity, and the political independence that characterize the federal judiciary, it is difficult to envision consistent, appropriate decisions in foster care right-to-safety cases. This is not to say that state judges are uniformly unable to handle competently foster care reform cases. In fact, there are instances in which state judges have done so.[323] However, given the added obstacles that they must overcome to achieve the results required, foster care reform cases belong in federal court.[324] The following section examines whether either of two

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[319] Neuborne, *supra* note 314, at 1121–24.

[320] M. Redish, *supra* note 313, at 2. Another reason that the federal courts seem better suited to address the right-to-safety cases is that the work load of state judges is much greater than that of their federal colleagues. Neuborne, *supra* note 314, at 1122.

[321] Neuborne, *supra* note 314, at 1124.

[322] *Id.*

[323] *E.g.*, *In re* P., No. 78J04583 and No. 78J04584, slip. op. (Ky. 1983), *cited in* Moraine, *Making Foster Care Work*, 4 Cal. Law. 24, 53 (1984); Palmer v. Cuomo, 121 A.D.2d 194, 503 N.Y.S.2d 20 (1986).

[324] It has been argued that there is empirical support for the notion of parity between federal and state courts. Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L.Q. 213 (1983). The data from that study, however, do not support the conclusion that state courts are as competent to handle class action right-to-safety claims for structural injunctive relief as are federal courts. The data were drawn from reported decisions without apparent differentiation between individual and class claims, or between established and as-yet-unestablished rights. *Id.* at 238. Individual adjudications of established rights differ from the class claims of previously unrecognized rights pertinent to the problem of foster care abuse. In such uncharted waters, the sympathy, independence and expertise of federal judges is especially important. Whitman, *supra* note 271, at 24

major abstention doctrines would prevent the federal courts from examining foster care reform cases.

B. Abstention Is Inappropriate in Right-to-Safety Cases

In *Younger v. Harris*,[325] the Supreme Court gave new life to an abstention doctrine applicable to civil rights cases.[326] The *Younger* doctrine is an exception to the general duty of federal courts to enforce federal law and "fearlessly protect"[327] federal constitutional rights from encroachment by state officials.[328] *Younger* instructs district courts to refrain from adjudicating properly presented federal constitutional issues when the relief sought would result in halting a state criminal proceeding, unless plaintiffs can demonstrate "extraordinary circumstances."[329] As long as federal plaintiffs have an opportunity to present their claim in the state criminal trial, and are not suffering irreparable injury, then the federal court should abstain.[330] Justice Black explained that "Our Federalism"[331] is the driving force behind

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n.114. In addition, the authors report that federal courts uphold federal claims in a greater percentage of cases than do state courts. Solimine & Walker, *supra*, at 240, table II (federal courts uphold federal claims in 41% of cases, compared with 32% in state courts). For the views of other commentators who favor the availability of federal forums for vindication of federal rights, see Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 Hastings L.J. 597, 647–50 (1987); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 168 (1953). For a contrary view, see Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605 (1981).

[325] 401 U.S. 37 (1971).

[326] The abstention doctrine now commonly associated with *Younger* traces its roots back to *In re* Sawyer, 124 U.S. 200 (1888). *See generally* Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. Pa. L. Rev. 266, 269–82 (1976) (tracing the history of the nonintervention doctrine of *Younger* and arguing that the Supreme Court's interpretation of the doctrine differs during periods of judicial activism and judicial restraint).

[327] Parker v. Turner, 626 F.2d 1, 6 (6th Cir. 1980).

[328] Mitchum v. Foster, 407 U.S. 225, 242 (1972) (The Court described federal courts "as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."). *See also* Morial v. Judiciary Comm. of La., 565 F.2d 295, 298–99 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

[329] *Younger*, 401 U.S. at 53.

[330] *Id.* at 43–45.

[331] *Id.* at 44.

the doctrine.[332] The Supreme Court has steadily enlarged the boundaries of this highly controversial doctrine by holding that the underlying policies dictate restraining federal involvement not only when state criminal proceedings are pending, but also during civil proceedings in which the state is a party in its "sovereign capacity."[333]

Indeed, the doctrine creates an enclave of virtual immunity from lower court enforcement of federal constitutional rights. Federal courts have justified the application of the *Younger* doctrine as necessary to prevent the unseemliness of allowing a state court defendant to come "running into federal court seeking an adjudication of his rights and/or an injunction halting the criminal prosecution."[334] To permit federal jurisdiction in such a case is considered undesireable because it would seem to imply that the state judiciary is unable or unwilling to enforce federal rights.[335] In addition, the bifurcation of the state case

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[332] Two other forms of abstention in use in federal courts today do not apply to right-to-safety cases or would require expansion of existing doctrines to apply: *Pullman* abstention and *Burford* abstention. *See* Railroad Comm'r of Texas v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943). *Pullman* only applies when one case raises both a federal constitutional question and an unclear question of state law, the resolution of which might modify the federal question or obviate the need to decide it. A right-to-safety case generally raises only a federal issue. Moreover, applying *Pullman* abstention would require waiting for the state court's decision on the state issues hypothetically involved, decisions that could theoretically remain pending during the child's entire time in foster care and permitting the harm to the foster child to persist.

Similarly, *Burford* abstention, in which the federal court defers to the state court to avoid interference with complex state administrative activities, usually by dismissing the action, would be inapplicable in right-to-safety cases. The *Burford* doctrine had been designed to apply to administrative actions, while right-to-safety cases deal with judicial issues. 319 U.S. at 332. *See generally* C. Wright, The Law of Federal Courts § 52 (4th ed. 1983) (describing four variations of the abstention doctrine); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).

[333] Trainor v. Hernandez, 431 U.S. 432, 444 (1977). Over the years, the Supreme Court has applied the doctrine to civil proceedings in which the state seeks civil enforcement, *id.*, proceedings regulating the conduct of attorneys, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), proceedings dealing with civil contempt, Juidice v. Vail, 430 U.S. 327 (1977), proceedings concerning child custody, Moore v. Sims, 442 U.S. 415 (1979) and, most recently, proceedings dealing with posting bonds pending appeal in a purely private case, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987).

[334] Parker v. Turner, 626 F.2d 1, 3 (6th Cir. 1980).

