

**DELIBERATE INDIFFERENCE,  
PROFESSIONAL JUDGMENT, AND THE CONSTITUTION: ON LIBERTY  
INTERESTS IN THE CHILD PLACEMENT CONTEXT**

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I. INTRODUCTION

Courts and commentators suggest that because adoption is a creature of statute, there can neither be a right to adopt nor a right to be adopted. They further argue that the case law supports their position, claiming that the United States Supreme Court in *Smith v. Organization of Foster Families For Equality and Reform (OFFER)*<sup>1</sup> expressly rejected the right to adopt or be adopted. Yet, the relevant constitutional jurisprudence is much more nuanced than these courts and commentators would have one believe. The focus of discussion should not be on whether there is a right to adopt or be adopted per se, but on whether there is a constitutionally protected liberty interest either in being adopted or in the state's not erecting arbitrary and unduly burdensome barriers to adoption. The relevant case law on this matter suggests that there is a constitutionally protected liberty interest in this area, both because of a related jurisprudence which establishes that children have some protected rights in the placement context and because *OFFER* is much more supportive of various parties' interests in adoption than might first be thought.

Part II of this article discusses the rights of foster care children with respect to the kinds of care that they receive, arguing that the jurisprudence in this area suggests that the interests of those parties who would adopt or be adopted may well have constitutional weight. Part III discusses *OFFER* and its implications for state limitations on adoption. The article concludes that the interests implicated in adoption are or should be constitutionally protected, at least where there are no competing interests of a biological parent at stake.

II. SECTION 1983 ACTIONS IN THE FOSTER CARE CONTEXT

Courts in many of the circuits have recognized that foster children have limited rights against the state with respect to the care that they receive. While the developing jurisprudence in this area does not *establish* that there is or should be a constitutionally recognized liberty interest in adopting or being adopted, that jurisprudence is nonetheless *suggestive* that some of the interests in the adoption context must be accorded constitutional weight. Further, this developing jurisprudence utterly undermines the contention that there can be

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1. 431 U.S. 816 (1977).

no constitutionally protected interests in adoption due to its being a creature of statute. Precisely because foster care is a creature of statute but nonetheless implicates constitutional interests, the constitutional analysis involving adoption rights must be much more nuanced than many courts and commentators seem to appreciate.

### A. Rights to Adequate Care

Courts and commentators sometimes suggest that because adoption is a creature of the state,<sup>2</sup> there can be no adoption rights. Yet, the same might be said of foster care,<sup>3</sup> and the law nonetheless recognizes that children have rights in the foster care context.<sup>4</sup> While those rights are not equivalent to a right to be adopted, they are nonetheless helpful to consider when examining the kinds of interest the Constitution does or should take account of in the placement context.<sup>5</sup>

The right of foster children to receive adequate care has been recognized in various jurisdictions. As the Washington Supreme Court explains in *Braam ex rel. Braam v. State*,

Foster children, because of circumstances usually far beyond their control, have been removed from their parents by the State for the child's own best interest . . . Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety.<sup>6</sup>

The right described in *Braam* is not a right to a permanent placement in the perfect home.<sup>7</sup> Much of the foster care rights jurisprudence focuses on preventing children from being subjected to very dangerous conditions. Thus,

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2. *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) ("Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state."); *Matter of Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995) ("[A]doption in this State is 'solely the creature of . . . statute[.]'" (citing *Matter of Eaton*, 305 N.Y. 162, 165 (N.Y. 1953))); Jane S. Schacter, *Constructing Families in a Democracy: Court, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 936 (2000) ("In the United States, adoption is a creature of state law."); Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 403 (1990) ("Like foster parent contracts, adoptions are creatures of state law.").

3. See *Renfro v. Cuyahoga County Dep't of Human Servs.*, 884 F.2d 943, 944 (6th Cir. 1989) ("The nature of the foster care relationship is distinctly different from that of the natural family; namely, it is a temporary arrangement created by state and contractual agreements."); *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991) ("The adoptive family's rights, like those of the foster family, arise from state statute.").

4. See *Nicini v. Morra* 212 F.3d 798, 807 (3d Cir. 2000) ("After *DeShaney*, many of our sister courts of appeals held that foster children have a substantive due process right to be free from harm at the hands of state-regulated foster parents.").

5. See *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 130 (7th Cir. 1989) (noting that adoption and foster care are both creatures of state law).

6. 81 P.3d 851, 859 (Wash. 2003).

7. *Charlie H. v. Whitman*, 83 F. Supp.2d 476, 507 (D.N.J. 2000) ("[T]his right to freedom from harm under the Due Process Clause of the Fourteenth Amendment does not entitle Plaintiffs to an 'optimal level of care and treatment.'" (citing *B.H. v. Johnson*, 715 F. Supp. 1387, 1397-98 (N.D. Ill. 1989)).

the *Braam* court explains that “at its core, foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety.”<sup>8</sup> However, this right to reasonable safety is not merely a right not to be placed in very dangerous settings—it also includes the right to have basic needs met. Thus, when explaining the “right to reasonable safety,”<sup>9</sup> the *Braam* court explains that “the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.”<sup>10</sup>

Many of the cases involving this substantive due process right have involved foster children who have suffered physical or sexual abuse as a result of being placed in a dangerous setting. For example, in one case, a seven-year-old was allegedly subjected to repeated sexual abuse by an intern hired by the Department of Child and Family Services, notwithstanding the intern’s history of mental illness and drug problems.<sup>11</sup> In another, two children placed in a foster home were subjected to repeated sexual abuse by men living in the home.<sup>12</sup> In yet another, three children were allegedly subjected to abuse by the teenage son of the operators of the foster home.<sup>13</sup> Other cases involved no sexual abuse but instead severe physical abuse leading to grave injury or death.<sup>14</sup> Sometimes the charges involved both physical and sexual abuse.<sup>15</sup> In short, many of the cases involved foster children who had been subjected to egregious treatment, although in these cases the issue was not whether the conduct against the children was wrong or even criminal but, instead, whether the relevant state actors had been sufficiently culpable that they should be subject to a § 1983 action.<sup>16</sup>

## B. The Standard for Determining Whether the State Has Met Its Obligations

In the cases described above, the plaintiffs claimed the state had deprived them of protected rights without due process of law. As the Tenth Circuit explains, “Section 1983 provides a private cause of action for ‘the deprivation of

8. *Braam*, 81 P.3d at 857.

9. *Id.*

10. *Id.*

11. See *Kitzman-Kelley, on behalf of Kitman-Kelley v. Warner*, 203 F.3d 454, 456 (7th Cir. 2000).

12. *Kara B. by Albert v. Dane County*, 555 N.W.2d 630, 631–32 (Wis. 1996). See also *Yvonne L., by and through Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 885 (10th Cir. 1992) (child allegedly sodomized and raped by another child residing there); *Whitley v. N.M. Children, Youth & Families Dep’t*, 184 F. Supp.2d 1146, 1149 (D.N.M. 2001) (child assaulted by adolescent patient living in same facility).

13. *Jordan v. City of Philadelphia*, 66 F. Supp.2d 638, 641 (E.D. Pa. 1999); see also *Wendy H. by and through Smith v. City of Philadelphia*, 849 F. Supp. 367, 370 (E.D. Pa. 1994) (child sexually abused by teenage son of foster parents).

