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Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety

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I. INTRODUCTION

Foster care. There are probably no two words in the English language that convey more of a sense of good intentions gone bad. Children enter foster care when their own parents fail them. Then they begin a state-sponsored journey through an overland railroad of foster homes, some run by adults who truly want to help, and others run by scoundrels.[1]

The purpose of foster care is to provide a temporary safe haven for children whose parents are unable to care for them. Unfortunately, however, the foster care system frequently fails to provide children with stable, secure care,[2] and fails to meet their medical, psychological, and

1. Judy Mann, *Fostering Common Sense*, Wash. Post D3 (Apr. 18, 1990).

2. See *Bright Futures or Broken Dreams: The Status of the Children of the District of Columbia and an Investment Agenda for the 1990s*, Report of the Children's Defense Fund, at 90-116 (highlighting deficiencies in Washington, D.C.'s foster care program and the resulting crisis for foster children). See generally Tracy Thompson, *Trial Reveals Foster Care's Dead End in D.C.*, Washington Post D1 (Feb. 11, 1991) (describing the host of problems that make arranging permanent homes for children extremely difficult); John Hurst, *County Accused of Letting Foster Chil-*

emotional needs. Many children spend the better part of their childhoods in foster homes,[3] often suffering mental, emotional, and physical abuse at the hands of their state-appointed foster parents. Stories of neglected, battered children and horrible living conditions pervade the case law.[4]

Deteriorating family relationships and systemic flaws within the child welfare system are to blame for foster family abuse and program abuse.[5] Among the interrelated problems merging into the foster crisis are an increased number of foster children, weakened family relationships, deteriorating social conditions, overextended and inefficiently managed child welfare agencies, and poor training of case workers and prospective foster parents. These factors have resulted in an ineffective bureaucracy that has lost sight of its purpose—safe temporary care for children in search of a permanent home.

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dren Suffer Abuse, L.A. Times A3 (Mar. 8, 1990) (stating that the local children's services agency has failed to protect foster shildren from substandard conditions and care); Michael D'Antonio, *Foster Care Failings: Abandoned, Abused Kids Stuck in a System Lacking Money—And Families*, Newsday 5 (Dec. 4, 1988) (discussing the failure of the foster care system to meet its responsibilities); J. C. Barden, *Foster Care System Reeling, Despite Law Meant to Help*, N.Y. Times A1 (Sept. 21, 1990) (stating that foster care has become a "multi-billion dollar system of confusion and misdirection"); Thomas J. Downey and George Miller, *Ten Years Later: Foster Care, Again*, Christian Science Monitor 18 (Jul. 10, 1990) (discussing the deterioration of foster care due to increasing social problems).

3. The system frequently fails to rehabilitate families or minimize the time children spend in state custody. Thus, some children drift for years in the foster care system, a condition Justice Brennan has termed "limbo." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 836 (1977).

4. The cases are replete with appalling stories of neglect, malnourishment, and abuse of children at the hands of their foster parents. See, for example, *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (involving a young girl who was placed in nine foster homes over the course of three and half years, and subjected to beatings and sexual assault in a number of the placements); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), cert. denied, 109 S. Ct. 1337 (1989) (involving a two-year-old girl who fell into a coma after her foster mother slapped, shook, and threw her to the floor); *Milburn v. Anne Arundel County Dep't of Social Serv.*, 871 F.2d 474 (4th Cir.), cert. denied, 110 S. Ct. 148 (1989) (involving a four-year-old boy, who was moved to a safe foster home, only after he had sustained multiple bruises, a fractured leg, a deep laceration over his left eye, and burns that permanently disfigured his hand). In another Missouri case, a foster mother whipped a four-year-old and forced her to stand with her hands over her head for a half-hour as punishment for being dirty. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. CR-CL L. Rev. 199, 200 (1988). See also *G.L. v. Zumwalt*, 564 F. Supp. 1030 (W.D. Mo. 1983) (involving an epileptic baby who was placed in a foster home that the state knew was inadequate to meet her medical needs). By reporting these atrocious stories, the media focused public attention on the instances of abuse, thereby reducing the family privacy considerations that had shielded such situations from public and judicial scrutiny in the past. Stacy Colvin, Note, LaShawn A. v. Dixon: *Responding to The Pleas of Children*, 49 Wash. & Lee L. Rev. 529, 533 nn.20, 22 (1992).

5. Downey and Miller, Christian Science Monitor at 18 (Jul. 10, 1990) (cited in note 2). Professor Mushlin uses the terms foster family abuse and program abuse to describe the aforementioned types of abuse and neglect in foster care. See Mushlin, 23 Harv. CR-CL L. Rev. at 204-09 (cited in note 4).

Currently, the nation's foster care system contains approximately 400,000 children, a record high.[6] This high number may be the result of several trends, including a growing number of placements related to drug and alcohol abuse or exposure,[7] homelessness,[8] and family disarray. As a result, increasing numbers of younger children are entering out-of-home placements, a disproportionately large number of minority children are in foster care[9] (with longer stays there), and more children require repeat placements.[10] Unfortunately, the increase in children needing foster care has been accompanied by an insufficient supply of adequate foster family homes to meet the demand.[11]

Not surprisingly, child welfare caseloads have accelerated beyond the ability of foster care systems to provide minimal care and services.[12] Despite the fact that most states and municipalities are aware of the inadequacies of their programs, budgetary constraints[13] as well as ineffectual administrative and bureaucratic procedures[14] hamper efficient implementation of foster care programs. Foster care systems are admin-

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6. House Comm. on Children, Youth and Families, H.R. Rep. No. 101-395, 101st Cong., 1st Sess. 17-19 (1990). After some contraction in the early 1980s, the number of children in foster care stood at about 275,000 in 1985, rose to 340,000 by 1988, and today aggregates nearly 400,000. Id.

7. Drug and alcohol abuse, and most recently, the crack epidemic, have been significant factors causing child abuse and neglect cases. Between 10% and 20% of newborn infants in low-income urban areas are exposed to drugs before they are born. Because of parental substance abuse, infants and children are being referred to the child welfare system and the foster care system in unprecedented numbers. *Child Welfare Services Are Being Strained By Drug Crisis*, Michigan Lawyers Weekly at 22 (Feb. 17, 1992).

8. Statistics show that approximately 100,000 American children are homeless. Id.

9. See Marcia Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, Fam. L.Q. 255 (1986) (explaining that State foster care systems inflict additional harm on already damaged children).

> [Foster care] systems take these children of the poor and, in many instances, complete what poverty and discrimination have begun, destroying salvageable human beings and producing yet another generation of the economically dependent and socially and psychologically unfit. Grown up, these former foster children fill our mental hospitals, our jails, and our welfare rolls. One study found that 50 percent of the homeless youth on our streets are young people who were raised in foster care.

Id. at 257.

10. Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 Pepperdine L. Rev. 353, 357 (1991).

11. Id. See, for example, Jerry Cheslow, *Foster Care in State Is Facing A Crisis*, N.Y. Times § 12NJ at 1 (Aug. 13, 1989) (stating that the foster care system in New Jersey is facing a shortage of foster parents).

12. *Child Welfare*, Mich. L. Weekly at 22.

13. For example, in a District of Columbia child welfare agency, 80 of the 240 social worker positions are vacant, a result of budget problems. Tracy Thompson, *Trial Reveals Foster Care's Dead End in D.C.*, Washington Post D1 (Feb. 11, 1991).

14. See J.C. Barden, *Group Says Violations Pervade Capital Foster Care*, N.Y. Times A22 (Oct. 28, 1990).

istered by staffs that are overburdened,[15] poorly paid, and often untrained for the difficult work they are called upon to perform.[16] The lack of financial resources has led to a poorly organized system that often lacks basic information about its own operation.[17] Foster parents also receive inadequate financial support. Payments offered to foster parents often are insufficient to cover the cost of caring for the child's basic needs. This lack of funding adds financial stress to the burdens of being a foster parent.[18]

Many of the overburdened state welfare agencies have failed to meet professional standards, a failure ultimately connected to incidents of foster family abuse and neglect.[19] Professional standards require careful screening and licensing of potential foster care parents, training of those who are hired, careful matching of foster children with foster parents, and regular, continual supervision of the placement by caseworkers.[20] Supervision by trained caseworkers enables the agency to ascertain whether the child is receiving proper care. An agency's supplying training and providing support also relieves the anxieties of foster parents and increases their understanding of the child.[21] Failure to

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15. Foster care caseworkers in the District of Columbia characterize their agency not as an inhumane bureaucracy, but as the "governmental equivalent of a frantic parent who cannot rescue his children from a burning house." According to the workers, caseloads are three times the recommended number. The workers also describe 80-hour weeks and supervisors who cannot do their job because they inherit the work left behind when burned-out employees quit. In a deposition, one worker said:

> I feel strongly that if I had a smaller caseload, I could be more effective. . . . As it stands right now . . . workers seem to function in a crisis-oriented situation. A fire starts and you put it out and then we move on to the next.

Thompson, Wash. Post at D1 (Feb. 11, 1991) (cited in note 13).

16. Mushlin, 23 Harv. CR-CL L. Rev. at 213 (cited in note 4).

17. Id.

18. Thus, the foster care system needs funds to hire additional trained social workers who can carefully screen and regularly supervise foster homes. Additional social workers are also necessary to train foster parents and to ensure that an adequate number of foster parents are available so that foster homes are not overloaded with more children than they can handle. See id. at 209-11. Funds also must be allocated to hire medical personnel to implement and supervise a basic medical care system. See id. at 208-09.

Present governmental funding of foster care exceeds one billion dollars annually. The federal government provides 53% of that amount with the remaining 47% coming from state and local sources. The federal funds primarily are provided through matching funds made available under the Adoption Assistance and Child Welfare Act of 1980. House Comm. on Children at 67, 120-21.