[335] *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (stressed that federal court interference with a state's process is "an offense to the State's interest," and "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'"), *reh'g denied*, 421 U.S. 971 (1975) (quoting Steffel v.

that results when federal courts take jurisdiction of a case already in a state court threatens to throw the administration of state criminal justice into confusion.[336]

The doctrine's boundaries were enlarged in *Moore v. Sims*.[337] There a sharply divided Court applied the *Younger* abstention doctrine to state child-protection proceedings. The plaintiffs in *Moore* were suspected of abusing their children. State officials had removed the children from school and placed them involuntarily in foster care, without notice to the parents and without a hearing pursuant to the Texas Family Code Act. The plaintiffs challenged the constitutionality of several sections of the code.[338] After several unsuccessful attempts to obtain a hearing before the state courts, plaintiffs turned to federal court and secured injunctive relief.[339] The Supreme Court, however, found that the district court should have abstained, as the enjoined state court proceedings touched on matters which are "a traditional area of state concern."[340] Because the state has a vital interest in "quickly and effectively removing the victims of child abuse from their parents,"[341] and because the child protection proceedings, under state abuse and neglect laws, are "in aid of and closely related to state criminal statutes,"[342] the Court held that the *Younger* doctrine was applicable. Finding none of the exceptions to the doctrine satisfied, the Court ordered abstention.[343]

Thompson, 415 U.S. 452, 462 (1974). *See also* Juidice v. Vail, 430 U.S. 327 (1977) (applying the *Younger* doctrine to halt the federal court's interference in the state contempt process).

But see, e.g., Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 Cornell L. Rev. 463, 482–84 (1978) (rejecting the need for deference to avoid insulting state courts).

[336] *Trainor*, 431 U.S. at 446. *See also* Moore v. Sims, 442 U.S. 415, 429–30 (1979) (noting that when federal courts intervene, they deprive the state judiciary of an opportunity to develop state policy); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. Rev. 59 (1981).

[337] 442 U.S. 415 (1979).

[338] Sections of chapters 11, 14, 15, 17, and 34 in Title 2 of the Texas Family Code were challenged. *See* Note, Moore v. Sims*: A Further Expansion of the* Younger *Abstention Doctrine*, 1 Pace L. Rev. 149 (1980).

[339] *Moore*, 442 U.S. at 418–22.

[340] *Id.* at 435.

[341] *Id.* (quoting Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1189 (S.D. Tex. 1977)).

[342] *Id.* at 423, (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)).

[343] *Id.* at 433–35.

Although *Moore v. Sims* concerned an attempt by parents to regain custody of their children, courts have since interpreted the decision as requiring the application of the *Younger* principle to all family court proceedings.[344] While one must therefore ask whether the *Younger* doctrine applies or should apply to foster child right-to-safety cases, an examination of the policies underlying the doctrine reveals that the answer is no. The *Younger* doctrine developed as a response to special cases where the state's interest in enforcement of its own laws outweighs the strong federal interest in the federal court enforcement of federal constitutional rights.[345] In right-to-safety cases, the important constitutional rights at stake outweigh any possible interference with the state's law enforcement interests. In such a context, the balance tips against *Younger* abstention because the predicate for the doctrine's applicability is missing.

Federal prison reform cases provide an appropriate analogy. Cases concerning prison conditions have never been considered subject to the *Younger* doctrine,[346] primarily because plaintiffs in these cases do not seek to overturn their convictions or to shorten their incarceration. Thus, federal involvement in these cases does not interfere with any pending state proceedings. The same is true of foster care right-to-safety cases, which concern the quality, not the existence of the placement.

The analogy to prison cases, however, is not perfect. Unlike prisoners, whose case is closed upon conviction, foster children remain subject to judicial proceedings,[347] even if their parents

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[344] *Id.* at 425, 430. District courts have based their opinions on a broad understanding of *Moore*. *See, e.g.*, Brown v. Jones, 473 F. Supp. 439, 443–46 (N.D. Tex. 1979).

[345] Trainor v. Hernandez, 431 U.S. 434, 444 (1977); Juidice v. Vail, 430 U.S. 327, 334–35 (1977).

[346] In the few prison cases that have dealt with abstention issues, *Younger* abstention has been rejected. Campbell v. McGruder, 580 F.2d 521, 525 (D.C. Cir. 1978) (abstention did not prevent federal court from granting injunctive relief to pretrial detainees in case of unconstitutional facility conditions); Ramos v. Lamm, 639 F.2d 559, 564–65 (10th Cir. 1980) (prison conditions case where *Pullman*, *Burford*, and *Younger* abstention were held to be inappropriate).

[347] Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (states must institute a procedure whereby review of the child's placement occurs at least once every eighteen months); Social Security Act § 47(a)(1), 42 U.S.C. § 67(a)(1) (Supp. 1981) (the purpose of the Adoption Assistance and Child Welfare Act of 1980 is to expeditiously either return the child to his parents, or to arrange for the child's adoption). *See, e.g.*, N.Y.

have consented to placement. The child's case will generally remain available for family court review during the time the child is in foster care.[348] The difference between a foster care case and a prison conditions case, then, is that a foster care right-to-safety case touches on collateral areas that, at least theoretically, are usually within the purview of cases already in state courts.

The Supreme Court has sent contradictory messages whether *Younger* applies to such collateral matters. On one hand, in *O'Shea v. Littleton*,[349] the Court approved application of the abstention doctrine where the relief sought would broadly affect state criminal court judicial practices and procedures.[350] On the other hand, in *Gerstein v. Pugh*,[351] the Court refused to apply *Younger* to an action seeking preliminary hearings for a class of pre-trial detainees.[352] Lower courts attempting to distinguish *Gerstein* and *O'Shea* have reached seemingly irreconcilable results.[353] The agony of their efforts may explain what

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Soc. Serv. Law § 392 (Consol. 1984 & Supp. 1986) and *infra* note 348 and accompanying text (a reviewing body may inquire into the child's foster care placement and order improvement if needed).

[348] M. Hardin, Foster Children in the Courts 623 (1983). *See* N.Y. Soc. Serv. Law § 392(10) (Consol. 1984 & Supp. 1986) (requires the court to possess continuing jurisdiction in the case of children who are continued in foster care; rehearings must occur at least every twenty-four months). *See also* Miss. Code Ann. § 43-15-13 (Supp. 1986); Tex. Fam. Code Ann. § 18 (Vernon 1986).

[349] 414 U.S. 488 (1974).