14. See *White by White v. Chambliss*, 112 F.3d 731, 735 (4th Cir. 1997) (child died from blows to head while in foster care); *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987) (child suffered severe and permanent injury inflicted by foster mother).

15. See *Doe v. New York City Dep’t of Social Servs.*, 649 F.2d 134, 137 (2d Cir. 1981) (foster child subjected to physical and sexual abuse at hands of foster father).

16. For a discussion of the differing levels of culpability required in different jurisdictions to meet the relevant standard, see notes 22–87 and accompanying text *infra*.

any rights, privileges, or immunities secured by the Constitution and laws of the United States.”<sup>17</sup>

When these § 1983 actions are brought, the claim is not merely, for example, that a private party has harmed a foster child, even severely. As the Third Circuit explains, “the Due Process Clause does not impose an affirmative duty upon the state to protect its citizens.”<sup>18</sup> Rather, the claim is that the state played an important role in bringing about the abuse of these children, for example, because the state removed those children from their homes and placed them in the setting where they were subjected to abuse.

When the state has children in its custody, the state has taken on a special obligation with respect to their care, which the state fails to meet if it puts children in unreasonably dangerous settings.<sup>19</sup> “[W]hen the state enters into a special relationship with a particular citizen, it may be held liable for failing to protect him or her from the private actions of third parties. This liability attaches under § 1983 when the state fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty.”<sup>20</sup>

Currently, there are two competing standards for determining whether a state actor is liable under § 1983 for failing to meet its obligations to the foster children in its care. The *Braam* court offered one, concluding that the “proper inquiry is whether the State’s conduct falls substantially short of the exercise of professional judgment, standards, or practices.”<sup>21</sup> The Wisconsin Supreme Court reached a similar conclusion.<sup>22</sup> However some courts have adopted a deliberate indifference or a shock-the-conscience standard. The Eighth Circuit explains,

In the context of this custodial relationship, a substantive due process violation will be found to have occurred only if the official conduct or inaction is so egregious or outrageous that it is conscience-shocking. When deliberation is practical, the officials’ conduct will not be found to be conscience-shocking unless the officials acted with deliberate indifference. Deliberate indifference will be found only if the officials were aware of facts from which an inference

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17. *Yvonne L.*, 959 F.2d at 886 (citing 42 U.S.C. § 1983). See also *Collier*, 763 F. Supp. at 475 (“To state a claim for relief under Section 1983, a plaintiff must be able to demonstrate that he was deprived of a right secured by the Constitution or laws of the United States, and that any such deprivation was achieved under color of law.”).

18. *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992).

19.

A relationship between the state and foster children arises out of the state’s affirmative act in finding the children and placing them with state-approved families. By so doing, the state assumes an important continuing, if not immediate, responsibility for the child’s well-being. In addition, the child’s placement renders him or her dependent upon the state, through the foster family, to meet the child’s basic needs.

See *D.R.*, 972 F.2d at 1372 (citing *Taylor*, 818 F.2d at 794–97).

20. *Id.* at 1369 (citing *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 352 (11th Cir. 1989)).

21. *Braam ex rel. Braam v. State*, 81 P.3d 851, 858 (Wash. 2003).

22. *Kara B. by Albert v. Dane County*, 555 N.W.2d 630, 637 (Wis. 1996) (“We hold that those entrusted with the task of ensuring that children are placed in a safe and secure foster home owe a constitutional duty that is determined by a professional judgment standard.”).

could be drawn that a substantial risk of serious harm existed and the officials actually drew that inference.<sup>23</sup>

Other courts have equated the shock-the-conscience and deliberate indifference standards, at least in the foster care context.<sup>24</sup>

These two different standards stem from different United States Supreme Court cases—on the one hand *Estelle v. Gamble*<sup>25</sup> and *County of Sacramento v. Lewis*<sup>26</sup> (*Estelle-Lewis* standard) and on the other *Youngberg v. Romeo*<sup>27</sup> (*Youngberg* standard).<sup>28</sup> The former standard seems more demanding than the latter, although some courts have implied that in the context of foster care it will not matter which standard is chosen.<sup>29</sup>

In *Estelle*, a prisoner, J. W. Gamble, brought a § 1983 action contending that he had been subjected to “cruel and unusual punishment in violation of the Eighth Amendment”<sup>30</sup> by virtue of the poor medical treatment that he had received while an inmate of the Texas Department of Corrections.<sup>31</sup> The *Estelle* Court explained that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment,”<sup>32</sup> and that “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”<sup>33</sup> The Court cautioned, however, that the decision did not stand for the proposition that “every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.”<sup>34</sup> Neither accident<sup>35</sup> nor mere negligence<sup>36</sup> would suffice to establish the relevant level of culpability.

In *Lewis*, the issue was “whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.”<sup>37</sup> The Court held that “in such circumstances only a purpose to cause harm unrelated to the legitimate object of

23. *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006) (citations omitted).

24. *See, e.g., Jacobs v. Impact Project, Inc.*, No. Civ.A. 04-2074, 2005 WL 1459333, \*1 (E.D. Pa. June 16, 2005) (mem.) (“In the foster care context, conduct that is ‘deliberately indifferent’ will shock the conscience.” (citing *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir. 1983))); *Susavage v. Bucks County Schools Intermediate Unit No. 22*, No. Civ.A. 00-6217, 2002 WL 109615, \*4 (E.D. Pa. Jan. 22, 2002) (mem.) (“Where the state actor has time to ‘make unhurried judgments,’ conduct which is deliberately indifferent will shock the conscience.”).

25. 429 U.S. 97 (1976).

26. 523 U.S. 833 (1998).

27. 457 U.S. 307 (1982).

28. *See infra* notes 31–49 and accompanying text *infra* for a discussion of these cases.

29. *See Yvonne L.*, by and through *Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (suggesting that there is little if any difference between the two standards).

30. *Estelle*, 429 U.S. at 101.

31. *See id.* at 98.

32. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

33. *Id.* at 104–105.

34. *Id.* at 105.

35. *Id.*

36. *Id.* at 106.

37. *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.”<sup>38</sup> The Court noted that its shock-the-conscience standard was fact-specific, because “[d]eliberate indifference that shocks in one environment may not be so patently egregious in another.”<sup>39</sup> For example, as the term implies, “the standard is sensibly employed only when actual deliberation is practical.”<sup>40</sup> The Court illustrated this by pointing out that “in the custodial situation of a prison, forethought about an inmate’s welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.”<sup>41</sup>

As the *Lewis* Court noted, the case before it did not involve a situation in which the officer had ample time for reflection. The officer had to make a split-second decision, and “when unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates ‘the large concerns of the governors and the governed.’”<sup>42</sup> The case involving a high-speed chase is to be contrasted with the prison case, since “liability for deliberate indifference of inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.”<sup>43</sup> Thus, where officials with individuals in their care are afforded sufficient time for investigation and reflection, they may well be held accountable for their deliberate indifference with respect to the welfare of those in their charge.