19. Mushlin, 23 Harv. CR-CL L. Rev. at 209-10. See Barden, N.Y. Times at A22 (Oct. 28, 1990) (cited in note 14).

20. Mushlin, 23 Harv. CR-CL L. Rev. at 210.

21. Id. Social workers should provide training, support, and consultation to foster parents to help them understand and guide foster children. Absent these forms of state support, foster parents can find the behavior of foster children baffling or inexplicable, or may feel that they are engulfed in an endless struggle for control. Professional standards also provide for the elimination of foster home overcrowding, strict bans on improper punishment, and prompt referrals for outside investigation of all suspicions of maltreatment by foster parents. Id. at 210-11.

do so may result in increased foster family abuse and neglect by foster parents.[22]

Congress designed the Adoption Assistance and Child Welfare Act of 1980[23] (the "Act") to reduce problematic foster care placements by requiring state welfare agencies to provide services to families at risk. This federal policy emphasizes avoidance of unnecessary out-of-home placements; family reunification for children in foster custody whenever possible; periodic review of the foster child's progress; permanency planning, including adoption, for children separated from natural parents for extended periods of time; greater delegation of authority to foster parents; and increased state court supervision of foster care placements.[24]

Although the Act is a substantial move toward foster care reform, it is inadequate because it lacks an enforcement mechanism.[25] Enforcement actions must be made available to foster children in order to achieve the urgently needed reform intended by Congress. Foster children are perhaps the most powerless political group in this country. Because children do not vote, cannot organize politically, and are incapable of donating financial support to political figures, their needs often are overlooked.[26] As a result, when economic constraints require trade-offs in a state's budget, children's programs often are the first to be sacrificed.[27] Foster children largely are unrepresented even in the court proceedings that lead to their placement.[28] Living without parental protection, they are completely subject to the whims of the very per-

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22. Id. at 211. One study connected abuse of foster children with insufficient training of foster parents, foster home overcrowding, the failure to match foster children with appropriate parents, and the failure to make regular visits to foster homes. Another study linked the continuing foster child abuse to the failure of agencies to refer allegations of abuse and neglect to the proper authorities for investigation and their failure to follow-up on suspicions of abuse. Id.

23. Pub. L. No. 96-272, 94 Stat. 500 (1980) codified at 42 U.S.C. §§ 620-28, 670-79 (1988).

24. Skoler, 18 Pepperdine L. Rev. at 357-58 (cited in note 10).

25. See note 91 and accompanying text.

26. Colvin, 49 Wash. & Lee L. Rev. at 530 (cited in note 4). See also Hillary Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487, 492-93 (1983) (discussing inability of children to secure rights for themselves).

Furthermore, foster care is a service almost always reserved for the children of the poor and underclass. Also, "in most states, foster care is disproportionately used by minority children who, not unexpectedly, have encountered discrimination in the foster care system." Mushlin, 23 Harv. CR-CL L. Rev. at 213 (cited in note 4).

27. Colvin, 49 Wash. & Lee L. Rev. at 531. Colvin writes that some cities consciously disregard court orders to improve foster care programs. Id. See also Michael Powell, *It's a Scofflaw Budget*, Newsday 7 (June 20, 1991) (explaining that states ignore court orders to fund programs such as foster care).

28. Rohert M. Horowitz and Howard A. Davidson, eds., *Legal Rights of Children* 296-99 (Shepard's/McGraw-Hill, 1984). Foster children usually have no voice in regard to placements. In addition, minimal or no procedural rights are available to foster children at periodic review proceedings. Id.

sons who may be maltreating them.[29] Abused foster children must depend on child activists to voice their concerns and call public attention to their plight.[30]

While the Act does provide requirements to ensure good foster care, it focuses on issues other than maltreatment. Generally, supporters of foster care reform champion the reunification concerns of natural parents or the adoption concerns of foster parents. As a result, these advocates have focused their efforts on reducing reliance on foster care rather than on maintaining safety within the foster care system.[31] Natural parents and their advocates have mobilized to increase the availability of preventive services while adoptive parents have lobbied for the implementation of strong permanency planning programs.[32]

This Note argues that if reform of the foster care system is to succeed, two actions for injunctive relief—Section 1983 claims to enforce the "reasonable efforts" requirement of the Act and substantive due process claims under the Fourteenth Amendment—should be made available to foster children. Part II of the Note describes the provisions of the Adoption Assistance and Child Welfare Act of 1980 in general terms. Part III argues that in spite of a recent Supreme Court decision to the contrary, the critical "reasonable efforts" requirement of the Act creates enforceable rights for Section 1983 civil rights claims. The Act aspires to avoid foster care placements by providing services that will keep biological families together or find adoptive homes for dislocated children. Although the Act also demands adequate foster care conditions, it maintains a focus beyond safety concerns. Therefore, Part IV advocates the use of substantive due process claims as a companion to Section 1983 actions to enforce the Act itself, so that the constitutional right to safety of children in state custody is protected.

II. THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

In an attempt to remedy the problems in the foster care system, Congress passed the Adoption Assistance and Child Welfare Act of 1980, a measure vitally important to the future of the child welfare sys-

29. Mushlin, 23 Harv. CR-CL L. Rev. at 214 (cited in note 4).

30. Colvin, 49 Wash. & Lee L. Rev. at 533 (cited in note 4).

> The status of children as political beings under the law is beginning to emerge from its embryonic form. The courts tend to see the family as a private unit and generally find it inappropriate to subject a family to political analysis or moral scrutiny. Though the autonomy granted to an individual family unit manifests itself in a variety of circumstances, the ever-increasing atrocities within traditional family settings have opened the family unit to the public eye.

Id.

31. Mushlin, 23 Harv. CR-CL L. Rev. at 214.

32. Id. at 214-15.

tem. Congress intended for the Act to protect children in foster care and to alleviate foster care drift by creating a comprehensive regulatory structure for state programs.[33] The goal of the Act was to respond to the needs of children lost in the foster care system by ensuring that reasonable efforts are made to maintain children in their natural homes, to return them to those homes after removal, or to find permanent adoptive homes. Prior to the Act's passage, the Social Security Act[34] governed foster care. The effectiveness of the Social Security Act was limited, however, because it provided neither financial incentives for states to take children out of foster care and place them for adoption[35] nor funding for preventive services to keep families together.[36] These inadequacies further contributed to the already complex problems facing the malfunctioning foster care system.[37]

In an effort to improve foster care conditions, Congress passed the Act with three goals in mind: first, to provide families with sufficient preplacement services to prevent the need for children to enter the foster care system; second, to protect and provide proper care to children while they remain in foster care; and third, to move children through the foster care system and back home or into adoptive placements as quickly as possible.[38] The Act provides federal financial assistance to

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33. 42 U.S.C. § 670.

34. Title IV-A of the Social Security Act, codified at 42 U.S.C. §§ 601-17 (1988), provided federal financial assistance for children who would qualify for Aid to Families with Dependent Children (AFDC) but for their removal from their homes.

35. The Social Security Act gave financial assistance to states for foster care ouly, to the total exclusion of adoption, thereby creating a financial disincentive to place children in permanent homes. As a result, children often lingered in foster care for unduly long periods of time. For a more detailed description of the shortcomings of adoption and foster care law before the Act's passage, see Barbara L. Atwell, *"A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. Cin. L. Rev. 593, 598-99 (1992).

36. The federal funding scheme also was limited because it provided AFDC foster care reimbursement only for out of home care. Id.

37. See Barden, N.Y. Times at A1 (cited in note 2). The sheer increase in the number of foster children, due largely to poverty and increased parental drug and alcohol abuse, has strained states' finances and resources. In 1989, 3000 New York City infants entered foster care from hospitals as a result of drug use by their mothers. In Los Angeles, approximately 90% of the 20,000 children who come before juvenile courts come from homes where parental drug or alcohol abuse is present. Aside from these cases related to suhstance abuse problems, many children still enter foster care due to the lack of affordable housing for low income families. Id. at A18.

38. Atwell, 60 U. Cin. L. Rev. at 596 (cited in note 35). See also 42 U.S.C. § 625(a)(1) (Supp. 1992), which provides:

> [T]he term "child welfare services" means public social services which are directed toward the accomplishment of the following purposes: (A) protecting and promoting the welfare of all children, including handicapped, homeless, dependent, or neglected children; (B) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children; (C) preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is

states that structure and implement a foster care system in accordance with the statute's requirements.[39] Conversely, the Act authorizes the withdrawal or reduction of financial assistance from states that do not comply with the federal requirements.[40]

The Act consists of two parts, Title IV-E, which provides for partial reimbursement by the federal government of "foster care maintenance payments" made by the states, and Title IV-B, which applies to the provision of child welfare services in general. Together, the two titles require that states adopt and implement three separate plans in order to receive federal financial assistance: (1) a Child Welfare Plan to direct the provision of child welfare services;[41] (2) a Foster Care Plan to guide the overall operation of their foster care systems;[42] and (3) an individualized Case Plan specific to each child in foster care.[43] The states also must create a Case Review System to review periodically the status of every foster child.[44] In addition, each state is eligible for additional funds if certain informational structures are established. Each of these plans has requirements that overlap with the Act's goals.[45] This comprehensive program is supposed to address the needs of foster chil-

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desirable and possible; (D) restoring to their families children who have been removed, by the provision of services to the child and the families; (E) placing children in suitable adoptive homes, in cases where the restoration to the biological family is not possible or appropriate; and (F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.

39. 42 U.S.C. §§ 621, 623, 674 (Supp. 1992). See also Mary Lee Allen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *Foster Children and the Courts*, Mark Hardin, ed. 710-17 (Butterworth Legal Publishers, 1983) (providing detailed analysis of the Act's funding provisions).

40. 42 U.S.C. § 671(b) (1988).

41. Id. § 622(a). See also 45 C.F.R. §§ 1355.21, 1356.20(a) (1990) (setting requirements for contents, submission, and inspection of state plans). The requirements for the Child Welfare Plan are largely administrative. The plan must provide for a single organizational unit to furnish child welfare services under Section 622(b)(1)(B), and it must coordinate the provision of child welfare services with other social services under Section 622(b)(2). The plan also must provide for the training and effective use of a paid paraprofessional staff under Section 622(b)(4), and it must emphasize the full- or part-time employment of persons "of low income, as community service aides, in the administration of the plan, and . . . the use of nonpaid or partially paid volunteers in providing services and in assisting any advisory committees established by the State agency." Id.