[350] *Id.* at 500–01 (even though the plaintiffs did not seek to enjoin any pending criminal proceeding, the Court held that the relief sought—a day-to-day audit of state court practices—was within the *Younger* prohibition since it would have thrust the federal court into the role of "receiver" of the state court system).

[351] 420 U.S. 103 (1975).

[352] *Id.* at 108 n.9.

[353] Lower federal courts have consistently found *Younger* applicable to collateral challenges to the absence of a hearing or standards in state bail-setting procedures, Muda v. Busse, 437 F. Supp. 505 (N.D. Ind. 1977); to the use of social histories prior to adjudication in family court juvenile delinquency proceedings, J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981); to the absence of appointed counsel in child support contempt matters, Parker v. Turner, 626 F.2d 1 (6th Cir. 1980); and to failure to adjourn a criminal trial on Friday, which the defendant observed as his sabbath, N.J. v. Chesmard, 555 F.2d 63 (3d Cir. 1977). However, other courts have determined that *Younger* is not implicated when the collateral attack is on preventive detention practices of family court judges, Coleman v. Stanziam, 570 F. Supp. 679 (E.D. Pa. 1983), *app. dismissed*, 735 F.2d 118 (3d Cir.), *cert. denied*, 469 U.S. 1037 (1984), or concerns the right to bail pending appeal of a criminal conviction, Abbott v. Laurie, 422 F. Supp. 976 (D.R.I. 1976), or relates to the practice of indefinitely confining a juvenile pursuant to an unclear family court order, A.T. v. County of Cook, 613 F. Supp. 775 (N.D. Ill. 1985).

prompted then-Justice Rehnquist to comment that the Court's *Younger*-based decisions map a "sinuous path."[354]

The path is easier to follow in right-to-safety cases. In every case in which a federal court has abstained from examining a federal claim on *Younger* grounds because, as a collateral matter, the claim involved a family court case, the federal claim involved an attack on the procedures followed by the state court.[355] At least for foster care cases, there is a relevant distinction between *Gerstein* and *O'Shea*. *Gerstein* was directed not at state criminal prosecutions, but at the narrow legality of pre-trial detention without a probable cause hearing.[356] *O'Shea*, on the other hand, was a broad-based attack on the Cairo, Illinois, criminal justice system.[357] Since right-to-safety cases do not challenge state court procedures, a foster care right-to-safety case bears a greater similarity to *Gerstein* than to *O'Shea*, because it challenges only the legality of the conditions of foster care, not the placement proceedings themselves.

When a federal court changes the procedures to be used in a state proceeding by, for example, ordering the appointment of counsel in a support order proceeding,[358] it comes dangerously close to intruding on the overriding state interest in conducting its own judicial proceedings. *Younger* is designed, in part, to avoid federal displacement of the state court "in supervising the conduct of trials in state court."[359] This displacement can occur when the federal challenge is to a collateral matter. The effect of a federal injunction which alters a state procedure is to transfer control of the case from a judge in one system to a judge in another system.[360] Such a transfer can create the same type of confusion and inefficiency as would an injunction against the state proceeding itself.

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[354] Steffel v. Thompson, 415 U.S. 459, 479 (1973) (Rehnquist, J., concurring).

[355] *See infra* notes 363–64 and accompanying text.

[356] 420 U.S. at 108.

[357] 414 U.S. at 499.

[358] Parker v. Turner, 626 F.2d 1 (6th Cir. 1980).

[359] N.J. v. Chesmard, 555 F.2d at 68 (3d Cir. 1977).

[360] *See also* J.P. v. DeSanti, 653 F.2d 1080, 1084 (6th Cir. 1981) (allowing federal suits would "clearly interfere" with the procedures of the juvenile court system); Brown v. Jones, 473 F. Supp. 439, 448 (N.D. Tex. 1979) (observing that without the *Younger* application, a party would continually move to stop a procedure, never allowing an action to get to court).

Equitable relief in right-to-safety cases does not pose these dangers. A federal court order to improve a foster care system in no way interferes with the local family court process. It neither dictates the procedures that the state court should follow nor limits the range of disposition alternatives that the state judge may consider. The overriding purpose of a family court foster care proceeding is to determine whether or not foster care placement is necessary, and, if it is, to determine when and by what means it should be terminated.[361] That purpose is not disturbed by a right-to-safety injunction. The state's interest in the integrity of its own proceedings, therefore, is not compromised by federal injunctive relief protecting the safety of foster children. Indeed, relief not only leaves intact the state interest in protecting children, but also enhances it by improving the quality of the foster care program.[362]

Lower federal courts confronting *Younger* issues in family court and foster care matters have applied the doctrine in a manner consistent with this analysis. Thus, cases seeking to enjoin the use of certain family court procedures have been dismissed,[363] but the courts have refused to apply *Younger* where, as in a right-to-safety case, the plaintiff does not seek to enjoin the state proceeding or to interfere with family court proceedings.[364]

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[361] M. Hardin, *supra* note 348, at 86; Guttenberger, *Foster Placement Review: Problems and Opportunities*, 83 Dick. L. Rev. 487, 491 (1979) (footnote omitted). *See also* Mass. Gen. Laws Ann., ch. 119, § 26 (Law Co-op Supp. 1987); N.Y. Soc. Serv. Law § 392 (Consol. 1984); Ohio Rev. Code Ann. § 5103.151 (Baldwin 1984 & Supp. 1986); Va. Code Ann. § 16.1-282 (1950 & Supp. 1987).

[362] L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981). The mere existence of an available, but unutilized, state forum has never been enough to authorize *Younger* abstention. Under 42 U.S.C. § 1983, the federal remedy for constitutional injury is supplemental to the state remedy. *See* Monroe v. Pape, 365 U.S. 167 (1961); Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985).

[363] *See, e.g.*, L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981); J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981); Haag v. Cuyahoga County, 619 F. Supp. 262 (N.D. Ohio 1985); Brown v. Jones, 473 F. Supp. 439 (N.D. Tex. 1979).

