Boston College Law Review

Volume 27 | Issue 5 Article 3

9-1-1986

Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity

Timothy J. Courville

NOTES

GOVERNMENT LIABILITY FOR FAILURE TO PREVENT CHILD ABUSE: A RATIONALE FOR ABSOLUTE IMMUNITY

The protection of children from child abuse[1] has become one of society's primary concerns.[2] Legislation in all fifty states requires most medical, educational, social work, child care, and law enforcement professionals to report suspected cases of child abuse to child protection agencies.[3] These agencies are mandated to receive and investigate reports of suspected child abuse and to provide protective services to abuse victims and their families.[4] Mandatory reporting laws and public awareness campaigns to publicize these laws have been extremely effective in identifying suspected victims of child abuse.[5] In 1983, approximately 1.3 million children were reported to child protection agencies as suspected victims of abuse.[6]

Unfortunately, the reporting of a suspected case of abuse to a child protection agency does not ensure the future safety of an abused child.[7] Many children suffer further injuries as a result of child abuse, even after a report of suspected abuse has been made on their behalf to a child protection agency.[8] Studies reveal that approximately one quarter of all deaths resulting from abuse involve children who already have been reported to child protection agencies,[9] and many more children suffer further injuries short of death after being reported as suspected victims of abuse.[10]

---

[1] The problem of defining child abuse has received substantial treatment in legal literature and is beyond the scope of this note. *See, e.g.*, Besharov, *State Intervention to Protect Children: New York's Definitions of "Child Abuse" and "Child Neglect"*, 26 N.Y.L. SCH. L. REV. 723 (1981).

[2] ANTLER, *Child Abuse: An Emerging Social Priority*, in CHILD ABUSE AND CHILD PROTECTION: POLICY AND PRACTICE 8 (S. Antler ed. 1982).

[3] Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 FAM. L.Q. 151, 154 (1983) [hereinafter Besharov, *Future Directions*]. For an exhaustive listing of state child protection statutes, see Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 272–74 (1982) [hereinafter *State Child Abuse Statutes*].

[4] L. Brown and J. Riley, *Agency Procedures with Abuse Reports*, JUV. & FAM. CT. J., Winter 1984–85, at 45. [hereinafter *Agency Procedures*].

[5] Besharov, *Future Directions*, *supra* note 3, at 154.

[6] Besharov, *Child Welfare Malpractice*, TRIAL MAG., March 1984, at 56. [hereinafter Besharov, *Child Welfare Malpractice*]. 1983 is the latest year for which statistics have been obtained for this note.

[7] Besharov, *Future Directions*, *supra* note 3, at 163.

[8] *See id.*

[9] *Id.* (citing Region VI Resource Center on Child Abuse, *Child Deaths in Texas*, p.26 (Univ. of Texas, Graduate School of Social Work, 1981); Mayberry, *Child Protective Services in New York City: An Analysis of Case Management* 109 (Welfare Research Inc., Albany, N.Y., draft dated May 1979)).

[10] Besharov, *Future Directions*, *supra* note 3, at 163.

The failure of the child protection system to prevent the further abuse of children who already have been identified as suspected victims of abuse has led to an emerging pattern of civil lawsuits against the government and government child protection workers.[11] Negligence claims have been filed against child protection workers in state courts for failing to conduct mandated investigations into reports of abuse.[12] Child protection workers also have been sued for negligence for failing to take adequate action to protect children from further abuse after investigating an abuse report.[13] Furthermore, child protection workers have been subjected to civil suits for failing to prevent children who have been placed in foster care from being abused by their foster parents.[14] In related cases, child protection workers have been subjected to civil lawsuits, not for failing to protect abused children but instead, for malicious prosecution or for depriving parents of parental rights during the course of child abuse proceedings.[15]

In two recent cases, the estates of three deceased children brought suits in federal courts against government child protection workers and agencies for failing to prevent the children from being abused by their parents after reports of abuse in the children's families had been made.[16] These suits were brought pursuant to 42 U.S.C. section 1983, which provides a civil cause of action against anyone who, acting under color of state law, causes any person to be deprived of rights guaranteed by the laws or Constitution of the United States.[17] The courts in *Jensen v.*

---

[11] Besharov, *Child Welfare Malpractice*, *supra* note 6, at 56.