42. 42 U.S.C. § 671(a) (1988); 45 C.F.R. §§ 1356.20(a), 1356.21(a) (1990). The Act requires that the Foster Care Plan include a variety of administrative provisions (see Section 671(a)), such as a procedure for maintaining confidentiality for the individuals assisted by the program (see Section 671(a)(8)), and a procedure for making foster care maintenance payments (see Section 671(a)(1)). In addition, the Foster Care Plan must provide an opportunity for a fair hearing to any individual who has been denied benefits or whose claims have not been acted upon in a tunely manner. 42 U.S.C. § 671(a)(12) (1988).

43. 42 U.S.C. § 671(a)(16) (1988).

44. Id. §§ 671(a)(16), 675(5)(B).

45. The following description of the Act's provisions follows Atwell's analysis. See Atwell, 60 U. Cin. L. Rev. at 602-11 (cited in note 35).

dren and their biological, foster, and adoptive families from the moment the children at risk are reported to the agency until they are placed permanently with their parents or an adoptive family.[46]

In order to prevent the need for foster care, the Act provides that states are entitled to reimbursement for foster care maintenance payments only if they make "reasonable efforts . . . prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home."[47] Although the Act does not define reasonable efforts, the regulations[48] suggest that reasonable efforts may include certain services aimed at preventing the unnecessary separation of children from their families by identifying and helping families resolve their problems.[49] The regulations set forth some specific examples of child welfare services that may satisfy the reasonable efforts requirement including arranging emergency financial assistance; temporary child care; home-based family services; self-help groups; services to unmarried parents; mental health, drug and alcohol abuse counseling; and vocational counseling or training.[50]

To ensure that children placed in foster care are safe,[51] the Foster Care Plan requires that states establish and maintain foster care standards that meet the recommended standards of national foster care organizations.[52] In addition, every foster family home or other child-care institution must meet state licensing requirements.[53] If the state has evidence to indicate that the child is being neglected, abused, or exploited, it must take affirmative steps to alert the appropriate agency or

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46. Id. at 601.

47. Id. § 671(a)(15). As Senator Alan Cranston explained:

> States must make reasonable efforts to prevent the removal of children from their homes. In the past, foster care has often been the first option selected when a family is in trouble; the new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunito families. . . . Far too many children and families have been broken apart when they could have been preserved with little effort. Foster care ought to be a last resort rather than the first.

126 Cong. Rec. 14,767 (1980).

48. 45 C.F.R. § 1356.21(b) (1990).

49. 42 U.S.C. § 625(a)(1)(C) (1988). These measures should be taken in cases where keeping the family together is desirable and possible. Some situations, however, may require that the child be separated from his family. Atwell, 60 U. Cin. L. Rev. at 602 (cited in note 35). State protective agencies will continue to have the authority to remove children from dangerous situations immediately. 126 Cong. Rec. 14,767 (1980) (statement of Sen. Cranston). See also Celia W. Dugger, *New York City Bets Millions on Preserving Families*, N.Y. Times A1 (July 19, 1991). The effectiveness of preventive services is debatable. Id.

50. 45 C.F.R. § 1357.15(e)(2) (1991).

51. 42 U.S.C. § 671(a)(10) (1988).

52. Id. The standards must be reviewed periodically. Id. § 671(a)(11); 45 C.F.R. § 1356.21(g) (1991).

53. 42 U.S.C. § 672(c) (1988).

law enforcement officials.[54] Further, as part of the Case Review System,[55] the state must establish a procedure for determining the appropriateness of the placement. Program workers must review and update the educational and health records of each child[56] and make the information available to the foster parents or other care providers to help them improve care for the children.[57]

The Case Plan is the primary instrument employed to ensure that each child receives proper care while in state custody.[58] Although the Act does not expressly define all that is encompassed by the term "proper care," it does require that the Case Plan include a description of the home or institution in which a child must be placed as well as a discussion of the appropriateness of the child's placement there.[59] The Act suggests that proper care begins with placing the child in the most family-like setting available. A family-like setting is in close proximity to the parents' home, when such an arrangement is "consistent with the best interests and special needs of the child."[60] Proper care also requires ensuring the child's physical well-being,[61] by providing adequate food, clothing and shelter;[62] reviewing the child's health and education records;[63] considering the placement's proximity to the child's school;[64] protecting the child's emotional well-being; and protecting the child's civil rights.[65] The prompt assignment of a caseworker to each child and regular visits by the caseworker to the foster home are also essential.

Current information is vital to foster care programs. To this end, Title IV-B provides financial incentives for states to establish information networks to update foster care records. A state may be entitled to additional payments specifically for foster care services if it implements a statewide information system to monitor each foster child who has been in the system within the past twelve months.[66] Without an information system, agencies may lose track of children in their care.[67]

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54. Id. § 671(a)(9).
55. Id. § 675(5)(B).
56. Id. § 675(5)(D).
57. Id.
58. Id. § 675(1)(B).
59. Id. § 675(1)(A).
60. Id. § 675(5)(A).
61. Id. § 671(a)(10).
62. Id. § 675(4)(A).
63. Id. § 675(5)(D). The Case Plan must include health and education information, such as the child's grade-level in school, his or her school record, and a record of any known medical problems. Id. § 675(1)(C).
64. Id. § 675(1)(C).
65. Id. § 671(a)(10).
66. Id. § 627(a).
67. The current information system

Therefore, a network provides essential access to critical information, including the child's foster home, school, special health care needs, and placement goals.[68] In order to qualify for the Additional Payments Program, states also must conduct an inventory of all foster children who have been in the system for the past six months to determine the appropriateness of their placement,[69] to review their placement goals,[70] and to coordinate the necessary services to achieve those goals.[71] An inventory system should help determine whether the child can or should be returned to her parents or freed for adoption. Further, the inventory system should help identify the services necessary to facilitate either choice.[72]

Each of the programs mandated by the Act must include a planning component for determining the child's permanent home and must provide whatever services are necessary to find that home.[73] The Foster Care Plan specifically requires that agencies make reasonable efforts to return children to their homes by providing the services required by the Act.[74] Though the Act leaves reasonable efforts undefined, the legislative history suggests that reasonable efforts to reunify families include transportation services, family and individual therapy, psychiatric counseling, homemaking and housekeeping services, day care, consumer education, respite care, information and referral services, and various

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> is unable to accurately identify the physical location of all of the children in foster care. . . . [S]ocial workers track information on thousands of three-by-five index cards. . . . The Court can only wonder how an agency that cannot track the location of the children in its custody can possibly comply with the remaining requirements of federal . . . law, much less within reasonable professional standards.

LaShawn A. v. Dixon, 762 F. Supp. 959, 976-77 (D.D.C. 1991).

68. Atwell, 60 U. Cin. L. Rev. at 607 (cited in note 35).

69. 42 U.S.C. § 627(a)(1) (1988); 45 C.F.R. § 1357.25(b) (1991).

70. 42 U.S.C. § 627(a)(1) (1988).

71. Id.

72. Id.

73. Id. § 627(a)(2)(C). The Act provides for comprehensive services that are critical to the program's success in finding permanent homes for displaced foster children. The Child Welfare Plan includes services for restoring children to their families and placing children in suitable adoptive homes, in cases in which restoration to the biological family is either impossible or inappropriate. Id. § 625(a)(1)(D)-(E). Similarly, the Case Plan is defined, in part, as a plan to facilitate the return of a child to his or her own home or to the permanent placement location of the child. Id. § 675(1)(B). The Plan must provide the services to the child, foster parents, and biological parents necessary to achieve this goal. The Case Plan also must include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family. 45 C.F.R. § 1356.21(d)(4) (1991). Finally, the Additional Payments Program requires that the state implement a "service program" designed to place the child back in a permanent family setting. 42 U.S.C. § 627(a)(2)(C) (1988). The regulations expressly require that the state set forth specifically in the Child Welfare Plan which preplacement preventive and unification services are available to children and families in need. 45 C.F.R. § 1357.15(e)(1) (1991).

74. 42 U.S.C. § 671(a)(15) (1988).

transition and follow-up services.[75] Other services, such as adequate visitation between the foster child and his or her natural parents while the child is in foster care also may constitute reasonable efforts.[76]

In order to monitor progress toward a permanent placement, the Case Review System provides for a two-tiered review that continues as long as the child remains in foster care.[77] First, a periodic review is conducted by either a court or an administrative agency every six months[78] to evaluate the need for and appropriateness of the child's current placement and to assess the progress made toward a permanent placement.[79] The second review consists of a formal dispositional court hearing, held within eighteen months of the original placement, to determine the future status of the child.[80]

While the Act is a major step in the right direction in terms of foster care reform, the lack of remedies to enforce its provisions coupled with the severe problems plaguing the system makes judicial enforcement measures necessary. Aside from the potential elimination or reduction of federal financial assistance, the Act includes few penalties for a state's failure to comply with its terms.[81] Reducing or eliminating federal funds, however, will only harm the recipients of these state-provided services, namely, foster children and their families. The statute itself is silent as to whether children living in foster care can enforce the Act privately. Nonetheless, allowing private enforcement[82] of the

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75. H.R. Rep. No. 136, 96th Cong., 1st Sess. 49 (1979).

76. Foster care maintenance payments include travel payments incurred for visitation. Atwell, 60 U. Cin. L. Rev. at 609 n.44 (cited in note 35). According to Atwell, Congress also intended that the Case Review System include procedural safeguards, concerning visitation rights. See S. Rep. No. 336, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 1448, 1453. Id.

77. 42 U.S.C. § 675(5) (1988).

78. Id. § 675(5)(B).

79. Id. § 675(5)(A)-(B).

80. Id. § 675(5)(C). See 45 C.F.R. § 1356.21(e).

81. Aside from reducing or eliminating funding, the only remedy the Act provides lies in Section 671(a)(12), which requires an opportunity for a fair hearing to any individual who has been denied benefits or whose claims have not been acted upon in a timely manner. For a detailed analysis of due process concerns regarding the fair hearing provision, see Harold M. Freiman, *'Some Get a Little and Some Get None': When Is Process Due Through Child Welfare and Foster Care Fair Hearings Under P.L. 96-272?*, 20 Colum. Hum. Rts. L. Rev. 343 (1989) (arguing that Congress intended that the fair hearing requirement would ensure that qualified recipients of a broad range of services, including preventive and reunification services, would not be denied such services without due process of law).