[364] *See, e.g.*, L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981); A.T. v. County of Cook, 613 F. Supp. 775 (N.D. Ill. 1985). *A.T.* and *L.H.* are illustrative. In *A.T.*, the plaintiff sought release from the indefinite confinement that resulted when he was confined pursuant to a family court order that allowed him to be "released upon request of the child's parent or other responsible adult." 613 F. Supp. at 776. The court held that *Younger* was not applicable because plaintiffs challenged what happened after the

There are two additional reasons why *Younger* should not relegate right-to-safety cases to the state courts. *Younger* does not apply either when there is no adequate remedy in the state court proceeding or when the plaintiff is suffering great and immediate irreparable harm.[365] In the right-to-safety context, both exceptions to *Younger* usually apply. First, a single family court judge, in a single case, is unlikely to have either the perspective or the authority to fashion relief that will improve the quality of the foster care system. The only question normally considered by the judge (and the only one that can be considered) is whether the child belongs in foster care, and, if so, when and under what conditions release is appropriate.[366] This yes-no, in-out approach is very different from what a right-to-safety decision requires. In such cases, a judge must consider not simply the child's status, but also the quality of the child's placement in the foster care system. Most state statutes provide neither procedures nor remedial power for family court judges to address these questions.[367]

Second, foster children do suffer great and immediate irreparable harm when their right to safety is violated. Unlike a *Younger* situation, where the cost, anxiety and inconvenience of having to defend against a criminal charge does not qualify

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family court judge had ruled. The injunction requested, therefore, did not duplicate, disrupt or insult the state judiciary. *Id.* at 778.

In *L.H.*, the plaintiff class sought additional funding for private agencies that care for children in the state's custody. The court refused to dismiss on *Younger* grounds even though there were foster care review proceedings, in which plaintiffs could have raised this claim, pending for all members of plaintiff class. The court noted that plaintiffs were not seeking to enjoin those proceedings. It also found that the relief requested "may enrich the variety of disposition alternatives available to a juvenile court judge." 643 F.2d at 1354.

[365] *Younger*, 401 U.S. at 45.

[366] *See supra* note 361 and accompanying text.

[367] Section 392 of New York's Social Service Law is an example of how little a family court judge can do to improve safety for foster children during placement. Family courts have four options: they can return the child to his parent, free the child for adoption, continue the existing foster care, or direct the adoption in the foster family home itself. Application of Social Services Official, 89 A.D.2d 534, 452 N.Y.S.2d 612 (1982); *In re* L., 77 Misc. 2d 363, 353 N.Y.S.2d 317, *modified on other grounds*, 45 A.D.2d 375, 357 N.Y.S.2d 987 (1974). Family courts are not given the task of overseeing an agency's efforts and should avoid substituting their judgment for the commissioner's. They should not choose between adequate plans or design their own plans, but should merely satisfy themselves that the placement plans of the Commissioner are adequate. *In re* Damon A., 61 N.Y.2d 77, 459 N.E.2d 1275, 471 N.Y.S.2d 838 (1983); *In re* Commissioner of Social Services *ex rel.* Riddle v. Rapp, 127 Misc. 2d 835, 487 N.Y.S.2d 477 (1985).

as a great and immediate irreparable harm, and unlike the possibility of having a child removed from parental custody during the pendency of the action,[368] violations of the right to safety cannot be rectified or minimized by subsequent review. When safety is at stake, every moment counts. Loss of life itself may be at stake—certainly, health and emotional well being are.[369] With the potential damage so great, the *Younger* rationale for delay is not persuasive.[370]

Younger, therefore, cannot bar a right-to-safety case in the foster care field any more than it bars a right-to-safety case involving prisoners. The policies that have led federal courts to close their doors to a limited number of federal constitutional cases are not contravened by right-to-safety cases. For the federal courts to abstain in such cases is for them to abdicate their responsibility to enforce federal rights.

C. The Domestic Relations Exception is not a Jurisdictional Barrier to Right-to-Safety Cases

"Poorly defined and unevenly applied,"[371] the domestic relations exception is a judge-made doctrine which permits federal courts to decline to exercise diversity jurisdiction when to do so might embroil them in family disputes. In its most extreme expression of the concept, the Supreme Court described the doctrine as impelled by the notion that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belong to the laws of the States and not to the laws of the United States."[372]

Several rationales have been offered for the doctrine, which constitutes a major restriction of federal jurisdiction. It has been

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[368] *Younger*, 401 U.S. at 46; *Moore*, 442 U.S. at 434–35.

[369] *See supra* notes 19–27 and accompanying text.

[370] *Younger* justified its abstention rule by, among other things, assuming that courts of equity should not act in a restraining manner if the "moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43–44. *See also* Trainor v. Hernandez, 431 U.S. 434, 440–42 (1977) (resting on the assumption that subsequent review and remedy at law can, except in the face of great and immediate injury, satisfactorily ameliorate any harm done to the moving party).

[371] Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 Hastings L.J. 571, 573 (1984).

[372] *In re* Burrus, 136 U.S. 586, 593–94 (1890).

said that the domestic relations exception is justified by the strong state interest in family law matters, by the state courts' superior competence in divorce and custody cases,[373] and by a fear of the possibility of incompatible decrees in divorce and child custody cases involving continuing judicial supervision.[374] Some federal courts also have expressed discomfort at the prospect of becoming involved in these often acrimonious proceedings.[375]

The doctrine is generally confined to diversity jurisdiction cases where, absent the doctrine, a state law claim could be brought in federal court solely because the parties reside in different states. On occasion, however, federal courts have declined to adjudicate claims involving domestic disputes even when they are otherwise properly brought under the federal question jurisdiction of the federal courts.[376] A recent panel opinion of the Eleventh Circuit suggested that the domestic relations doctrine might apply in a right-to-safety case.[377] But the doctrine, which has dubious credentials in any setting,[378] has no place in right-to-safety cases.

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[373] *See, e.g.*, Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); Phillips, Nizer, Benjamin, Krim and Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (quoting C. Wright, Federal Courts 84 (2d ed. 1970)).

[374] *See, e.g.*, Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982) (recognizing that "the exercise of federal jurisdiction will create a potential for inconsistent decrees"); Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) ("there is an obvious likelihood of incompatible state and federal decrees").

[375] *See, e.g.*, Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976) ("vexatious" field of family law warrants separate courts; "the federal court system should allow [state courts] that dubious honor exclusively"); *see also* Wand, *A Call for the Repudiation of the Domestic Relation Exception to Federal Jurisdiction*, 30 Vill. L. Rev. 307, 385–87 (1975).