The deliberate indifference standard discussed in *Estelle* and *Lewis* is to be contrasted with the professionalism standard suggested in *Youngberg*. In *Youngberg*, an inmate involuntarily committed to a state institution for the mentally handicapped claimed that he had “a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by failing to provide constitutionally required conditions of confinement.”<sup>44</sup> The *Youngberg* Court explained that there is “a duty to provide adequate food, shelter, clothing, and medical care. . . . The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution.”<sup>45</sup>

Of course, if the Court is recognizing a duty to provide such care, the Court should provide some way of knowing when that duty has been met. The *Youngberg* Court offered the following criterion: “liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”<sup>46</sup>

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38. *Id.*

39. *Id.* at 850.

40. *Id.* at 851.

41. *Id.*

42. *Id.* at 853. (citing *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

43. *Id.*

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

45. *Id.* at 324.

46. *Id.* at 323.

This standard, while not lax, is nonetheless easier for a plaintiff to meet than is the deliberate indifference standard.<sup>47</sup> The Court justified imposing a less rigorous standard in this context because “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”<sup>48</sup> If, indeed, the relevant standard is to be determined in light of whether the confined individuals had been responsible for their own confinement, then there are important implications for which standard is appropriate in the foster care context. Foster children are much more likely to have been victimized than to have been victimizers.<sup>49</sup> They thus would seem entitled to comparatively more considerate treatment and the correspondingly less demanding criterion for them to establish a § 1983 violation especially when they have been subjected to egregious physical or sexual abuse.

### C. Application of *Estelle-Lewis* and *Youngberg* in the Context of Foster Care

Various lower courts have suggested that children in foster care are analogous in important ways to individuals who are either incarcerated or institutionalized,<sup>50</sup> and that the kinds of obligations of care placed on officials in a prison or other institutional setting are illustrative of the kinds of obligations that officials in the foster care setting also have.<sup>51</sup> While these courts recognize that foster care should be differentiated from institutionalized care in some respects, they tend to believe that these differences are a matter of degree rather than of kind.<sup>52</sup>

As an initial matter, it might be helpful to consider why courts are even comparing and contrasting these different kinds of settings. The impetus for this analysis comes from *DeShaney v. Winnebago County Dept. of Social Services*.<sup>53</sup>

*DeShaney* involved an action on behalf of a little boy, Joshua, whose father had beaten him so severely that he was “expected to spend the rest of his life

47. See *infra* notes 80–82 and accompanying text (discussing possible differences in the subjective requirements of these standards).

48. *Youngberg*, 457 U.S. at 321–22.

49. Cf. *Braam ex rel. Braam v. State*, 81 P.3d 851, 859 (Wash. 2003) (“Foster children, because of circumstances usually far beyond their control, have been removed from their parents by the State for the child’s own best interest.”).

50. *Jordan v. City of Philadelphia*, 66 F. Supp.2d 638, 646 (E.D. Pa. 1999) (“Numerous courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals.”).

51. *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (“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.”).

52.

[T]he analogy between foster children on the one hand and prisoners and institutionalized persons on the other is incomplete . . . Nonetheless, any distinctions between children placed in foster care and the prisoners at issue in *Estelle* or the institutionalized mentally retarded persons at issue in *Youngberg* are matters of degree rather than of kind.

*Nicini v. Morra* 212 F.3d 798, 808 (3d Cir. 2000).

53. 489 U.S. 189 (1989).

confined to an institution for the profoundly retarded.”<sup>54</sup> Joshua and his mother brought a § 1983 action against various members of the Winnebago County Department of Social Services,<sup>55</sup> claiming that the failure of various state officials to protect him “deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”<sup>56</sup>

The *DeShaney* Court began its analysis by noting that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”<sup>57</sup> The Court explained that as “a general matter . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause,”<sup>58</sup> although the Court was careful to note that “in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”<sup>59</sup> For example, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”<sup>60</sup> Thus, while the state does not violate due process by failing to prevent one private individual from injuring another, the state may well violate due process in certain special circumstances where the state itself took on additional obligations.

The *DeShaney* Court differentiated between the general rule respecting the state’s lack of a duty to protect private persons from other private persons and the special kind of case in which the state has taken an individual into custody by noting that:

when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.<sup>61</sup>

In essence the Court is suggesting that the due process protections are triggered when the state takes custody of an individual or limits the individual’s liberty in some way—without that trigger, even egregious harm will not implicate due process guarantees.<sup>62</sup> The Court explained in a note that “the

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54. *Id.* at 193.

55. *Id.*

56. *Id.* at 191.

57. *Id.* at 195.

58. *Id.* at 197.

59. *Id.* at 198.

60. *Id.* at 199–200.

61. *Id.* at 200.

62.

In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.



protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement.”<sup>63</sup> A prisoner who has been sentenced to a term of years will not additionally have been sentenced to receive inadequate medical care, and thus an incarcerated individual would have a § 1983 action if, for example, he was deliberately subjected to egregiously poor treatment.

Courts have considered *DeShaney* and concluded that foster children have the requisite special relationship with the state to trigger potential due process protections.<sup>64</sup> For example, the Tenth Circuit has recognized that “prisoners, individuals committed against their will to mental institutions, and children in state run foster care [have] a special relationship with the state.”<sup>65</sup> This special relationship entails an “affirmative duty to protect [which] arises from the limitation which the state has imposed on the child’s freedom to act on her own behalf.”<sup>66</sup>

Notwithstanding the existence of this obligation to protect foster children, § 1983 actions are difficult to maintain whether the professional judgment or the reckless indifference standard is used. Indeed, there is some question as to whether the standards differ. For example, the Tenth Circuit itself expressed doubt about whether there was much difference between the deliberate indifference and the professional judgment standards.<sup>67</sup>

The confusion regarding whether the standards actually differ may be explained in part by the professional judgment standard having been given an interpretation by the Seventh Circuit which makes it virtually indistinguishable from the deliberate indifference standard.<sup>68</sup> When explaining the applicable standard, the Seventh Circuit in *Lewis v. Anderson* noted that “in the context of child placement by an adoption agency, that agency officials and case workers

63. *Id.* at 200 (footnote.8).

64. *See, e.g.,* *Whitley v. N.M. Children, Youth & Families Dep’t*, 184 F. Supp.2d 1146, 1155 (D.N.M. 2001) (noting that the Tenth Circuit relied on *Youngberg* and *DeShaney* in its analysis of the substantive due process rights which foster children have); *Jordan v. City of Philadelphia*, 66 F. Supp.2d 638, 646 (E.D. Pa. 1999) (discussing the substantive due process rights of children in foster care).

65. *Whitley*, 184 F. Supp.2d at 1155 (citing *DeAnzóna v. Denver*, 222 F.3d 1229, 1234 (10th Cir. 1992)).

66. *Id.* at 1154–1155 (citing *DeShaney*, 489 U.S. at 199–200).

67. *See* *Yvonne L.*, by and through *Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (“As applied to a foster care setting we doubt there is much difference in the two standards.”). *See also* *Whitley*, 184 F. Supp.2d at 1156 (“In *Yvonne L.*, the Tenth Circuit expressed ‘doubt’ as to whether there was much difference between the professional judgment standard and deliberate indifference when applied in the foster care setting.”) (citing *Yvonne L.*, 959 F.2d at 894).