82. Private enforcement actions should seek injunctive relief as opposed to damages. Individual actions for damages are not useful mechanisms for achieving reform because they focus on individual culpability for past actions instead of on detecting and correcting institutional deficiencies that contribute to the problem. A claim for damages, by its nature, examines past wrongs and seeks to compensate for them, while a claim for equitable relief, such as injunction, seeks to prevent harm from occurring in the first place. Mushlin, 23 Harv. CR-CL L. Rev. at 250 (cited in note 4).

Act through Section 1983 actions and substantive due process claims will make the Act a more effective tool for foster care reform.

III. Private Enforcment of the Rights of Foster Children

A. *Section 1983 Actions*

Section 1983 provides a private cause of action for the deprivation of a right or privilege provided by the laws of the United States.[83] A Section 1983 action is available to redress violations of federal statutes by state agents,[84] except when Congress has foreclosed such enforcement of the statute in the language of the statute itself or when the statute does not create enforceable rights, privileges, or immunities within the meaning of Section 1983.[85] In the absence of an express exclusion, Section 1983 claims may be foreclosed when the statute's remedial scheme demonstrates congressional intent to preclude the use of Section 1983 as a remedy.[86] When Congress has not foreclosed a Section 1983 claim within a statute, the plaintiffs have the burden of proving that the statute creates enforceable rights under Section 1983.[87] The threshold inquiry is whether Congress intended the provision in question to benefit the plaintiff.[88] If the threshold inquiry is met, a right is created unless the provision reflects merely a "congressional preference for a certain kind of conduct rather than a binding obligation on the

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83. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Thus, a person who has been deprived of a federal statutory right can, under appropriate circumstances, sue state officials responsible for the deprivation of that right. See also Henry Paul Managhan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233 (1991) (discussing states' duty to enforce federal statutory rights).

84. See, for example, *Maine v. Thiboutot*, 448 U.S. 1 (1980).

85. See, for example, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987).

86. *Wilder*, 496 U.S. at 520 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 451 U.S. 1, 20 (1981)). See also *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) (reasoning that the statutory framework must be such that allowing a plaintiff to bring a Section 1983 action "would be inconsistent with Congress' carefully tailored scheme") (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

87. *Vantage Healthcare Corp. v. Virginia Bd. of Med. Assistance Serv.*, 684 F. Supp. 1329, 1331 (E.D. Va. 1988).

88. *Wilder*, 496 U.S. at 509 (citing *Golden State Transit*, 493 U.S. at 106).

[state]"[89] or unless the interest the plaintiff asserts is too vague and amorphous for the judiciary to enforce.[90]

Most of the litigation surrounding the Act has involved two provisions—the provision requiring the state to exert reasonable efforts to prevent removal of children from their homes or to facilitate their return to home,[91] and the provision requiring the state to develop a Case Plan and Case Review System.[92] Generally, the courts have agreed that the Case Plan/Case Review provision is specific enough to create an enforceable right. In a recent decision, however, the Supreme Court endangered future actions to enforce the Act's provisions by holding, in spite of circuit court decisions to the contrary, that the reasonable efforts provision does not create enforceable rights under Section 1983.[93] The reasonable efforts provision should create enforceable rights because it satisfies the established legal tests and because, in terms of policy, the provision helps guarantee the effectiveness of the Act itself.

1. *Suter v. Artist M.:* A Setback for Private Enforcement

The Supreme Court's decision in *Suter v. Artist M.*,[94] the latest case on the enforceability of foster care legislation, constitutes a severe setback for private enforcement of the Act. In *Suter*, the Court held that foster children and other dependent children may not maintain private actions under Section 1983 to enforce their rights under the rea-

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89. Id. at 509 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)).

90. *Wilder*, 496 U.S. at 509 (citing *Golden State Transit*, 493 U.S. at 106 (quoting *Wright*, 479 U.S. at 431-32)).

91. 42 U.S.C. § 671(a)(15) (1988).

92. Id. § 671(a)(16). Because the Act mandates that the state create the Case Plan and Case Review System to qualify for federal financial assistance, and because the requirements of each are specifically stated, the courts uniformly have found that this provision creates enforceable rights under Section 1983. The Act requires that the Case Plan include specific information and ensure that every foster child receive "proper care," which includes providing for both the physical and emotional well-being of the child. Id. § 675(5)(A). The Case Review System requires periodic review of each foster child's status and sets forth both procedural and substantive guidelines for the performance of those reviews. Id. § 675(5)(B). See *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983) (upholding private action rights and the issuance of preliminary injunctive relief to enforce the state's case plan and case review obligations under the Act, including a worker caseload limit); *Darr ex rel. L. J. v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988) (finding that Sections 671(a)(9), (10) and (16), taken together, spell out "a standard of conduct," and as a corollary, rights in plaintiffs, in holding that plaintiff foster children were entitled to injunctive relief and money damages to redress physical, sexual, and medical neglect that had resulted from improper administration of the city's federally funded program activities), cert. denied, 488 U.S. 1018 (1989).

Attempts to enforce various other provisions of the Act, such as meaningful visitation and placement in the least restrictive setting, have been largely unsuccessful.

93. See notes 94-105 and accompanying text (discussing *Suter v. Artist M.*).

94. 112 S. Ct. 1360 (1992).

sonable efforts requirement[95] of the Act. The Court reasoned that the funding clause does not create enforceable rights but rather imposes only a generalized duty on the states to be enforced by the Secretary of Health and Human Services.[96]

The *Suter* majority nominally recognized the established test: Section 1983 is not available to enforce a violation of a federal statute when Congress has foreclosed such enforcement in the enactment itself and when the statute does not create enforceable rights, privileges or immunities within the meaning of Section 1983.[97] The Court reasoned, however, that the ultimate question was whether Congress unambiguously conferred upon the child beneficiaries of the Act a right to enforce the requirement that the state make reasonable efforts to prevent the removal of children from their homes and to reunify families when state-imposed separation has occurred.[98] In other words, the Court departed from the standard test to hold that Congress must confer such rights unambiguously when it intends to impose conditions on the grant of federal monies.[99]

The Court distingnished *Suter* from *Wilder v. Virginia Hospital Association*.[100] In *Wilder*, the Court had found that a measure in the Medicaid Act similar to the one in the Act allowed a plaintiff to bring a Section 1983 claim. The *Wilder* Court had decided that the Medicaid Act set out standards for determining whether states have adopted reasonable and adequate reimbursement rates. However, the *Suter* Court found that the Act neither sets out these standards[101] nor provides sufficient guidance as to how reasonable efforts are to be measured. Therefore, according to the *Suter* Court, the Act is a directive whose meaning will vary with the circumstances of each individual case.[102] The *Suter* Court also found it significant that the Act's enforcement regulations are not specific and do not condition the receipt of federal funds on anything other than submitting a plan with the requisite features.[103]

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95. Under Section 671(a)(15) of Title IV-E of the Act, states that seek financial assistance for foster care and adoptive services must have a plan that "provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."

96. *Suter*, 112 S. Ct. at 1368.

97. Id. at 1366 (citing *Wright*, 479 U.S. 481 (1987)).

98. Id. at 1367.

99. Id.

100. 496 U.S. 498 (1990).

101. *Suter*, 112 S. Ct. at 1367.

102. Id.

103. Id.

In dissent, Justice Blackmun applied the traditional three-pronged test[104] and accused the majority of disregarding established precedent for determining the availability of a cause of action under Section 1983. Justice Blackmun found the majority's conclusion inconsistent with *Wilder*.[105] Justice Blackmun's dissent illustrates why the reasonable efforts requirement satisfies the established standard and thereby creates an enforceable right under Section 1983.

2. Why the Act Creates an Enforceable Right to "Reasonable Efforts"

To determine whether the provisions of the Act are enforceable in a Section 1983 civil rights action, the first question is whether Congress foreclosed a Section 1983 claim. In the Act, Congress did not explicitly foreclose Section 1983 claims. In the absence of an express exclusion, Section 1983 claims still may be foreclosed when the remedial scheme within a statute comprehensively shows that Congress intended to preclude the use of Section 1983 as a remedy.[106] However, the remedial scheme within the Act is far from comprehensive. The Act focuses on the "establishment of a framework for the smooth operation of state foster care systems rather than on remedies for state failures to comply" with the Act's requirements.[107] The Act provides as remedies the right to a hearing for individuals whose applications for benefits have been denied and the right to[108] a dispositional hearing conducted within eighteen months of the child's first placement in foster care to develop plans for the child's future.[109] Beyond these rights the only remaining remedy is the reduction or termination of federal financial assistance to noncomplying state programs.

In prior cases, the Supreme Court held that the ability to reduce or terminate funds is insufficient to constitute congressional foreclosure of Section 1983 actions.[110] The Court also has found that the right to a hearing as created by the Act is insufficient to foreclose Section 1983

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104. Id. at 1371 (Blackmun, dissenting).

105. Id. at 1375 (Blackmun, dissenting).

106. *Wilder*, 496 U.S. at 521 (quoting *National Sea Clammers*, 451 U.S. at 20).

107. Atwell, 60 U. Cin. L. Rev. at 613 (cited in note 35).

108. 42 U.S.C. § 671(a)(12) (1988). The right to a hearing "is not really responsive in cases . . . where a class alleges systemic malfeasance. Such problems are treated inefficiently if they must he pursued individually." *Lynch v. Dukakis*, 719 F.2d at 512.

109. 42 U.S.C. § 675(5)(C) (1988).

110. *Rosado v. Wyman*, 397 U.S. 397, 420 (1970) (rejecting the "argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements"). See also *Wilder*, 496 U.S. at 508 (holding that under Section 1983, federal courts can enforce the right to reasonable rent and utility rates created by the Boren Amendment); *Wright*, 479 U.S. at 423-24 (holding that the authority of

claims.[111] In fact, the Supreme Court has found statutory remedies sufficient to foreclose Section 1983 claims in only two cases, *Middlesex County Sewerage Authority v. National Sea Clammers Association*[112] and *Smith v. Robinson.*[113] In both cases, the remedial schemes were much more comprehensive than the scheme created by the Act.[114] Unlike the statutes in question in *Middlesex* and *Smith*, the Act does not contain provisions for private judicial enforcement of its requirements, which is precisely why Section 1983 claims are needed.