[376] *See, e.g.*, Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983) ("[t]here is no subject matter jurisdiction over these types of domestic disputes"); Zak v. Pilla, 698 F.2d 800, 801 (6th Cir. 1982) (even a valid claim under 42 U.S.C. § 1983 should be "dismissed by a federal district court for lack of jurisdiction"). *But see* Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983) ("[t]he mere fact that a claimed violation of constitutional rights arises in a domestic relations context does not bar review of those constitutional issues"). The Supreme Court has not expressly stated that the domestic relations exception does not apply to cases brought under federal question jurisdiction. However, the Court has not invoked this exception in cases challenging the constitutionality of a child's placement or treatment in foster care. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979); Smith v. OFFER, 431 U.S. 816 (1977).

[377] Taylor v. Ledbetter, 791 F.2d 881, 884 (11th Cir. 1986), *aff'd in part, rev'd in part on rehearing*, 818 F.2d 791 (11th Cir. 1987) (en banc).

[378] *See* Atwood, *supra* note 371; Wand, *supra* note 375; Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L.

After *Erie Railroad v. Tompkins*,[379] a federal court's only substantive concern in most diversity cases is to apply state law in an even-handed manner.[380] In that limited context, the domestic relations exception, despite its questionable pedigree, serves reasonably well. Without it, a potential out-of-state litigant in a state divorce or custody matter could escape adjudication of her dispute in the state tribunal to which it is assigned by state law. For example, if litigants, in such an instance, can avoid the state tribunal, the potential for disruption and inefficiency is greater than when a tort action is brought in federal court. Unlike tort or contract matters, family law enforcement is generally entrusted to a specialized tribunal,[381] and family law cases often involve emotional matters of unique state concern.[382] In domestic relations matters, the risk of inconsistent adjudications by judges untrained in the intricacies of local law—ever-present in all diversity jurisdiction cases—becomes too high a price to pay for the theoretically impartial forum that diversity jurisdiction is designed to obtain.

The balance, however, changes significantly when the litigation is brought to vindicate federal rights. No longer must the court weigh the relative importance of an impartial federal forum for the adjudication of a pure state law claim against the disruption to the state system caused by the provision of the alterna-

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Rev. 843 (1984); Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. Rev. 661 (1983). Much of the criticism of the exception (which originated from dicta in two Supreme Court opinions) questions whether the exception is justified. Atwood, *supra* note 371, at 592–93; Wand, *supra* note 375, at 359–85; Note, *supra*, at 684–91. Critics have also condemned the inconsistent application of the exception. Atwood, *supra* note 371, at 573; Wand, *supra* note 380, at 387; Comment, *supra*, at 855–72; Note, *supra*, at 676–84.

Although authorities debate whether the exception should be redefined or abolished, most agree that it should not extend to cases brought under federal question jurisdiction. Wand, *supra* note 375, at 392; Comment, *supra*, at 882; Atwood, *supra* note 371, at 626. An extension of this sort would preclude federal courts from deciding important constitutional issues that were intended to be within their jurisdiction. Wand, *supra* note 375, at 392–93; Comment, *supra*, at 882–83.

[379] 304 U.S. 64 (1938).

[380] *Id.* at 71 (previously "the laws of the several States" under section 34 of the Federal Judiciary Act of September 24, 1789 did not include common law).

[381] H. Clark, The Law of Domestic Relations in the United States 284 (1968); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

[382] An example is the *Baby "M"* case, involving surrogate parenting arrangements. *In re* Baby "M", 217 N.J. Super. 313, 525 A.2d 1128 (1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (1987).

tive forum. In right-to-safety cases, the clash is between the overriding duty of federal courts to enforce and uphold constitutional rights, and the state's interest in having its courts hear these cases. The addition of the federal constitutional component changes the result of the abstention inquiry.

> Federal courts should be most sensitive to their institutional responsibility to accept jurisdiction assigned to them by Congress when considering domestic relations cases that raise substantial federal constitutional or statutory claims. The domestic relations limitation, of dubious validity even in diversity cases, is wholly inappropriate in actions founded on a federal question.[383]

Accordingly, most courts and commentators take the position that the domestic relations exception is appropriately restricted to diversity cases.[384]

There is another reason why the doctrine should not apply in right-to-safety cases on behalf of foster children: none of the principles that the domestic relations exception is designed to uphold are threatened by the invocation of federal jurisdiction. The right to safety concerns the quality, not the fact or the duration, of a child's placement in foster family care. The articulation and maintenance of this right by federal courts will not interfere with divorce cases, intrude on competency regarding family matters or have a major impact on child custody arrangements.[385]

Thus, since there are no genuine obstacles to the provision of a federal forum for the vindication of a foster child's federally secured constitutional right to safety, and since a structural injunction granted by a federal court is the preferred remedy, the concluding section of this article considers guidelines for fashioning and administering the appropriate injunctive relief if foster care systems are to be made safe.

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[383] Atwood, *supra* note 371, at 625–26.
[384] *See supra* note 378 and accompanying text.
[385] *See supra* notes 361–62 and accompanying text.

VI. Guidelines for Effective Structural Injunctions

Unfortunately, a precise recipe for success in obtaining implementation of complex injunctive decrees does not exist.[386] This is certainly true for foster care. There is only a single federal structural injunction dealing with safety in foster care: the order in *G.L. v. Zumwalt*.[387] But *G.L.* is still in post-judgment litigation,[388] so courts and lawyers confronting foster care right-to-safety cases do not have a completed record of other cases in the foster care field to draw upon. However, there are many mature structural injunctions in other, closely related, fields that present similar implementation questions.[389] Important lessons emerge from the extensive experience in those cases about what the court and the parties involved in the case must do to increase the chances that a structural decree will be effective. This section discusses five guidelines derived from those cases that, if followed, materially increase the probability of successfully implementing a structural injunction that protects the right to foster care safety while preserving the independence and integrity of the court.

A. Continued Involvement of Plaintiffs' Counsel

Institutional judgments are not self-executing. Child welfare agencies have been resistant to reform and, if the past is any guide, there is no reason to think that merely hortatory court

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[386] Lowry, *supra* note 7, at 280.

[387] 564 F. Supp. 1030 (W.D. Mo. 1983). *See supra* note 11 and accompanying text.

[388] Under the terms of a supplemental consent decree, the court approved the establishment of an outside body composed of three persons to assist the parties' compliance with the decree. G.L. v. Zumwalt, Supplemental Consent Decree, at 2–7 (July 29, 1985). The Committee, as that body is called, currently is engaged in monitoring the decree. In addition, soon after the decree was entered, the state legislature passed a law establishing a state children's commission which, among other things, was specifically charged with reporting to the legislature annually on compliance with the decree. H.B. 256, 82nd Gen. Assembly, 1st Reg. Sess., 1973 Mo. Laws 504.