68. Both the Second and the Sixth Circuits have suggested that the deliberate indifference standard is appropriately used in § 1983 actions involving foster care. *See* *Doe v. New York City Dep’t of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981) (“[O]fficials in charge of the agency being sued must have displayed a mental state of ‘deliberate indifference’ in order to ‘meaningfully be termed culpable’ under § 1983.”). *See also* *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (suggesting that children in “state-regulated foster homes” have a due process right to be free of unnecessary harm and that deliberate indifference on the part of state officials will have to be established to bring a § 1983 action successfully).

are liable only if they violated ‘the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser.*’<sup>69</sup> The court made clear that this test does not “impose some kind of duty of inquiry in these cases.”<sup>70</sup> Thus, the court explained, liability cannot be imposed “on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry.”<sup>71</sup> Instead, it must be shown that the “defendants actually knew of or suspected the existence of child abuse in the prospective adoptive family.”<sup>72</sup> To support that its analysis was in accord with the relevant constitutional jurisprudence, the *Anderson* court cited the *Lewis* shock-the-conscience test.<sup>73</sup>

The court’s citing *Lewis* would be unsurprising were it applying the shock-the-conscience or the deliberate indifference standards. The *Anderson* court was not trying to do that but, instead, was trying to apply the professional judgment standard developed in the circuit in *K.H. through Murphy v. Morgan*.<sup>74</sup>

When explicating the standard to be used in evaluating a § 1983 action in the foster care context, the *K.H.* court suggested that *Youngberg* rather than *Estelle-Lewis* was the relevant standard.<sup>75</sup> The court made clear that it was applying the professional judgment standard, noting that “child welfare workers and their supervisors have a secure haven from liability when they exercise a bona fide professional judgment as to where to place children in their custody.”<sup>76</sup> The court explained that child welfare workers will face potential liability “[o]nly if without justification based either on financial constraints or on considerations of professional judgment they place the child in hands they know to be dangerous or otherwise unfit.”<sup>77</sup>

Yet, other courts describing the professional judgment standard do not read it as only affording “the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser.*”<sup>78</sup> For example, when describing the relevant standard, the Tenth Circuit suggests, “If defendants knew of the asserted danger to plaintiffs or failed to exercise professional judgment with respect thereto . . . and if an affirmative link to the injuries plaintiffs suffered can be shown, then under the analysis set forth hereafter

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69. 308 F.3d 768,773 (citing *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir.1990)) (emphasis in original).

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* at 775.

74. 914 F.2d 846 (7th Cir. 1990). *See also Anderson*, 308 F.3d at 775–776 (“If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under *K.H.* the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely.”) (citing *K.H.*, 914 F.2d at 852).

75. *See K.H.*, 914 F.2d at 853 (“*Youngberg* establishes an intelligible standard of liability (conformity to minimal professional standards)]”).

76. *Id.* at 854.

77. *Id.*

78. *Id.* at 852 (emphasis in original).

defendants violated plaintiffs' constitutional rights."<sup>79</sup> Thus, on the Tenth Circuit's reading, an individual who exercised no professional judgment and, for example, did not even look at the relevant files or do any investigation whatsoever but instead decided where to place a child by flipping a coin might be liable for harms directly resulting from that placement. However, where subjective knowledge of the danger is required, no liability would be imposed even were someone to decide placements by flipping a coin.<sup>80</sup>

At least one way to distinguish these standards involves whether the professionals can have the relevant information and conclusions imputed to them when they have failed to conduct the necessary investigations.<sup>81</sup> As the Tenth Circuit explained when explicating the professional judgment standard, "Failure to exercise professional judgment' . . . does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements."<sup>82</sup> In contrast, consider *James ex rel. James v. Friend*,<sup>83</sup> in which the Eighth Circuit applied the deliberate indifference standard and dismissed a § 1983 action precisely because the relevant subjective knowledge on the part of the defendants could not be established.<sup>84</sup> Had a "knew or should have known" standard been used, the *James* court might have reached a different result.<sup>85</sup>

Certainly, there are benefits and drawbacks to the use of either standard. Use of the knew-or-should have-known professional judgment standard would create an incentive for those responsible for placing children in foster care to pay

79. *Yvonne L., by and through Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 890 (10th Cir. 1992).

80. See *Lewis v. Anderson*, 308 F.3d 768, 775–76 (7th Cir. 2002) ("If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under *K.H.* the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely.").

81. See *Whitley v. N.M. Children, Youth & Families Dep't*, 184 F. Supp.2d 1146, 1155 (D.N.M. 2001) ("[I]n order to hold the social workers liable, Plaintiff must demonstrate that the social workers knew of the asserted danger to plaintiff or failed to exercise professional judgment, that is, that they abdicated their duty to act professionally, thereby causing injury.").

82. See *Yvonne L.*, 959 F.2d at 894.

83. 458 F.3d 726 (8th Cir. 2006).

84. See *id.* at 730 ("James has presented evidence that shows that appellees were aware of facts from which an inference might have been drawn that a substantial risk of serious harm existed. He has not, however, presented sufficient evidence to show that any of the appellees actually drew such an inference."); see also *id.* at 730–31 ("The most that can be said about Friend, Hardy, or Valade based on this record is that they were insufficiently skeptical about the Dilleys' explanations for Dominic's injuries. Their willingness to accept those explanations does not rise to the level of a substantive due process violation."). A separate issue is whether the Plaintiff had in fact met the burden of presenting enough proof regarding the subjective understanding of the defendant. See *id.* at 732 (Lay, J. dissenting) ("Specifically, there is evidence that Friend actually drew the inference that the Dilleys posed a substantial risk of serious harm to Dominic.").

85. Courts might well uphold a finding of liability where foreseeability rather than subjective knowledge is the relevant test, although foreseeability might also be thought part of the deliberate indifference test.

Because BCIU was aware of Cynthia's medical condition which prevented her from sitting upright or riding unattended, failure to insure a safe transport system for Cynthia prior to subjecting her to the risk of foreseeable serious injury could be viewed as a "failure to act appropriately in light of known or obvious risk," that is, deliberate indifference.

See, e.g., *Susavage*, 2002 WL 109615 at \*15.

close attention and discover the relevant information, since they would not be immune by virtue of having had no subjective knowledge of the relevant dangers.<sup>86</sup> Use of the deliberate indifference standard would implicitly, if not explicitly, acknowledge some of the difficult conditions under which state officials operating in the foster care field find themselves, including inadequate training,<sup>87</sup> unrealistic caseloads,<sup>88</sup> and inadequate funding.<sup>89</sup>

#### D. The Duty to Do More than Refrain from Exposing to Danger

The above discussion is focused on the state's responsibility not to expose foster children to great danger. Yet, the 14th Amendment has been understood to impose further obligations on the state, e.g., to provide at least minimal levels of basic goods. For example, in *B.H. v. Johnson*,<sup>90</sup> a federal district court in Illinois recognized that the state assumes "some responsibility for the emotional as well as physical well-being of children in its care."<sup>91</sup> The court suggested that there is an interest protected by substantive due process in being "free from unreasonable and unnecessary intrusions upon their physical and emotional well-being, while directly or indirectly in state custody,"<sup>92</sup> in addition "adequate to food, shelter, clothing and medical care."<sup>93</sup>

This right is not to be construed as a right to be placed in an optimal home<sup>94</sup> or even to be placed at all,<sup>95</sup> given that the interest in placement might have to be weighed against other competing interests such as the interests of the biological parents.<sup>96</sup> Nonetheless, the limited rights in the foster care context establish that

86. See, e.g., *Wendy H.*, 849 F. Supp. at 376

The defendants' expert also highlights the fact that Finney had no way of knowing that the plaintiff was at risk . . . [but] that lack of knowledge is due in part to Finney's acknowledged neglect of her duties. . . . The implicit suggestion of this report is that had Finney responded to all the information that as a professional social worker she should have been aware of, Wendy H's placement would have properly sat squarely on the "front burner" of her caseload.