Because Section 1983 claims have not be foreclosed by Congress, a court must determine whether the Act itself creates enforceable rights under Section 1983. The first prong examines whether the statute at issue is intended to benefit the plaintiff. The purpose and goals of the Act reveal Congress's intention to benefit foster children. Congress enacted the Act "for the purpose of enabling each State to provide, in appropriate cases, foster care and adoption assistance for children."[115] The Act requires states to provide the following for children and their families: preventive services to help reduce the need for foster care, proper care to children in foster care, and permanency planning services.[116] Thus, the intended beneficiaries of these programs are children in foster care,[117] children at risk of entering the foster care system,[118] and the biological and foster parents and other caretakers of these children.[119]

HUD to enforce benefits for housing project tenants did not exclude private enforcement in the courts under Section 1983).

111. See *Wilder*, 496 U.S. at 523 (rejecting the argument that the "existence of administrative procedures . . . evidences an intent to foreclose a private remedy in the federal courts"); *Wright*, 479 U.S. at 426-27; *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982).

In Social Security Act cases, the Court traditionally has allowed Section 1983 claims. See, for example, *Thiboutot*, 448 U.S. at 9; *Miller v. Youakim*, 440 U.S. 125, 131 (1979); *Quern v. Mandley*, 436 U.S. 725, 529-30 n.3 (1978); *Townsend v. Swank*, 404 U.S. 282, 284 n.2 (1971); *Rosado*, 397 U.S. at 401; *King v. Smith*, 392 U.S. 309, 311 (1968). The Court also has required an express statement of intent to foreclose claims. See, for example, *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

112. 453 U.S. 1 (1981).

113. 468 U.S. 992 (1984).

114. In *National Sea Clammers*, the statutes at issue provided that any interested person could seek judicial review of actions taken by the Environmental Protection Agency Administrator. 453 U.S. at 13-14. The statutes expressly authorized "private persons to sue for injunctions to enforce these statutes." Id. at 14. In *Smith v. Robinson*, the Court held that Congress intended the private judicial enforcement provisions of the statute to be the "exclusive avenue" through which a plaintiff may assert Equal Protection claims under the act. 468 U.S. at 1009-12.

115. 42 U.S.C. § 670 (1988).

116. 42 U.S.C. §§ 620-28, 670-79 (1988).

117. *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883 (10th Cir. 1992). As Justice Blackmun noted, the children are the intended heneficiaries of the reasonable efforts requirement. *Suter*, 112 S. Ct. at 1370, 1372-73 (Blackmun dissenting).

118. Atwell, 60 U. Cin. L. Rev. at 616 (cited in note 35).

119. Id.

The second prong of the test requires determining whether the Act merely reflects a congressional preference for a certain kind of conduct or whether it creates a binding obligation on the governmental unit.[120] Arguably, the Act is only a statement of congressional preference because the states are free to forego the financial assistance that the Act provides. This argument must be rejected, however, in light of the Court's allowance of a Section 1983 claim in *Wilder* under the Boren Amendment. The statute in *Wilder* provided federal financial assistance to states that voluntarily complied with its Medicaid requirements.[121] The *Wilder* Court reasoned that because compliance with the federal statute was a condition precedent to the receipt of federal assistance, the statute set forth a congressional command.[122] Therefore, because the Boren Amendment set forth a duty with which participating states must comply in order to receive funds, the plaintiffs had a right to enforce that duty through use of Section 1983.[123]

In addition, the second prong of the test is not met unless Congress clearly expressed an intention to bind the states. In *Pennhurst State School and Hospital v. Halderman*,[124] the Supreme Court held that Congress's intention to condition federal funding on compliance by the states must be expressed clearly so that the states could decide knowingly whether to comply.[125] The clear language of the Act's reasonable efforts requirement meets the *Pennhurst* test and thus makes the Act's provisions mandatory upon participating state plans. Section 671(a) explicitly provides that a state must meet the statute's requirements to be eligible for funding.[126] The Act indicates a clear intent to bind the state

120. *Wilder*, 496 U.S. at 509.

121. Id.

122. The Court found the congressional mandate "wholly uncharacteristic of a mere suggestion of nudge." Id. at 512 (quoting *West Virginia Univ. Hosp. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989), aff'd, 111 S. Ct. 1138 (1991)). In upholding the Section 1983 claim, the *Wilder* Court distinguished an earlier case, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981), which involved a federal funding statute without language suggesting that the statute was a condition for the receipt of federal assistance. Id. at 510. As such, the *Pennhurst* Court held that the statute simply set forth congressional preferences. Id.

123. Atwell, 60 U. Cin. L. Rev. at 617 (cited in note 35) (stating that under Hohfeldian terminology terms "right" and "duty" are jural correlatives) (citing Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710, 717 (1917)).

124. 451 U.S. 1 (1981).

125. In *Pennhurst*, the Court found that Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010 (1988), did not create a binding obligation because neither the statute nor the corresponding regulations conditioned receipt of federal funding on compliance with the provision. 451 U.S. at 24.

126. Section 671(b) provides as follows:

> The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the Secretary finds, after reasonable notice and opportunity for a hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a), of this section, or that in the adminis-

because it presents the state with a quid pro quo: exchanging foster care reimbursements for specified planning and operation standards.[127] In addition, the reasonable efforts clause imposes a binding obligation on the state because it is "cast in mandatory rather than precatory terms."[128]

The final inquiry is to determine whether the asserted interests of foster children are so vague and amorphous that the judiciary lacks the competence to enforce them.[129] The reasonable efforts requirement of the Act is specific enough to create Section 1983 rights for several reasons. First, the Act's language itself is sufficiently specific to render the reasonable efforts requirement enforceable for purposes of Section 1983. Because the Act clearly states the purpose of the requirement—to prevent separating a child from his family and home and to return the children who have been removed to their homes—the reasonable efforts requirement is not too vague and amorphous for courts and trained professionals to decipher.[130]

Furthermore, the Constitution itself uses "reasonableness" as a standard of behavior,[131] and the courts regularly determine, on a case by case basis, whether the standard of reasonableness has been met.[132] In addition, the standard of a "reasonable" person is vital to the com-

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tration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part [42 USCS §§ 670 et seq.], or that such payments will be made to the State but reduced by an amount which the Secretary deems appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

42 U.S.C. § 671(b) (1988). See also *Wilder*, 496 U.S. at 510 (finding congressional conditions mandatory where "provision of federal funds is expressly conditioned on compliance").

127. *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883, 888 (10th Cir. 1992). By holding that the Act does create enforceable rights, the Tenth Circuit rejected its former position that it had articulated in *Spielman v. Hildebrand*, 873 F.2d 1377, 1386 (10th Cir. 1989). In *Spielman*, the Tenth Circuit suggested that though the Act sets minimum requirements as prerequisites for federal funding that may not be enough to meet the "mandate requirement" of *Pennhurst*. See also *Harpole v. Arkansas Dep't of Human Serv.*, 820 F.2d 923, 928 (8th Cir. 1987) (stating, without further analysis, that the Act was "enacted to enable states to provide financial assistance to needy persons and not as a means of seeking compensation when one of those persons is indirectly injured by the state"). These cases support the argument that the Act, like the statute in *Pennhurst*, only encourages rather than mandates a specific entitlement.

128. *Wilder*, 496 U.S. at 510.

129. See id.

130. Atwell, 60 U. Cin. L. Rev. at 623-24 (cited in note 35).

131. For example, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., Amend. IV.

132. Atwell, 60 U. Cin. L. Rev. at 620-21 (cited in note 35). See, for example, *Katz v. United States*, 389 U.S. 347 (1967) (saying that the protections of Fourth Amendment apply when person has reasonable expectation of privacy in the area searched by the authorities); *Warden, Maryland*

mon law tradition, especially in tort and contract contexts.[133] In those contexts, the concept of "reasonable" is almost completely undefined and is determined by the factfinder on a case by case basis.[134] Therefore, the use of a "reasonable efforts" standard to enforce the Act should not present an unsuual obstacle for the courts.

The Supreme Court also has found the standard of reasonableness enforceable in other federal funding cases, such as *Wilder*.[135] The statute in *Wilder* required that reimbursement rates for Medicaid be reasonable and adequate to meet the costs incurred by efficiently run facilities.[136] Though the act did not define "reasonable and adequate," the Court found that the standard was specific enough to enforce, in part, because the statute and the accompanying regulations set forth factors that states must consider in adopting their rates.[137] Using similar reasoning, the Supreme Court held in *Wright v. City of Roanoke Redevelopment & Housing Authority*[138] that the term "reasonable" as a standard of conduct was not too vague and amorphous to create an enforceable Section 1983 right.[139]

Penitentiary v. Hayden, 387 U.S. 294 (1967) (saying that a warrantless search is reasonable under the Fourth Amendment if exigent circumstances such as hot pursuit exist).

133. For example, basic tort law measures negligence in terms of the behavior of a reasonable person of ordinary prudence under the circumstances. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 30 (West, 5th ed. 1984). What constitutes reasonableness must be determined by a jury on the facts of each case.

In contract law, a promisor may have to use reasonable efforts to perform his or her contractual duties if such efforts are an express provision of the contract or if the other party must rely on those efforts to receive the benefit of the bargain. *Wood v. Lucy Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917). In addition, the law regarding offer and acceptance focuses on the concept of a reasonable time. See E. Allan Farnsworth, *Farnsworth on Contracts* § 3.19 (Little, Brown, 2d ed. 1990); Uniform Commercial Code, Article 2.

134. Atwell, 60 U. Cin. L. Rev. at 624 (cited in note 35). With respect to the test's final element, Justice Blackmun, in his *Suter* dissent, observed that federal courts "in innumerable cases, have routinely enforced reasonableness clauses in federal statutes." *Suter*, 112 S. Ct. at 1374. See also *Virginia R.R. v. System Fed'n No. 40*, 300 U.S. 515 (1937) (enforcing reasonable efforts provisions of the Railway Labor Act and noting that the reasonableness issue is an everyday subject of inquiry by courts in developing and enforcing the laws).