[389] There is a growing literature, primarily in the form of case studies, on the effect of structural injunctions. *See, e.g.*, Alpert, *Prison Reform by Judicial Decree: The Unintended Consequences of* Ruiz v. Estelle, 9 Just. Sys. J. 291 (1984); Champagne & Hass, *The Impact of* Johnson v. Avery *on Prison Administration*, 43 Tenn. L. Rev. 275 (1976); M. Harris & D. Spiller, *supra* note 299; Mnookin, In the Interest, *supra* note 8; Note, *supra* note 295; M. Rebell & A. Block, *supra* note 301; D. Rothman & S. Rothman, *supra* note 120, at 66–89.

orders will be treated more seriously than other calls for change that are almost always ignored. An institutional injunction case, therefore, cannot end at final judgment. Indeed, the victory that accompanies attainment of an institutional injunction must be seen by plaintiffs' counsel as only a way station on the road toward the achievement of the clients' goal.

Several case studies of institutional reform litigation in other areas stress the importance of an active role for the plaintiffs' counsel. David and Sheila Rothman in their study of the Willowbrook litigation, for example, identify the constant involvement of plaintiffs' counsel, whose "energies did not flag" over the decade or more of active post-judgment monitoring, as having contributed in a major way to the successful implementation that was achieved in that case.[390] An American Bar Association study of compliance with court orders in prison reform cases made a similar observation when it commented that "[i]t is logical to conclude that compliance would not have occurred as quickly or in the ways that it did if plaintiffs' attorneys [in these cases] had not been monitoring actively."[391] Thus, the first essential element to increase the probability of compliance with a structural injunction is the continuing involvement of plaintiffs' attorney in the post-judgment proceedings.[392]

B. A Specific Decree

The decree itself must be detailed and specific. It is not enough to declare that the plaintiff foster children have the right to be protected from harm; the court must specify what the foster care system must do to effectuate the right. A concrete decree focuses the parties and the court on the deficiencies in the system that caused the problem. Decrees should be quantitative and precise and should provide specific tasks, possibly

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[390] D. Rothman & S. Rothman, *supra* note 120, at 356–57.

[391] M. Harris & D. Spiller, *supra* note 299, at 396.

[392] Where the administration of the decree is left to the parties, the burden of reporting non-compliance usually falls on the plaintiff's attorney. Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 824 (1978). *See also* Note, *supra* note 295 at 1366, ("more active participation by the attorneys for the plaintiffs and amici might have compensated for some of the deficiencies of the . . . [monitor] that emerged during the implementation process").

along with timetables for achieving them. If nonobjective standards and goals are provided, intermediate, objective standards should also be outlined.[393] *G.L.* is a model of this type of decree.[394]

The *G.L.* decree dealt with fifteen different aspects of the problem, including caseworker case loads, foster parent compensation, medical and dental examinations, selection and supervision of foster homes, and investigations of suspected instances of foster parent abuse and neglect. For each topic, the decree provides standards for gauging the defendants' performance. For example, the defendants must maintain accurate medical records for each child including, at minimum, a complete medical history, all medical, dental and eye examinations, all inoculations and prescribed medication and indications as to when the next exam should occur.[395] The decree does more than simply declare that foster homes be supervised regularly by trained caseworkers; it specifies a minimum acceptable frequency for the visits.[396]

While a court must avoid excessive detail that will enmesh it in the minutiae of child care management,[397] it is important that its order not be so general that it fails to provide effective relief. A decree that prescribes specific standards for the defendants to meet saves the court and the parties from later time-consuming and frustrating disputes about what constitutes compliance with the decree.[398] A court formulating a decree has the opportunity to seek the input of the defendants. Since the decree is normally not issued until well after the initial determination

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[393] Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 Mental Disability L. Rep. 69, 74 (1976); Note, *supra* note 306, at 457.

[394] The district court in that case published the consent decree that it approved because of the "assistance this case may render other courts considering similar questions." G.L. v. Zumwalt, 564 F. Supp. 1030, 1030 (W.D. Mo. 1983). Publishing *G.L.* was an unusual but not unprecedented event. *See, e.g.*, Goldsby v. Carnes, 365 F. Supp. 395, 396 (W.D. Mo. 1973); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

[395] *G.L.*, 564 F. Supp. at 1038.

[396] *G.L.*, 564 F. Supp. at 1034.

[397] *Cf.* Procunier v. Martinez, 416 U.S. 396, 404 (1973) ("problems of prisons . . . [are] not readily susceptible of resolution by decree"). *See also* Bell v. Wolfish, 441 U.S. 520, 531 (1978); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126 (1976).

[398] Special Project, *supra* note 392, at 817–18 (addresses the advantages and disadvantages of a detailed decree).

of liability, and since the defendants have the right to comment on it without prejudicing their right to appeal, there is no impediment to seeking their assistance.[399] For the same reasons, the defendants have an incentive to come forward. Used wisely, the defendants' participation in the decree formulation process can be beneficial. By incorporating defendants' suggestions the court "encourages voluntarism" and "cooperative approaches."[400] It also becomes more fully informed about the practical consequences of its decree, and by encouraging the defendants' participation, it helps blunt the criticism that the judiciary lacks "relevant information"[401] needed to formulate feasible remedies for systemic constitutional injuries.

An additional and important benefit of a detailed decree is that it aids the court and parties in gauging the progress, or lack thereof toward compliance. The American Bar Association's study of prison cases revealed the practical significance of detailed structural decrees. The authors commented that the "clear and unambiguous" nature of a decree contribute[s] to compliance in that it gives "the plaintiffs' attorneys objective standards by which to measure failure to comply," and more importantly, it "contribute[s] to the belief (by defendants) that the judge [is] committed to achievement of compliance."[402]

C. The Need for Monitoring

In addition to its substantive provisions, the decree must provide for monitoring the defendants' performance. Monitoring

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[399] *See, e.g.*, Taylor v. Board of Educ., 288 F.2d 600, 604 n.2 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

For example, in Tatum v. Rogers, 75 Civ. 2782 (CBM) (S.D.N.Y. February 20, 1979) (available August 20, 1987 on LEXIS, Genfed Library, Dist file), an action challenging the New York State Division of Criminal Justice Services maintenance and use of its computerized criminal history information system, the court, after finding that the plaintiff class's constitutional arguments were justified, directed the defendant agency to prepare a feasibility study to advise the court and plaintiffs' counsel how the vast defects in defendant's data base and procedures could be corrected.