87. See Elizabeth A. Varney, *Trading Custody for Care: Why Parents Are Forced to Choose between the Two and Why the Government Must Support the Keeping Families Together Act*, 39 NEW ENG. L. REV. 755, 780 (2004-05) (suggesting that inadequate training is a pervasive problem for those working in this area).

88. See *id.*

89. *K.H.*, 914 F.2d at 853-854 (noting some of the constraints imposed by inadequate funding).

90. 715 F. Supp. 1387 (N. D. Ill. 1989).

91. *Id.* at 1394.

92. *Id.* at 1396.

93. *Id.*; see also *Baby Neal v. Casey* 821 F. Supp. 320, 335 (E.D. Pa. 1993) *rev'd on other grounds* 43 F.3d 48 (noting that the "Supreme Court in *Youngberg* stated that the essentials of care which the state must provide under the due process clause are *adequate* food, shelter, clothing and medical care." (citing *Youngberg*, 457 U.S. at 324) (emphasis added).

94. *Charlie H. v. Whitman.*, 83 F. Supp.2d at 507 (D.N.J. 2000) ("However, this right to freedom from harm under the Due Process Clause of the Fourteenth Amendment does not entitle Plaintiffs to an 'optimal level of care and treatment.'" (citing *B.H.*, 715 F. Supp. at 1397-98)).

95. *Baby Neal*, 821 F. Supp. at 335 ("Plaintiffs' constitutional right to be free from harm while in foster care does not entitle them to the right to permanent placements or placement in preadoptive homes.").

96. *Collier*, 763 F. Supp. at 476 ("Adoption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the State's interest in

the fact that an institution is created by the state does not preclude the existence of associated, constitutionally protected liberty interests. Indeed, the intimation by courts that the state is responsible for providing a minimal level of basic goods at least suggests that states have a responsibility not to impose arbitrary and unnecessary roadblocks to adoption.

### III. THE CONSTITUTIONALLY PROTECTED INTERESTS IN ADOPTION

When discussing whether children have a constitutionally protected liberty interest in being adopted, it is helpful to distinguish among a variety of different scenarios. Some children need to be placed in a permanent home, whereas others are already in a permanent home but nonetheless might benefit from a formal recognition of an existing parent-child relationship. Some children have one or more adults acting as parents, whereas other children have no one willing to take on the rights and responsibilities of parenthood. Some children are in the custody of the state, whereas others are in the custody of loving, albeit imperfect, private individuals or couples. It is at least in part because of the multiplicity of contexts in which adoption interests might be implicated that a nuanced discussion and analysis is required.

#### A. Rights in the Adoption Context

Courts and commentators have questioned whether it makes sense to talk about children's rights more generally or children's rights in the adoption context more particularly. Some believe that children's interests are adequately represented by adults and, further, that affording rights to children would do more harm than good. Yet, such a view fails to account for those children's rights that are already recognized and, further, ignores contexts in which children's interests are not adequately represented by others. Children in need of placement are a prime example of those whose interests often are not adequately served by third parties.

As an initial matter, it is too late to assert that children do not have rights. As the Court explained in *Planned Parenthood of Central Missouri v. Danforth*, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>97</sup>

Of course, that is not to say that the rights of children and adults are equivalent. In *Bellotti v. Baird*,<sup>98</sup> the Court noted "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>99</sup> The *Bellotti* Court noted that the "State commonly protects its youth from adverse governmental action and from their

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protecting the existing rights of the natural parents, as well as in securing ultimately *the welfare of the child.*" (emphasis in original) (citing *Lindley for Lindley*, 889 F.2d at 131 (7th Cir. 1989)).

97. 428 U.S. 52, 74 (1976).

98. 443 U.S. 622 (1979). *aff'g in part Baird v. Bellotti*, 724 F.2d 1032 (1st Cir. 1984).

99. *Id.* at 634.

own immaturity by requiring parental consent to or involvement in important decisions by minors,”<sup>100</sup> suggesting that “[p]roperly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.”<sup>101</sup> Indeed, the difficulty in reconciling the rights of children with the rights of their parents causes some to reject that children have rights in the placement context.

## B. Parental Rights

Martin Guggenheim argues that there “is little doubt that children need rights against the exercise of state power.”<sup>102</sup> However, he worries that according rights to children in the adoption context might work against the rights of parents, noting that the “threat to the parental rights doctrine stemming from child welfare is obvious: child welfare law uniquely authorizes government officials to remove children from their parents’ custody and even to sever permanently all legal ties between parents and children over the parents’ objection.”<sup>103</sup>

Yet, whether or not children’s rights are recognized, there are serious concerns on the one hand that children might be separated from their parents too quickly or easily and on the other that the state’s failure to act might have dire consequences for a child. Basically, the state has a special interest in children,<sup>104</sup> and a very important, although contentious, area involves how to balance the extremely important but possibly adverse interests that are implicated in situations where the state may seek to protect children by taking them away from their parents.

As an initial matter, any intervention policy adopted by the state must account for the importance of parental rights. As the *Troxel* Court explained, “The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>105</sup> Further, where the parent has not been shown to be unfit or to have abandoned or neglected the child, the child’s interests are thought to coincide with the parent’s,<sup>106</sup> and so the state’s recognizing children’s rights in this kind of case would do nothing to undermine the biological family.

A number of limitations are imposed on the state insofar as it wishes to interfere with parental rights. In *Lassiter v. Department of Social Services*, the Court

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100. *Id.* at 637.

101. *Id.* at 638.

102. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 250 (Harvard University Press 2005).

103. *Id.* at 176.

104. *See Reno v. American Civil Liberties Union* 521 U.S. 844, 865 (1997) (noting “the State’s independent interest in the well-being of its youth”); *Maryland v. Craig* 497 U.S. 836, 855 (1990) (discussing “the State’s traditional and ‘transcendent interest in protecting the welfare of children’”) (citing *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).

105. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

106. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”).

explained that “a parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”<sup>107</sup> However, the *Lassiter* Court also recognized that “the State has an urgent interest in the welfare of the child,”<sup>108</sup> concluding that in some but not all cases<sup>109</sup> due process protections guarantee indigent parents the right to appointed counsel before their parental rights can be terminated.<sup>110</sup>

When the State seeks to terminate parental rights, it must establish by clear and convincing evidence that such rights should be terminated.<sup>111</sup> The *Santosky* Court noted that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>112</sup> On the other hand, the children’s interests might be severely impaired by remaining with parents who abuse or neglect them, and it is for this reason that the Court has adopted an intermediate, clear and convincing standard<sup>113</sup> rather than an even more difficult one in parental rights termination proceedings.<sup>114</sup> A separate issue is whether other interests should be considered, such as those of the adults who may have been fostering a particular child for an extended period of time.