135. 496 U.S. 498 (1990).

136. Id. at 501-02.

137. Id. at 502. Among these factors were

> (1) the unique situation (financial and otherwise) of a hospital that serves a disproportionate number of low income patients, (2) the statutory requirements for adequate care in a nursing home, and (3) the special situation of hospitals providing inpatient care when long-term care at a nursing home would be sufficient but unavailable.

Id. at 502-03.

138. 479 U.S. 418 (1987).

139. In *Wright*, the Court upheld a Section 1983 claim based on the Brooke Amendment to the Housing Act of 1937, which limited the amount of rent that a public housing tenant could be charged and required the inclusion of a reasonable rent allowance for utilities. The Court rejected the argument that the reasonable utilities provision was too vague and amorphous, concluding that

In both *Wilder* and *Wright*, the Court relied on the regulations promulgated by the overseeing federal agencies or on some other objective benchmark to measure compliance with federal law that limited the state's discretion.[140] This reliance suggests that, in order to find sufficient specificity for a Section 1983 right, the Court wants to ensure that the state agency's discretion is limited when the statutory language grants broad authority.[141]

The regulations promulgated under the Act provide the objective benchmark the Court demands. The regulations[142] set forth specific types of child welfare services,[143] the provision of which may satisfy the reasonable efforts requirement. These specific examples of reasonable services give guidance comparable to the regulations explaining the statutes that were considered in *Wilder* and *Wright*.[144] Although state agencies retain the flexibility to assess individual family situations and devise a service-based solution,[145] the regulations provide specific examples that give states guidance so that they will understand the reasona-

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the regulations included sufficient guidelines to create an enforceable right. *Wright*, 479 U.S. at 112.

140. In *Wilder* the states were to measure the reasonableness of the rates against the "objective benchmark" of an efficiently and economically operated facility. Id. at 519. Thus, the states, while they had considerable flexibility in establishing and calculating rates, were not allowed unlimited discretion. Id. at 519-20. Furthermore, although evaluating the reasonableness of a state's rates might require some knowledge of the hospital industry, the *Wilder* Court found this inquiry well within the competence of the judiciary. Id. at 520. The regulations required that housing authorities calculate their utility allowances

> on the basis of current data, to set the allowances in such a fashion that 90 percent of a particular authority's dwelling units do not pay surcharges, and to review tenant surcharges quarterly and consider revision of the allowances if more than 25 percent of any category of units are being surcharged.

Wright, 479 U.S. at 421-22 n.4.

141. Atwell, 60 U. Cin. L. Rev. at 623 (cited in note 35).

142. See 45 C.F.R. § 1356.21(b). Several lower courts had determined prior to *Suter* that the "reasonable" language in the Act did create an enforceable Section 1983 right. See *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883 (10th Cir. 1992); *Del A. v. Edwards*, 855 F.2d 1148, 1154 (5th Cir. 1988) (holding that a reasonable person would have known that inaction was unlawful); *Massinga*, 838 F.2d at 122 (4th Cir. 1988) (finding that an official should have known that failure to comply with the statute would violate constitutional rights of children); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 970, 986 (D.D.C. 1991) (holding that the District of Columbia Child and Family Services Agency failed to use reasonable efforts to protect children); *Norman v. Johnson*, 739 F. Supp. 1182, 1185-87 (N.D. Ill. 1990) (finding that the reasonable efforts requirement is a flexible standard that leaves much discretion to states). But see *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (holding that the rights created by Child Welfare Act were too amorphous to be enforceable); *B.H. v. Johnson*, 715 F. Supp. 1387, 1402 (N.D. Ill. 1989).

143. 45 C.F.R. § 1357.15(e).

144. Atwell, 60 U. Cin. L. Rev. at 623.

145. In *Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990), the court reasoned that a reasonable effort standard is flexible and leaves the states much discretion in providing child welfare services. Id.

ble efforts requirement.[146] Consequently, the judiciary has an objective benchmark by which to evaluate the state's actions. Therefore, the Act satisfies the three-pronged test, and foster children should be permitted to use Section 1983 claims to enforce the reasonable efforts requirement of the Act.[147]

B. Substantive Due Process Claims: A Foster Child's Right to Safety

Claims asserted under the Child Welfare Act often are accompanied by constitutional substantive Due Process claims.[148] Section 1983 provides a civil cause of action in federal court against any person[149]

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146. The National Council of Juvenile and Family Court Judges, the Child Welfare League of America, the Youth Law Center, and the National Center for Youth Law also have produced reasonable efforts guidelines. Atwell, 60 U. Cin. L. Rev. at 623 n.201 (cited in note 35).

147. As plaintiffs, foster children also might argue that the Act gives them an implied right to seek enforcement of its provisions. In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court articulated four relevant factors in determining whether to infer a cause of action from a federal statute: first, whether plaintiff is a member of the class that the statute was enacted to benefit; second, whether the legislature intended, explicitly or implicitly, to create or to deny such a remedy; third, whether an implied remedy for the plaintiff is consistent with the underlying purposes of the legislative scheme; and finally, whether the cause of action is traditionally a state law concern so that inferring a cause of action based solely on federal law would be inappropriate. Id. at 78. According to the Supreme Court, the central inquiry is whether Congress intended, either expressly or by implication, to create a private cause of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

Thus, the implied right analysis is similar to the Section 1983 question. *B.H. v. Johnson*, 715 F. Supp. 1387, 1404 (N.D. Ill. 1989). See also *Wright*, 479 U.S. at 432-33 (O'Connor dissenting) (applying the *Cort* analysis in determining whether the enforceable rights existed within the meaning of Section 1983); *Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983) (noting that the inquiry under Section 1983 resembles the analysis used to determine whether a private cause of action may be implied from an enactment of Congress). The majority in *Suter* quickly disposed of the implied right argument with little explanation. However, the dissent's assertion that an implied right does exist merits attention as it follows *Cort* more closely.

148. See, for example, *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 202 (1989) (stating that "the State had no constitutional duty to protect [a child] against his father's violence. . . . [Even] its failure to do so . . . simply does not constitute a violation of the Due Process Clause"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) (holding that when "the State removed a child from the custody of her parents . . . it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment, than it could deliberately and without justification place a criminal defendant in jail or prison in which his health or safety would be endangered, without violating his rights either under the cruel and unusual punishment clause of the Eighth Amendment . . . or the due process clause"); *Taylor v. Ledbetter*, 818 F.2d 791, 794-98 (11th Cir. 1987) (asserting: "We hold that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a Section 1983 action for violation of Fourteenth Amendment rights"); *Doe v. New York City Dep't of Soc. Serv.*, 649 F.2d 134, 141-47 (2d Cir. 1981) (holding that a child in foster care had a constitutional right to be safeguarded from abuse).

149. Municipalities and other local government units are included among those persons to whom Section 1983 applies. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690 (1978).

acting or failing to act under color of state law, who deprives another of constitutionally guaranteed rights.[150] These rights are protected by the Due Process Clause of the Fourteenth Amendment, which provides that a state shall not deprive residents of life, liberty, or property without due process of law.[151] The substantive component of Due Process protects liberty interests that are so fundamental that the state cannot take them away.[152] Among these guaranteed liberties is the right to be free from unjustified intrusions on personal security, which includes the right to freedom from bodily restraint and punishment.[153]

While the language of the Due Process Clause merely prohibits certain state action, the courts have interpreted it to impose positive duties on the state in certain limited circumstances. A line of Supreme Court cases has acknowledged that substantive due process rights may emanate from the state's positive exercise of its power.[154] Courts have extended this doctrine's application from prisoners and mental patients

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150. *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (noting that the first inquiry in any Section 1983 suit is whether the plaintiff has been deprived of a right secured by the Constitution and its laws). See also *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1975) (holding that Section 1983 imposes liability only for conduct that subjects or causes the complaining party to be subjected to a deprivation of such a secured right).

151. U.S. Const., Amend. XIV.

152. Another avenue that can be used to vindicate a child's right to safe foster care conditions involves a procedural Due Process claim, based on a wrongful deprivation of rights and benefits (entitlements) applicable to foster care custody created under state law and regulation. See *Bd. of Regents v. Roth*, 408 U.S. 564, 576-78 (1972).

Two federal circuits have found a procedural Due Process right to access to federal protection based on state foster care legislation. In *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), the Eleventh Circuit found sufficient protective responsibilities, based on a number of duties articulated in the Georgia child care statutory scheme, to impose procedural Due Process obligations on the state. Similarly, in *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990), the Sixth Circuit held that Kentucky had a legislative obligation to provide foster children with "a program of care, treatment and rehabilitation" and had responsibility "for the operation, management and development of the existing state facilities for the custodial care and rehabilitation of children." Id. at 476-77. In both of these cases, the courts were speaking of potential liability in summary dispositions and had not ruled on the sufficiency of the evidence to prove that the alleged harm occurred and that damages were due. Skoler, 18 Pepperdine L. Rev. at 374-75 (cited in note 10).

153. *Ingraham v. Wright*, 430 U.S. 651 (1976). See also *Youngberg v. Romeo*, 457 U.S. 307 (1982) (finding that a mentally retarded boy involuntarily committed to a state institution has liberty interests in reasonably safe conditions of confinement and freedom from unreasonable bodily restraints).

154. See, for example, *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment requires the state to provide adequate medical care to incarcerated prisoners); *Youngberg*, 457 U.S. at 314-25 (holding that the substantive component of Fourteenth Amendment Due Process requires the state to provide involuntarily committed mental patients with the services necessary to ensure their reasonable safety). See also *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (holding that the estate of a mental institution child inmate who was beaten to death by fellow inmates had a valid due process claim against state hospital officials who were aware that the child had been beaten in the past but failed to take steps to protect him).

in the state's care to any persons in state custody.[155] Taken together, these cases propose that when states hold persons in custody against their will, the Constitution imposes a duty to assume responsibility for their safety and well-being.[156] In other words, because the state affirmatively exercises its power to restrain a person's liberty, rendering him unable to care for himself, the state must provide for his basic human needs.[157] These basic needs consist of food, clothing, shelter, medical care, and reasonable safety.[158]

In *DeShaney v. Winnebago County Dept. of Social Services*,[159] the Court left unresolved the question of whether the state may be liable under the Due Process Clause for failing to protect children in foster homes from mistreatment by their foster parents.[160] Lower courts have held state placement agencies liable for injuries to children received while in foster care, reasoning that foster care constitutes exactly the kind of custody that triggers the protection of the Due Process

155. See *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984) (extending *Youngberg* to any person in state custody and holding that the state was required to exercise accepted "professional judgment" in safeguarding the security of children in its custody). See also *Rubacha v. Coler*, 607 F. Supp. 477, 479 (N.D. Ill. 1985) (finding that a mentally retarded juvenile placed in DCFS-run shelter who was attacked and beaten by residents had a Fourteenth Amendment cause of action against DCFS employees and officials).