[400] Lasker, *supra* note 290, at 79. Judge Lasker, who has presided over several significant structural decrees involving all the major pretrial detention facilities in New York City, concludes that this approach avoids "unnecessary intrusion" by the judiciary. *Id.* at 79.

[401] Robertson, *supra* note 119, at 148. *See also* Note, *supra* note 306, at 439 (participation by the defendants can "enhance the likelihood of compliance with whatever standards are chosen").

[402] M. Harris & D. Spiller, *supra* note 299, at 189.

allows the court and the parties to determine the extent to which defendants have implemented the decree.[403] Moreover, it forces the defendants to confront their obligation to change the system to comply with the decree. Unless defendants deliberately abdicate all responsibility, monitoring educates them about the system that they are responsible for running.

There are several methods utilized by the courts to monitor decrees. One is for the court merely to retain jurisdiction, leaving plaintiffs' counsel solely responsible for monitoring. This method is generally coupled with provision for the plaintiffs' counsel to have access to the institutional records, documents and other relevant materials in the defendants' possession.[404] In addition, most courts require the defendants to submit regular reports detailing the progress of implementation.[405] The general consensus is, however, that this alone is not an effective method of implementation.[406] An example of the ineffectiveness of the method is *Mills v. Board of Education of the District of Columbia*.[407] In *Mills*, the court ordered the Board of Education to provide suitable education for the handicapped. Over the next three years, the plaintiffs were unsuccessful in obtaining compliance.[408] As a result, the court, on motion of the plaintiffs, appointed a special master.[409] A special master may have a broad range of power, including fact-finding, reporting and making recommendations, negotiating disputes between the parties, acting as an arbitrator, and in some cases, issuing orders binding the parties.[410] Although controversial, the use of masters in

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[403] Note, *supra* note 306, at 440; Special Project, *supra* note 392, at 824–37.

[404] This device has been used frequently as an adjunct to the retention of jurisdiction. *See, e.g.*, G.L. v. Zumwalt, 564 F. Supp. 1030, 1042 (W.D. Mo. 1983); Lottman, *supra* note 393, at 69–70.

[405] The drawback of this device is that it depends on the "accuracy or completeness of information provided by administrators." Note, *supra* note 306, at 441. Reliability is often suspect because defendants may exaggerate compliance or base the reports on "inadequate record keeping systems." *Id.* at 442.

[406] Note, *supra* note 306, at 441. This method typically leaves enforcement up to an overworked plaintiffs' counsel whose lack of time and financial backing can hamper the enforcement effort. Lottman, *supra* note 393, at 70.

[407] 348 F. Supp. 866 (D.D.C. 1972).

[408] Rebell, *supra* note 295, at 337–38.

[409] *Id.* at 338.

[410] Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 Toledo L. Rev. 419, 421 (1979). Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) (quoting *ex parte* Peterson, 253 U.S. 300, 312 (1920)). *See*

institutional reform cases has been considered "highly effective" by some commentators.[411]

A third method of monitoring used by the courts, and one somewhat less intrusive than a master, is the appointment of a monitor. In contrast to the role of a master, a monitor's powers are usually more limited. In a typical case the monitor serves as the court's "'eyes and ears' during the implementation process,"[412] but is not vested with direct responsibility for implementation.[413] In *Wyatt v. Stickney*,[414] a case involving the rights of the mentally ill and retarded in Alabama, Judge Frank Johnson used this device when he appointed a Human Rights Committee to oversee compliance. The committee was effective to the extent that two years after the order there had been a substantial improvement in safety, sanitation and habitability of the facility,[415] but many other provisions of the order had not been successfully addressed.[416] In the *G.L.* case, after attempts at monitoring by the plaintiffs' counsel proved unsuccessful, the court ordered the appointment of a blue ribbon commission with powers similar to the Human Rights Committee used by Judge Johnson.[417] Thus, while there continues to be much debate about which form of monitoring is most effective,[418] and concrete recommendations in this area cannot be made reliably, there can be no debate that some method of examining defendants' conduct after entry of the decree is crucial.

D. The Role of the District Judge

The district judge must be actively involved to ensure successful implementation of a structural injunction. By relying

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generally Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452 (1958).

[411] Nathan, *supra* note 410, at 421; Special Project, *supra* note 392, at 835.

[412] Note, *supra* note 295, at 1360.

[413] *Id.* at 1361.

[414] 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[415] Note, *supra* note 295, at 1378.

[416] *Id.*

[417] The Committee, a three-person body appointed by the parties, has been given a budget with which to hire a professional staff person. G.L. v. Zumwalt, Supplemental Consent Decree, at 2–7 (Filed July 29, 1985).

[418] *See, e.g.*, Nathan, *supra* note 410, at 461–64; Special Project, *supra* note 392, at 809; Harris, *The Title VII Administrator, A Case Study in Judicial Flexibility*, 60 Cornell L. Rev. 53, 62–74 (1974).

upon counsel, and, if appropriate, court-appointed monitoring adjuncts, the court can avoid the appearance of administrative involvement, which has been criticized by opponents of structural injunctions. Activity should not be confused with partisanship. The court need not shed the mantle of independence and become identified as a partisan "powerbroker"[419] in order to be effectively involved. The judge sits to resolve disputes among the parties in the post-judgment phase of litigation just as dispassionately and objectively as prior to judgment. The key to success here is not that the judge identifies with one side or the other—of course, she should not—but that the court not end its involvement merely because a judgment has been entered.

A clearly communicated willingness of the court to use its powers to enforce its decree is paramount. Without this, the natural reluctance of defendants to comply is reinforced. Of all the variables associated with institutional compliance with structural injunctions, this is the one that appears to be predictive.