### C. OFFER

The seminal case in which the Court discusses the different interests in the child placement context is *Smith v. Organization of Foster Families For Equality and Reform (OFFER)*.<sup>115</sup> *OFFER* is sometimes read as establishing that there is no federal constitutional right either to adopt or to be adopted,<sup>116</sup> or as establishing

107. 452 U.S. 18, 27 (1981) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

108. *Id.*

109. *Id.* at 32 (deciding to “leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.”).

110. *Id.* at 31

If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

111. *Santosky*, 455 U.S. 745, 747–48 (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

112. *Id.* at 753.

113. *See id.* at 756 (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence.’”).

114. *See id.* at 790–91

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other.

115. 431 U.S. 816 (1977).

116. *See* Christopher Colorado, *Tying the Braid of Second-Parent Adoptions-Where Due Process Meets Equal Protection*, 74 *FORDHAM L. REV.* 1425, 1430 (2005) (“*Smith* is often cited as the Supreme Court’s

that foster families do not have a constitutionally protected liberty interest in remaining intact.<sup>117</sup> Certainly, it is fair to read *OFFER* as limiting the rights of foster families or even of would-be adoptive families,<sup>118</sup> but such a reading is perfectly compatible with the recognition that interests of members of foster families or even would-be adoptive families have constitutional weight.

At issue in *OFFER* was whether the individual interest in having the status of foster parent continue was “within the ‘liberty’ protected by the Fourteenth Amendment.”<sup>119</sup> In attempting to resolve this issue, the Court distinguished foster families both from adoptive families and from biological families. The *OFFER* Court noted that foster placements are for a “planned period,”<sup>120</sup> which makes them “unlike adoptive placement, which implies a permanent substitution of one home for another,”<sup>121</sup> and distinguished the foster family from the biological family in a number of ways. For example, the Court noted that the

law transfers ‘care and custody’ to the agency, but day-to-day supervision of the child and his activities, and most of the functions ordinarily associated with legal custody, are the responsibility of the foster parent. Nevertheless, agency supervision of the performance of the foster parents takes forms indicating that the foster parent does not have the full authority of a legal custodian.<sup>122</sup>

The Court also noted that the biological parent has both rights and responsibilities, even when his or her child is in foster care.

[T]he natural parent’s placement of the child with the agency does not surrender legal guardianship; the parent retains authority to act with respect to the child in certain circumstances. The natural parent has not only the right but the obligation to visit the foster child and plan for his future; failure of a parent with capacity to fulfill the obligation for more than a year can result in a court order terminating the parent’s rights on the ground of neglect.<sup>123</sup>

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determination that a constitutional right to adoption is unavailable because the adoption process lacks a fundamental constitutional quality.”); Stephanie R. Richardson, *Strict Scrutiny, Biracial Children, and Adoption*, 12 B.U. PUB. INT. L.J. 203, 214 (2002) (“Both the majority and concurring opinions in *Smith* illustrate that there is no federal constitutional protection for the right to adopt.”).

117. Barbara McLaughlin, *Transracial Adoption in New York State*, 60 ALB. L. REV. 501, 527 (1996) (“Many lower courts have utilized this decision in holding that there is no constitutionally protected liberty interest that grants a foster family the right to remain intact.”).

118. See *Marylou L. v. Tenecha L.*, 698 N.Y.S.2d 827, 831 (N.Y.Fam.Ct., 1999) (“the legal rights of foster parents are necessarily limited”); *New Jersey Div. of Youth & Family Services v. M.R.*, 715 A.2d 308, 314 (N.J. Super. App. Div. 1998) (“While freedom of personal choice in certain family life decisions is a fundamental liberty interest protected by the Fourteenth Amendment [citing *Santosky*, 455 U.S. at 753], it does not protect every aspect of family life.”) (citation omitted); *Whalen v. County of Fulton*, 126 F.3d 400, 404 (2d Cir. 1997) (interpreting *OFFER* to stand for the proposition that “foster families have, at best, a limited liberty interest in remaining together”); *Matter of Michael B.*, 604 N.E.2d 122, 128 (N.Y. 1992) (“Because of the statutory emphasis on the biological family as best serving a child’s long-range needs, the legal rights of foster parents are necessarily limited.”).

119. *OFFER*, 431 U.S. at 839.

120. *Id.* at 824.

121. *Id.* (emphasis omitted).

122. *Id.* at 827 (citations omitted).

123. *Id.* at 827–828.



Thus, foster parents and biological parents are to be distinguished in that the former may be making day-to-day decisions for the child but do not have the full legal rights and responsibilities that biological parents usually have. Further, even when a child is in foster care, the biological parents may continue to have rights and obligations with respect to that child.

In many cases, the foster family can be distinguished from the biological family in that there are no blood ties between the foster family and the child.<sup>124</sup> The *OFFER* Court noted that “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.”<sup>125</sup> Yet, that was not the basis upon which *OFFER* was decided—the Court noted that “biological relationships are not exclusive determination of the existence of a family.”<sup>126</sup> For example, the “basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation.”<sup>127</sup>

The *OFFER* Court explained that “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children, as well as from the fact of blood relationship.”<sup>128</sup> The Court considered it obvious that foster children can form deep and abiding bonds with their foster parents.<sup>129</sup> “No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.”<sup>130</sup> Indeed,

where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.<sup>131</sup>

Thus, the Court understood that in some cases the foster family serves the very same functions as does the biological family and, all else being equal, might be as important to the individuals themselves and to society as a whole as the biological family.

Nonetheless, the Court offered several reasons for its refusal to accord the requested relief to foster families. The Court worried that “social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural

124. *Id.* at 843 (“A biological relationship is not present in the case of the usual foster family.”).

125. *Id.*

126. *Id.* at 843.

127. *Id.*

128. *Id.* at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–233 (1972)).

129. *Id.* at 836 (“It is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents.”).

130. *Id.* at 844.

131. *Id.*

parents' poverty and lifestyle as prejudicial to the best interests of the child."<sup>132</sup> Further, when considering whether a foster family counted as "family" for constitutional purposes,<sup>133</sup> the Court understood that there were other considerations that had to be weighed in the balance. For example, the Court noted that "ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another."<sup>134</sup> The situation at issue here was different, because the foster parents would be accorded rights at the *expense* of the biological parent. Thus, the Court explained,

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right an interest the foster parent has recognized by contract from the outset.<sup>135</sup>

Thus, the *OFFER* Court was not suggesting that there was no liberty interest of constitutional weight in the foster care context, but merely that "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."<sup>136</sup> Yet, this means that if the interests of the foster family are being considered in a context in which the interests of the biological family do *not* weigh in the balance, e.g., because the parental rights of the biological parents have already been terminated, then *OFFER* neither stands for the proposition that such interests do not have constitutional weight nor even for the proposition that whatever interests exist are significantly attenuated.

The *OFFER* Court did distinguish the foster family from other families by noting that "the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements."<sup>137</sup> Yet, the fact that the relationship had its source in state law did not end the matter. Indeed, the Court noted that "liberty interests may in some cases arise from positive-law sources."<sup>138</sup> However, the Court argued that "the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family."<sup>139</sup> After all, most of the foster care placements were

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132. *Id.* at 834.

133. *See id.* at 842 ("But is the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection?").

134. *Id.* at 846.