156. *DeShaney*, 489 U.S. at 200 (1989). See also *Youngberg*, 457 U.S. at 317 (stating that "when a person is institutionalized—and wholly dependent on the state . . . a duty te provide certain services and care does exist").

157. *DeShaney*, 489 U.S. at 200. State-run foster care placement constitutes the kind of custedy for which the state must provide for the safety and physical needs of the affected children. Thus, "more than negligent" withholding or denial of services can be a constitutionally actionable deprivation. The distinction between supervision by governmental welfare offices as opposed to private contractors retained to manage foster care programs is irrelevant. Further, whether the care is provided in group homes by the state or in the homes of private citizens who are licensed and supervised to be foster parents is of no consequence to the creation of the action. Skoler, 16 Pepperdine L. Rev. at 376 (cited in note 10).

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

159. 489 U.S. 189 (1989). For discussions of *DeShaney*'s impact on the state's duty to protect children, see generally Kristen L. Davenport, Note, *Due Process—Claims of Abused Children Against State Protective Agencies—The State's Responsibility After* DeShaney v. Winnebago County Department of Social Services, 19 Fla. St. U. L. Rev. 243 (1991); Mark Levine, *The Need for the "Special Relationship" Doctrine in the Child Protection Context:* DeShaney v. Winnebago, 56 Brooklyn L. Rev. 329 (1990); Dennis A. Bjorklund, *Crossing* DeShaney: *Can the Gap Be Closed Between Child Abuse in the Home and the State's Duty to Protect?*, 75 Iowa L. Rev. 791 (1990); Garrett M. Smith, Note, DeShaney v. Winnebago County: *The Narrowing Scope of Constitutional Torts*, 49 Md. L. Rev. 484 (1990); Breaden Marshall Douthett, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in* DeShaney v. Winnebago County Department of Social Services, 52 Ohio St. L. J. 643 (1991); Thomas A. Eaton and Michael Wells, *Governmental Inaction As A Constitutional Tort:* DeShaney *and its Aftermath*, 66 Wash. L. Rev. 107 (1991).

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

Clause.[161] When the state implements its foster care operations, it "acts affirmatively to supplant the . . . role of natural parents and to exercise . . . custodial power over foster children in order to keep them safe from abuse and neglect."[162] Foster children are entirely dependent on the state for protection through proper placements and proper supervision. A foster child "is in a situation . . . analogous to a prisoner in a penal institution and a child confined in a mental health facility."[163] By assuming custody of a child, state authorities cut off the child's avenues of self-help.[164] Therefore, the Due Process Clause guarantees that foster children's basic needs are met, which include a child's physical and emotional well-being, and it protects them against arbitrary intrusions on their personal security.[165]

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161. See, for example, *Doe v. Lambert*, No. 87 C 8150 (N.D. Ill. April 19, 1988) (finding that a child has a substantive Due Process claim against state and county officials who are responsible for his foster home placement that resulted in injuries while in the physical custody of the foster parents); *Taylor v. Ledbetter*, 818 F.2d at 799.

162. Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process Right To Safety*, 69 N.C. L. Rev. 113, 157 (1990).

163. *B.H. v. Johnson*, 715 F. Supp. at 1396 (quoting *Taylor*, 818 F.2d at 797).

164. The *Johnson* court stated:

> We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes . . . are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.

Id. at 1396. The Second Circuit has reached a similar holding. See *Doe v. New York City Dep't of Soc. Serv.*, 649 F.2d 134, 141-42 (2d Cir. 1981). See also *Doe v. Lambert*, No. 87 C 8150 (finding that a child has a Section 1983 substantive Due Process claim against DCFS for injuries he suffered while in foster care); *Doe v. Bobbitt*, 665 F. Supp. 691, 697 (N.D. Ill. 1987) (finding that a complaint stated a valid Fourteenth Amendment cause of action against a state agency where the state agent removed the child from her home and placed her in a foster home that the agent suspected was unsafe and in which the child was injured).

165. See *B.H. v. Johnson*, 715 F. Supp. at 1394-97 (holding that a child who is directly or indirectly in state custody has a substantive Due Process right to be free from unreasonable and unnecessary intrusions on both his physical and emotional well-being and a right to adequate food, shelter, clothing, and medical care); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (holding that substantive Due Process rights of children are implicated where police officers arbitrarily refuse to aid children endangered by the officers' performances of their official duties).

The *Johnson* court, however, did not recognize the claims of foster children in regard to gnidelines in the Act, such as parental and sibling visitation, placements in the least restrictive settings possible, and adequately trained caseworkers. *B.H. v. Johnson*, 715 F. Supp. at 1397-98.

> There is no constitutional obligation on the state either to provide plaintiffs with welfare or housing benefits or to affirmatively insurance a given type of family life, and none may be created by inference and misdirection through the penumbral constitutional family right to familial privacy. Though this Court has the power to insure that no state agency improperly *interfere* in . . . family life, it does not have the power to enforce the laudable sociological view of the importance of the family held by plaintiffs and their next friends.

Id. at 1397 (quoting *Black v. Beame*, 419 F. Supp. 599, 607 (S.D.N.Y. 1976), aff'd, 550 F.2d 815 (2d Cir. 1977) (emphasis in original). Because "the Fourteenth Amendment does not mandate an optimal level of care and treatment," these claims lie beyond the reach of substantive Due Process. Id. at 1397-98.

1. Voluntary Versus Involuntary Placement: A Distinction Without a Difference

Prior to *DeShaney*, courts generally did not distinguish between voluntary and involuntary placements in the face of substantive Due Process claims. The courts reasoned that once a child had come into the hands of the state or its agents, that dependence alone, particularly for minors and incompetents in institutional settings, was sufficient to generate affirmative care responsibilities.[166] After *DeShaney*, some courts found the distinction relevant to the determination of Due Process rights.

In *Milburn v. Anne Arundel County Department of Social Services*,[167] the Fourth Circuit held that because the abused child plaintiff was voluntarily placed in the foster home by his natural parents, he was not in state custody nor in a predicament created by state action.[168] Under this reasoning, the Fourth Circuit held that the child voluntarily placed in a foster home by his natural parents and then severely physically abused while in foster care has no Due Process right against the social services agency when its workers did not remove the child after reports of probable abuse.[169] The Fourth Circuit found, comparing the case to *DeShaney*, that the state had not restrained the foster child's liberty and that the child's resulting injury during foster care custody was caused by individuals who were not state actors.[170] The Fourth Circuit reached this conclusion notwithstanding the fact that the state agency located and contracted with the foster parents for the required

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166. See, for example, *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d at 1245 (stating that it need not decide whether residents of a developmental center are voluntarily or involuntarily there because in either case they are entitled to safe conditions and freedom from undue restraint).

Several district courts reached similar conclusions about equal status for voluntary and involuntary admittees to state facilities. See, for example, *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978); *McCartney v. Barg*, 643 F. Supp. 1181, 1185 (N.D. Ohio 1986); *Kolpak v. Bell*, 619 F. Supp. 359, 378 (N.D. Ill. 1985). In some cases, the courts stated that voluntary placement of children in state hands never could compromise the constitutional rights of children to be protected from violent conditions or substandard care. Skoler, 18 Pepperdine L. Rev. at 361 (cited in note 10) (citing *Fialkowski v. Greenwich Home for Children, Inc.*, 683 F. Supp. 103 (E.D. Pa. 1987); *Seide v. Prevost*, 536 F. Supp. 1121 (S.D.N.Y. 1982); *Naughton v. Bevliaqua*, 458 F. Supp. 610 (D.R.I. 1978), aff'd, 605 F.2d 586 (1st Cir. 1979)).

167. 871 F.2d 474 (4th Cir. 1989).

168. Id. at 479.

169. Id. at 476.

170. Id. at 476-79. Similarly, in *Jordan v. Tennessee*, 738 F. Supp. 258 (M.D. Tenn. 1990), a federal district court held that a child whose parents voluntarily committed him to a state institution for the severely retarded could not claim a Due Process right to a safe environment. See also Skoler, 18 Pepperdine L. Rev. at 362. The district court noted that the boy's parents were aware of the conditions at the facility and that the state did not affirmatively require the child to remain there. Id. See also 738 F. Supp. 258, 259 (M.D. Tenn. 1990).

care and inspected and approved the foster home for the voluntary placement.[171]

Using a voluntariness distinction to determine whether due process rights are implicated is unsound.[172] In *DeShaney*, the Supreme Court staked its "liberty interest desideratum on custody (or other affirmative state action) which impairs the child's ability to protect or care for itself or obtain such help from parents or others."[173] A child voluntarily placed in foster care is equally dependent on state care and protection as a child committed by a court order. In reality, "voluntary commitment can be the functional equivalent of a 'plea bargain' negotiated to avoid the expense"[174] and emotional distress involved in a state court neglect or abuse proceeding. Therefore, voluntarily committed children should have the same protection as that enjoyed by children placed in state foster care by the courts.

Allowing such a voluntariness distinction to excuse official liability for extreme indifference to known safety and care hazards surely will be detrimental to children.[175] Both voluntarily and involuntarily placed children face the same predicament. More often than not, the same state court or state agency will supervise both voluntary and court-ordered placements. The same requirements for proper care and placement apply, and as such, all foster children should be treated alike in regard to asserting their due process rights.

2. Standards to Determine State Liability

The courts have articulated two broad standards to determine the liability of state agencies for abuse of foster children: the deliberate in-

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171. 871 F.2d at 477.