A study of one of the major early prison condition cases, involving the entire Arkansas prison system, *Holt v. Sarver*,[420] concluded that transcending all other factors that influenced compliance was the "district court's expectation that defendants would comply with all of the court's order."[421] By contrast, the study of *Hamilton v. Schiro*[422] by the same research team identified the district judge's apparent satisfaction with the slow and incomplete efforts of the defendants to achieve compliance as a cause of the less than positive results achieved in that case.[423] If, despite the result of the trial, the judge does not appear to take the decree seriously, then neither will those responsible for its implementation.[424]

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[419] The pejorative term "powerbroker" was first used in this context in Diver, *supra* note 285.

[420] 309 F. Supp. 363 (E.D. Ark. 1970).

[421] M. Harris & D. Spiller, *supra* note 299, at 90. *See also* D. Rothman & S. Rothman, *supra* note 120, at 356 (attributing successful implementation of the Willowbrook litigation in large part to the efforts of the district judge).

[422] 338 F. Supp. 1016 (E.D. La. 1970).

[423] M. Harris & D. Spiller, *supra* note 299, at 283. Failure of judicial involvement has been affirmatively linked to poor compliance results by others. *See, e.g.*, Mnookin, In the Interest, *supra* note 8, at 351; Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 Colum. L. Rev. 739, 750–51 (describing how the "lack of judicial responsiveness" hindered enforcement of the decree).

[424] M. Harris & D. Spiller, *supra* note 299, at 27 (study concluded that the single

E. The Need for Flexibility

Finally, the decree must be flexible enough so that unanticipated consequences can be dealt with through modification of its terms if necessary. Any attempt, whether judicial, legislative or executive, to reform an institution as complex as a modern social services bureaucracy is likely to produce unintended consequences.[425] The decree in *G.L. v. Zumwalt*, for example, limited the number of children permitted in any single foster home to six,[426] because of concern that overcrowded foster homes were more likely to become centers of maltreatment than foster homes that were not overcrowded. While in the abstract this provision seems sensible,[427] in practice it produced difficulty.

Several excellent foster homes were caring for more than six *G.L.* class members when the decree was entered. In order to comply with the literal language of the decree, defendants would have had to remove children doing well in their homes. The disruption and anxiety caused these children would have outweighed any benefit that they might have gained from being sent to smaller foster families. The Federal Rules of Civil Procedure provide a mechanism by which an injunction can be modified when it is not having its intended effect.[428] In *G.L.* this was not necessary, as plaintiffs' counsel agreed to permit the

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most important factor to a successful implementation effort was the judicial determination to see that compliance was obtained).

[425] Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1033 (1986). A structural injunction, like any significant organizational change, often produces unintended results. *Id.* at 1034. *See also* Horowitz, *supra* note 291, at 1305.

See also Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (unintended consequences—boredom and anxiety among the patients—resulted when, in order to comply with the decree, the hospital was unable to allow the residents to work because it could not afford the compensation).

[426] *G.L.*, 564 F. Supp. at 1036.

[427] *See supra* note 61 and accompanying text.

[428] Fed. R. Civ. P. 60(b)(5) & (6); C. Wright, *supra* note 332, at 661. As early as 1932, Justice Cardozo stated that a "continuing decree of injunction directed to events to come" should be understood to be "subject always to adaptation as events may shape the need." United States v. Swift & Co., 286 U.S. 106, 114 (1932). *See also* United States v. Karahalias, 205 F.2d 331 (2d Cir. 1953). Lower courts have continued to rely on Cardozo's principles. *See, e.g.*, Nelson v. Collins, 659 F.2d 420, 424 (4th Cir. 1981) (en banc). *See also* Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101 (1986).

children to remain in these homes providing that no others were sent to them until they had shrunk, by attrition, to the required size.[429] The court and parties need always be ready to modify the decree to avoid detrimental, unintended consequences.[430]

These guidelines are, of course, general. They do not begin to answer the many specific questions that any serious effort at implementation of a right-to-safety decree will present.[431] They do serve, however, to identify at least the major tasks that must be attended to if implementation is to be achieved. If these tasks are undertaken, given the record of effectiveness obtained for structural decrees in other settings, there is reason to be hopeful that a federal court can achieve its function of assuring that the constitutional right to safety is provided to foster children.

Conclusion

The time has come to recognize that foster children have a right to safety while in foster care. Foster care is intended to be a temporary refuge for children whose parents cannot care for them. But in practice, more often than has been acknowledged by many observers, foster care is not safe. Abuse and neglect of foster children occur at levels that far exceed in quantity and magnitude what a reasonably run system of care should produce. State-countenanced mistreatment of innocent children has serious ramifications for society. The infliction of harm on children who have suffered the trauma of parental default retards or even eliminates their potential for normal development. However, the political process has proven to be ineffective in alleviating this problem. Foster children, drawn largely from the disadvantaged and from minority groups, sim-

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[429] *See* Letter from plaintiffs' counsel to defendants dated February 3, 1984, at 4 (on file with author).

[430] Examples of court-ordered modifications of structural injunctions include New York State Ass'n For Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975), *modification denied*, 551 F. Supp. 1165 (E.D.N.Y. 1982), *aff'd in part and rev'd in part*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973), *modified*, 429 F. Supp. 370 (W.D. Mo. 1977). For a criticism of the over-eagerness of some courts to modify decrees when implementation becomes difficult, see Shapiro, *The Modification of Equitable Decrees: A Critical Commentary*, 50 Brooklyn L. Rev. 459 (1984).

[431] *See supra* notes 293–95 and accompanying text.

ply do not have access or influence to move the executive or legislative branches of government to increase the funding needed to bring about change. As a practical matter, the courts must become involved if foster care is to function as it is intended.

The basis for judicial involvement is clear. The right to safety has deep roots in American jurisprudential thought. During the past two decades, federal courts have developed and implemented the right for every group of persons held under state custody other than foster children. Ironically, foster children are the one group with the most to gain from recognition of this fundamental right.

This article demonstrates that it is not possible to construct a logical distinction between foster children and other groups that have been afforded the benefits of the right to safety. To make the right to safety effective, a court must be able to fashion prospective relief with the flexibility to take into account the wide range of factors that can stimulate the organizational change needed. Experience with right-to-safety cases for other groups shows that only the structural injunction provides the court with these tools. Federal courts have historically served as the forum for the protection of citizens' constitutional rights from abridgement by the state. Therefore, they are the preferred forum for foster care right-to-safety cases. Reform of foster care will not come easily or quickly. But, if the guidelines offered in this article for courts and parties are followed, experience from other structural injunction cases demonstrates that federal courts have it in their power to make foster care, at last, the haven it was always intended to be.