135. *Id.*

136. *Id.* at 846-47.

137. *Id.* at 845.

138. *Id.*

139. *Id.* at 846.

presumably voluntary,<sup>140</sup> and a parent might be less willing to place her children temporarily with the state if she believed that foster parents might acquire protected interests in those children as a result of that placement. However, were the interests of the biological parents not conflicting with those of the foster parents, e.g., because the biological parent's interests had already been terminated, and were the interests or rights of the children at issue in accord with rather than contrary to those of the foster parents,<sup>141</sup> *OFFER* would seem to support the notion that the interests of the foster family in remaining intact have constitutional weight.

#### D. Applying *OFFER* in the Adoption Context

Some of the worries articulated by the Court in *OFFER* are also applicable in the adoption context. For example, as the Seventh Circuit pointed out in *Lindley for Lindley v. Sullivan*, the “adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been governed by legislative enactment.”<sup>142</sup> More important than the mere fact that adoption is a creature of statute is that the rights of the would-be adoptive parent might be pitted against the rights of the biological parent, at least in certain circumstances. The *Lindley* court made clear that where there is such a conflict, the “rights of a couple to adopt must be reconciled with the state’s interest in protecting the existing rights of the natural parents, as well as in securing ultimately the welfare of the child.”<sup>143</sup> Thus, although the *Lindley* court read *OFFER* as cautioning “that biological relationships do not exclusively determine the existence of a family,”<sup>144</sup> it correctly understood that the recognition of an unqualified right either to adopt or to be adopted might come into conflict with the existing rights of parents.

#### E. Adoption Statutes

Given the fundamental interest of parents in the care, custody, and control of their children, it makes sense for states to structure foster care and adoption in ways which account for those rights. Suppose, however, that we consider statutes which limit adoption in ways which having nothing to do with preserving parental rights and may in fact undermine the welfare of children. Those are the kind of statutes which would seem to conflict with the United States Constitution.

Consider the Florida statute which precludes members of the LGBT (lesbian, gay, bisexual, and transgender) community from adopting.<sup>145</sup> This statute applies whether or not the biological parents of the would-be adopted

140. *Id.* at 824 (“Most foster care placements are voluntary.”).

141. The children’s interests were presumed to be in accord with those of the biological parents rather than those of the foster parents. *Cf. Santosky*, 455 U.S. 745, 760 (discussing presumption that interests on the child and the biological parents coincide).

142. 889 F.2d 124, 130 (7th Cir. 1989).

143. *Id.* at 131 (citing *OFFER*, 431 U.S. at 846–47).

144. *Id.* at 130 (citing *OFFER*, 431 U.S. at 843).

145. See FLOR. STAT. ANN. § 63.042(3) (2005) (“No person eligible to adopt under this statute may adopt is that person is a homosexual.”).

children have already had their parental rights terminated, whether or not the children are in fact being raised by the same-sex partner of their biological parent, and whether or not the only parent that the children have ever known would thereby be precluded from adopting them. Statutes like Florida's have a very broad sweep and implicate a number of constitutional and public policy issues.

In *Lofton v. Secretary of Department of Children and Family Services*, the 11th Circuit upheld Florida's gay adoption ban.<sup>146</sup> The facts of the case illustrate some of the reasons that such a ban is against public policy. Steve Lofton, an "exemplary" parent,<sup>147</sup> was precluded from adopting a child whom he had been parenting for almost all of the thirteen years of the child's life.<sup>148</sup> This was done, allegedly, to promote the child's best interests.<sup>149</sup>

Professor Martin Guggenheim notes that "[c]hildren need and greatly benefit from a sense of security."<sup>150</sup> It is difficult to see how precluding an individual from legally cementing a parent-child relationship like the one at issue in *Lofton* would promote the child's feelings of security or well-being.<sup>151</sup> It was not as if Florida believed that it was bad for the child to be with Lofton, since the state was willing to make Lofton the child's guardian.<sup>152</sup> Rather, the state was willing to sacrifice the security and well-being of the child to further other goals.<sup>153</sup>

Consider a different kind of case—a parent is raising her biological children with her same-sex partner. The non-biological parent wants to adopt her partner's children, thereby establishing in law what already exists in fact. Precluding such an adoption even when the biological parent consents and the adoption would entitle the children to a whole range of benefits to which they would not otherwise be entitled is difficult to justify in terms of the best interests of the child.<sup>154</sup> Professor Guggenheim writes,

A generation ago, men were denied the right to be recognized as a parent for the sole reason that they did not marry the children's mother. Ultimately, we came to appreciate that this requirement was arbitrary, having nothing to do with the

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146. 358 F.3d 804,806(11th Cir. 2004) ("The district court granted summary judgment to Florida over an equal protection and due process challenge by homosexual persons desiring to adopt. We affirm.").

147. See *id.* at 807.

148. *Id.* at 807.

149. See *id.* at 818 ("Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children.").

150. GUGGENHEIM, *supra* note 102, at 37. See also W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 891 (2006) ("Because stability is so important for children, it is a primary focus of modern adoption criteria in some states.").

151. For further discussion of *Lofton*, see Mark Strasser, *Lawrence, Lofton, and Reasoned Judgment: On Who Can Adopt and Why*, 18 ST. THOMAS L. REV. 473-93 (2005).

152. *Lofton*, 358 F.3d at 808.

153. See Strasser, *supra* note 151, at 476 ("It is simply incredible that the child's interests are cited to support this policy, when those interests are being sacrificed so that other policies of the state can be effectuated.").

154. See *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1198 (Pa. 2002) (discussing some of the benefits to the children of recognizing parental status in this kind of case).

significance of the already formed parent-child relationship. The same is true for non-marital partners who have children by other means than making one together biologically.<sup>155</sup>

As a general matter, children fare better in two-parent homes than in one-parent homes.<sup>156</sup> Of course, in many circumstances it will be better for a child to be adopted by a single parent than to remain in foster care,<sup>157</sup> and, it might be noted, single-parent adoptions have recently increased significantly.<sup>158</sup> Yet, if children fare better in two-parent homes than in one-parent homes and if children fare better when adopted by singles than when remaining in foster care, there would seem to be ample reason to permit same-sex couples to adopt and LGBT individuals to adopt.

Same-sex relationships, like different-sex relationships, sometimes do not last, either because one of the members of the couple dies or because the individuals drift apart. Yet, this is a reason to permit each member of a same-sex couple in a non-marital relationship to establish a legal relationship with the child they both are raising rather than to preclude the non-legal parent from doing so.<sup>159</sup> Were the law to fail to recognize both parent-child relationships and were the adults' relationship to end, the non-legal parent might be treated as a stranger to the child, even if the child's best interests would be promoted by maintaining contact with that parent.<sup>160</sup>

Florida's adoption policy might be easier to understand if, for example, professional child advocacy groups advocated that adoptions by LGBT individuals not be permitted. The opposite, however, is true.<sup>161</sup> Yet, given that

155. GUGGENHEIM, *supra* note 102, at 130.

156. Wilcox & Wilson, *supra* note 150, at 895 ("the research to date indicates that children raised in adopted two-parent homes do better than children raised in single-parent, biologically related homes").

157. See Sharon S. v. Superior Court, 73 P.3d 554, 587 (Cal. 2003) (Brown, J., concurring and dissenting) ("The law permits single individuals to adopt a child on their own because one parent is better than none.").