172. Significantly, *Youngberg v. Romeo*, 457 U.S. 307 (1982), the basis of the Court's current doctrine regarding when involuntary civil custody arrangements generate substantive Due Process obligations, involved a retarded boy whose mother asked the local court to admit him to a state-run institution permanently. *Kolpak v. Bell*, 619 F. Supp. 359, 378 (N.D. Ill. 1985). The mother's choice in *Youngberg* illustrates the blurriness of the voluntary-involuntary placement distinction. Skoler, 18 Pepperdine L. Rev. at 363 (cited in note 10). Moreover, the interests of children and the parents who may be abusing and neglecting them do not coincide, thus the courts should not accept parents as "proxies" for making custody decisions on behalf of their children. Id. See American Bar Association and Institute of Judicial Admin. Juvenile Justice Standard, Counsel for Private Parties § 2.3(b) (1980) (advocating representation for children, independent of counsel for their parents, in neglect, dependency, custody, and adoption proceedings).

The Supreme Court stated that many " 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent." *Smith v. Organization of Foster Families*, 431 U.S. 816, 834 (cited in note 3).

173. Skoler, 18 Pepperdine L. Rev. at 379 (cited in note 10).

174. Id.

175. Courts always have considered children legally disabled parties who need special state protection and care. See, for example, *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973).

difference and professional judgment standards.[176] Following Supreme Court precedents in other areas,[177] the courts seem to concur that negligence or even gross negligence on the part of state and local child welfare agencies is not enough to trigger liability.[178] The courts have required some knowledge of potential danger or risk to the child's safety.[179] The courts have not articulated the level of knowledge required under a given set of circumstances or whether the knowledge requirement is case-specific.[180] Part of the Supreme Court's unfinished business regarding foster care custody rights is to provide some specificity to the standards it has constructed.[181]

Some courts have found that when caseworkers were deliberately indifferent or when the agency failed to respond to threats to or violations of a child's clearly established rights, liability exists.[182] The deliberate indifference test previously was applied to the supervision of wardens, police chiefs, and hospital administrators.[183] In *Doe v. New York*,[184] the Second Circuit recognized that care in such institutional settings was easier to monitor than foster home care because caseworkers, in the child welfare context, can make only occasional supervisory visits.[185] In addition, less exercise of hierarchical authority among state workers is desirable in the foster care context than in institutional custody situations.[186] The Second Circuit stated that good foster care tries to approximate a normal family environment, with few intrusions, and it facilitates a respect for foster family autonomy and integrity, which are necessary for successful relationships.[187] Because of

176. See, for example, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), cert. denied, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Soc. Serv.*, 649 F.2d 134 (2d Cir. 1981), cert. denied sub nom., *Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983) (employing the deliberate indifference standard); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (employing the departure from professional standards test).

177. See *Daniels v. Williams*, 474 U.S. 327 (1986) (stating that mere negligence of a state official does not constitute deprivation under the Fourteenth Amendment's Due Process Clause); *City of Canton v. Harris*, 489 U.S. 378 (1989) (rejecting gross negligence standard for holding liable a municipal official for failure to train employee).

178. Skoler, 18 Pepperdine L. Rev. at 371 (cited in note 10).

179. See, for example, *Morgan*, 914 F.2d at 852 (stating that neither negligence nor gross negligence alone can satisfy the elements of knowledge and deliberate action required to constitute a violation); *Doe v. New York*, 649 F.2d at 143 (stating that gross negligence can only create a presumption of deliberate indifference).

180. Skoler, 18 Pepperdine L. Rev. at 371.

181. Id. at 370.

182. See *Taylor*, 818 F.2d at 794; *Doe v. New York*, 649 F.2d at 141; *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

183. Skoler, 18 Pepperdine L. Rev. at 370.

184. 649 F.2d 134.

185. Id. at 142.

186. Id.

187. Id.

the differences between foster care and institutional custody, the courts have felt that deliberate indifference should not be inferred from a child welfare caseworker's failure to act as readily as might be done in a prison situation.[188] For example, caseworkers often may take an unobtrusive stance, choosing to give the foster family the benefit of the doubt, rather than deciding to interfere.[189]

Other circuits have found that the Supreme Court's professional judgment standard[190] is more appropriate in the foster care context.[191] Here, once the child's safety interest has been violated, official liability depends on whether the state workers adhered to accepted professional standards and practices in deciding to place or maintain children in situations of known risk.[192] The controlling standard for determining whether those rights have been violated is whether professional judgment, in fact, was exercised.[193] The constitutional norm is violated only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards that the person responsible could not have based the decision on such a judgment.[194]

The scope of the professional judgment test has been circumscribed as well. In *K.H. v. Morgan*,[195] the Seventh Circuit took a restrictive view of agency and worker responsibility. The concurrence built into the professional judgment test a defense for lack of resources so that no liability would attach, even for placements involving known risks of abuse, if the responsible agency did not have resources to assure a proper placement.[196] The Seventh Circuit emphasized the law's antipa-

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188. Skoler, 18 Pepperdine L. Rev. at 370 (cited in note 10).

189. Id.

190. The Supreme Court formulated this standard in child institutionalization cases. See, for example, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (cited in note 3).

191. See, for example, *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990).

192. Skoler, 18 Pepperdine L. Rev. at 370. See *Youngberg*, 457 U.S. at 323. A professional's decision is presumptively valid; liability may be imposed only when the decision is a substantial departure from the judgment that such a professional is presumed to exercise. Id.

193. Id. at 321.

194. Id. at 323.

195. 914 F.2d 846 (7th Cir. 1990). *K.H. v. Morgan* involved a young girl who was placed in nine foster homes in four years, some of which involved beatings and sexual assault. Id. at 848. In its detailed analysis of the professional judgment test applied in the foster care context, the court held that a narrow approach to agency and worker liability was appropriate even though the caseworkers were aware of the risks to the child. Id. at 852.

196. Id. at 867-68 (Coffey concurring in part and dissenting in part). This position was derived from the *Youngberg* opinion, in which the Court stated that a "professional will not be liable [for damages] if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability." Id. at 867 n.18 (quoting *Youngberg*, 457 U.S. at 323 (1982)).

thy to damage suits in the foster care context, the nation's lack of adequate foster care facilities, and the minimal obligations of the state in caring for children in state custody.[197] The *Morgan* opinion raised a number of questions[198] that, when answered, will refine the contours of the law in this area and clarify the state's specific duties under the Due Process Clause.

Both the deliberate indifference and professional judgment standards are sufficiently flexible to accommodate the difficulties faced by agencies and caseworkers that provide care and supervision constrained by minimal resources. Enforcement of the Act will make the duties of the state and its employees clearer to produce more exacting analysis of state responsibilities.

IV. CONCLUSION

In order to establish the provisions of the Act as standard procedure rather than amorphous guidelines for state foster care agencies, the Supreme Court should endorse the general acceptance of Section 1983 private enforcement actions of foster care obligations. Recent circuit decisions have scrutinized carefully the issues, and have adhered faithfully to established Supreme Court standards concerning when such enforcement is suitable. If Section 1983 actions are not recognized, the goals set out by the Act to benefit foster children by finding permanent homes remain illusory ideals that exist only on paper. The plight of foster children and the ailing system designed to serve them will not improve if these essential reforms are not implemented.

Until the reforms outlined in the Act in fact are implemented so that the need for foster care diminishes, the safety of children already in the system must remain a primary focus. Apart from the remedy that Congress provided through the Act, courts have established a constitutional right to safe foster care for children in state custody, grounded in Fourteenth Amendment substantive Due Process liberty interests.[199] As

197. See *Morgan* at 853.

198. These questions include whether mild danger signals of abuse followed by no investigation whatsoever would produce the requisite failure to exercise professional judgment, and whether, in the case of unmistakable reports or a history of abuse by particular foster parents, the Seventh Circuit's test really would protect agency personnel who make or tolerate a risky placement on grounds that there were no other foster homes or institutional placements available. Skoler, 18 Pepperdine L. Rev. at 370-71 (cited in note 10).

199. Many issues remain unresolved. The courts must fashion fact-related boundaries to determine what kinds of conduct are violative of the right to safety, what standards for measuring such violations should be, what obligations should be imposed on the professionals who supervise foster families, and what obligations government agencies must discharge. Other issues include what sorts of foster care services are mandated by the right to safety and whether state actors can claim immunity from liability. The courts also must clarify whether and when "state foreclosure of

a result, foster children are entitled to protection from injury intentionally inflicted by their foster parents and to the provision of basic necessities such as food, shelter, and medical care. These rights are "rooted in affirmative governmental obligations" that arise when the state assumes custody of a child because that undertaking substantially forecloses that child's other avenues for care and protection.[200]

When used together, Section 1983 and substantive due process actions will help accomplish the preventive, care, and permanency goals of the Act, while reinforcing the right to safe foster care for children. Thus, systemic reform in the provision of child welfare services may be achieved without sacrificing the safety of the children currently in the system. If the judiciary does not make these claims available to foster children, the overburdened, ineffective foster care system will be slow to change.

The Federal District Court of the District of Columbia aptly summarized the foster care crisis in *LaShawn A. v. Dixon:*[201]

> [This] is a case about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the [state] to provide them with food, shelter, and day-to-day care. . . . It is about the failures of an ineptly managed child welfare system . . . and the resultant tragedies for . . . children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.[202]

Society has humanitarian and utilitarian interests in reforming the foster care system before more young lives are damaged. Children are our society's most helpless segment, and yet they are its most valuable resource. Their rights to safety and proper care must be guaranteed to ensure our future.

Cristina Chi-Young Chou

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opportunity and freedom in the foster care context can implicate the child's protected liberty interest in safe foster care." Skoler, 18 Pepperdine L. Rev. at 376.

200. Id. at 375-76. The rights to safety and basic care are not dependent on constitutional cruel and unusual punishment guarantees or the special relationship doctrine that some courts have held to establish affirmative duties to individuals who are not strictly in state custody. Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. Rev. 659, 677-83 (1990). See also Sheryl A. Donella, *Safe Foster Care: A Constitutional Mandate*, 19 Family L. Q. 79 (1985).

201. 762 F. Supp. 959 (D.D.C. 1991).

202. Id. at 960.