158. Wilcox & Wilson, *supra* note 150, at 886 ("Over the last twenty years, single parent adoptions have become the 'fastest growing trend' in the adoption industry."); Elizabeth L. Maurer, *Errors that Won't Happen Twice: A Constitutional Glance at a Proposed Texas Statute that Will Ban Homosexuals from Foster Parent Eligibility*, 5 APPALACHIAN J. L. 171, 187 (2006) ("The U.S. Department of Health and Human Services estimates that, as of August 2004, nearly one-third of all children adopted from foster care in the United States were adopted by single persons").

159. Given that Massachusetts is the only state permitting same-sex couples to marry, precluding both members of a nonmarital couple from establishing a legal relationship with the child they are raising imposes special burdens on LGBT families.

160. Cf. Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J. L. & FAM. STUD. 297, 308 (2003)

In many of the second-parent cases, the child views the non-marital partner as one of her parents and, in fact, may well have been raised by that adult as well as by the child's biological or adoptive parent. That functional parental status notwithstanding, the non-marital partner may be viewed by the law as a legal stranger to the child, which might be especially significant should something happen to the biological/adoptive parent.

161. See Megan Backer, *Giving Lawrence Its Due: How the Eleventh Circuit Underestimated the Due Process Implications of Lawrence v. Texas in Lofton v. Secretary of the Department of Children & Family Services*, 90 MINN. L. REV. 745, 774-75 (2006) ("[C]hild advocacy groups, including the Child Welfare League of America, the American Academy of Pediatrics, the American Psychiatric Association, and

such groups recognize that adoptions by LGBT would-be parents promote the interests of children, a state's precluding such adoptions implies that children who might otherwise be placed in adoptive homes will not be.<sup>162</sup> This simply cannot be justified in public policy terms.

Commentators debate whether children will do as well when adopted by a same-sex couple as they would have if adopted by a different-sex couple. Yet, a few points might be made about that debate. First, the focus of that analysis is not whether children thrive in families headed by two adults of the same sex<sup>163</sup> but, instead, which parents are optimal. As should not be surprising, those few differences which are appearing in the literature do not clearly establish which set of parents is best. For example, some studies suggest that same-sex parents are more demanding than their different-sex counterparts.<sup>164</sup> Other studies suggest that same-sex parents are less rigid about traditional gender roles,<sup>165</sup> while still other studies suggest that the children of same-sex parents are more willing to experiment to discover their sexual identity.<sup>166</sup> Yet, each of these might be thought to *favor* same-sex couples. In any event, for the child who is in foster care, the issue should not be whether the potential adoptive home is the best possible placement but, instead, whether that home would be a place where the child could thrive. Thus, even if it could be established which parents were "optimal," that would not undermine the contention that permitting an adoption by the non-optimal parents might nonetheless greatly benefit the child who, for example, might otherwise be adopted by no one.<sup>167</sup>

Consider one more kind of statute. Some states permit single adults to adopt and married couples to adopt but do not permit individuals in cohabiting, non-marital relationships to adopt.<sup>168</sup> These statutes do not merely prevent both members of the couple from establishing a legal relationship with the same child, for example, by allowing one member of a couple to adopt as a single adult but then precluding the other member from adopting, but preclude either member from adopting. Such a law might be expected to have many unfortu-

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the American Psychological Association, have made statements in support of allowing gay adoption").

162. Cf. Maurer, *supra* note 158, at 172 ("the most recent calculations indicated that there were qualified adoptive families and single parents available for just twenty percent of all children in foster care").

163. See Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 632 (2004) ("Studies show that children thrive in households with same-sex parents as well as in households with different-sex parents.").

164. See Strasser, *supra* note 151, at 489.

165. *Id.*

166. See *id.*

167. See STRASSER, *supra* note 163, at 632 ("Neither same-sex nor different-sex parents can plausibly be denied the right to adopt based on the likely effects on the children that they would be adopting, especially when one considers what may well happen to the children if they remain unadopted.").

168. See, e.g., Utah Code Ann. 1953 § 78-30-1(3)(b)(1953)

A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), "cohabiting" means residing with another person and being involved in a sexual relationship with that person.

nate consequences. For example, it might force an individual to end his/her relationship with another adult in order to be eligible to adopt. Yet, if as a general matter two parents are better for children than one, then by adopting such a statute the state may be precluding the adoptive child from having as good an adoptive setting as the child otherwise would have had. Or, perhaps the individuals who wish to adopt a child are nonetheless unwilling to end their non-marital relationship in order to become eligible to adopt. In that event, there may well be children who would have been placed in two-parent homes but now will not be placed in any home. The state will have made everyone worse off—the child, the would-be adoptive parents, and society itself.

It is of course true that legislatures should have some latitude when making laws, especially when those laws concern one of society's most important assets—its children. Yet, it is not at all clear that states should have the latitude to create laws which make all of the relevant parties worse off than they would have been without the law at issue.

#### IV. CONCLUSION

Those who claim that there can be no constitutionally protected interests in adopting or being adopted because adoption is a creature of statute are failing to consider some of the lessons offered by the foster care jurisprudence. Those lessons include both that interests created by statute can nonetheless be constitutionally protected and, perhaps, that professional judgments about the suitability of LGBT would-be parents should be given some weight. Indeed, the decision to let children remain in foster care rather than permit them to be adopted by parents who would love them and help them to thrive suggests a kind of reckless indifference to the welfare of children in the interest of serving other, unarticulated goals.

The claim here is not that a public official in a state with a statute precluding members of the LGBT community from adopting would somehow be liable under § 1983, although it is suggested that such a statute should be viewed as unconstitutional because it is not rationally related to the promotion of the asserted goal of promoting the welfare of children. Such a statute should also be held unconstitutional because it does not give adequate weight to the constitutionally protected liberty interests of those who would adopt and those who would be adopted, at least in those cases where there are no competing interests of biological parents.

When downplaying the interests of foster families in remaining intact, the *OFFER* Court was careful to make clear that it was doing so because the rights of the biological parents weighed in the balance. Further, implicit in that decision was the presumption that the child's interests coincided with those of her biological parents. Yet, where the interests of the biological parents are not at issue and where the child would be benefited by not only remaining with the foster or would-be adoptive family but also by having the parental relationship(s) given legal recognition, the implicated interests should be recognized as being constitutionally protected.

In *Moore v. City of East Cleveland*, the Supreme Court cautioned courts not to close their "eyes to the basic reasons why certain rights associated with the

family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."<sup>169</sup> The *Moore* Court recognized that the "institution of the family is deeply rooted in this Nation's history and tradition,"<sup>170</sup> but also made clear that family could not be narrowly construed by the State. Indeed, the *Moore* Court noted that the Constitution prevents the state "from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."<sup>171</sup>

Those who ignore the functions performed by foster families or non-marital couples raising children are closing their eyes to the reasons that family is protected under the Fourteenth Amendment. The Court should take the first available opportunity to open the eyes of those who fail to see how society and the individuals themselves are benefited by such families, while at the same time explaining how the rights of biological and adoptive parents are not at all diminished by this inclusiveness.

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169. 431 U.S. 494, 501 (1977).

170. *Id.* at 503.

171. *Id.* at 506.