[12] *See, e.g.*, Mammo v. State, 138 Ariz. 528, 675 P.2d 1347 (Ariz. Ct. App. 1983). In *Mammo*, a divorced, noncustodial father of a child who had been fatally abused by her mother filed a wrongful death action against the state and the state child protection agency. Prior to the death of the child, the father had filed a report of suspected abuse concerning two of his children after he noticed bruises on them during a visit. *Id.* at 1349. The child protection agency did not investigate the report and instead recommended that the father consult an attorney to contest his ex-wife's custody of the children. *Id.* The Arizona Court of Appeals upheld a jury verdict in favor of the plaintiff and a subsequent damage award of $300,000. *Id.* at 1349, 1353.

[13] *See* Bross, *Professional and Agency Liability for Negligence in Child Protection*, 11 L., MED. & HEALTH CARE 71, 72 (1983) (citing Buege v. Iowa, No. 20521 (July 30, 1980); Fischer v. Iowa Dep't of Social Serv., No. C. 1664–280 (Feb. 18, 1980)).

[14] *See, e.g.*, Barnes v. County of Nassau, 108 A.D.2d 510, 487 N.Y.S.2d 827 (App. Div. 1985); Koepf v. York, 198 Neb. 67, 251 N.W.2d 866 (1977); Vonner v. Louisiana, 273 So. 2d 252 (La. 1973); Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (App. Ct. 1970).

[15] *See, e.g.*, Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984); Pepper v. Alexander, 599 F. Supp. 523 (D.N.M. 1984); Whelehan v. County of Monroe, 558 F. Supp. 1093 (W.D.N.Y. 1983); Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y. 1980); LaBelle v. County of St. Lawrence, 85 A.D.2d 759, 445 N.Y.S.2d 275 (App. Div. 1981).

[16] *See* Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).

[17] Section 1983, originally section 1 of the Civil Rights Act of 1871, is codified at 42 U.S.C. § 1983 (1982), and provides in part:

> 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 at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

Congress enacted the Civil Rights Acts of 1870 and 1871 to enforce the Civil War Amendments in the hostile southern states. *See* Davidson v. O'Lone, 752 F.2d 817, 826 n.5 (3d Cir. 1985), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986). Section 1983 was enacted in

Conrad[18] and *Estate of Bailey v. County of York*[19] held that a constitutional right to receive protection by the state could arise under the fourteenth amendment[20] if a "special relationship" exists between the state and an abused child.[21] These decisions therefore establish that child protection workers and agencies who fail to protect an abused child may be subjected to civil suit for depriving the child of fourteenth amendment rights.

The potential for courts to hold the government and child protection workers liable under section 1983 of the Federal Civil Rights Act for failing to protect a child who reportedly has been abused presents many difficult legal issues, as well as a host of social policy implications. The recent suits indicate that a plaintiff will have a heavy burden in establishing the presence of several elements necessary to recover in a section 1983 claim against the government and its workers for failing to protect abused children. Despite the heavy burden on plaintiffs, however, the cases make clear that recovery in such a section 1983 claim is possible. The threat of potential liability likely will deter child protection workers from exercising their best professional judgment in child abuse investigations. Instead, workers will be encouraged to use drastic methods of intervention into the families of suspected abuse victims in order to protect children from further abuse and therefore avoid liability. In most cases, however, drastic intervention will not be necessary to protect the child and may even be harmful to the child and the family. Due to the negative consequences which would result from subjecting members of the child protection system to liability for failing to protect abused children, the government and its workers should be absolutely immune from such suits.

This note will examine the recent suits under section 1983 against government child protection workers and agencies for failing to protect children from abuse. Section I will trace the historical development of a constitutional right to receive protection from the state from injuries inflicted by private persons.[22] Next, section I will discuss the standard of conduct which plaintiffs must prove in order to recover under section 1983 for the deprivation of a constitutional right.[23] Section I will conclude with a discussion of the governmental immunity doctrines which sometimes prevent plaintiffs from recovering in section 1983 actions.[24] Section II will review the two recent federal court cases in which plaintiffs sought to impose liability upon the government and its workers who, after receiving and investigating reports of suspected abuse, failed to protect children from fatal abuse inflicted by their caretakers.[25] Section III first will analyze, in light of these decisions, the elements necessary to recover in a section 1983 suit against members of the child protection system who fail to protect children from abuse.[26] This section will

---

response to outrages committed by the Ku Klux Klan which went unpunished by state officials. *Id.* For a discussion of the background of section 1983 and the development of the statute as a means of protecting constitutional rights, see Note, *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

[18] 747 F.2d 185, 187 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).

[19] 768 F.2d 503 (3d Cir. 1985).

[20] The fourteenth amendment provides, in pertinent part, that a state may not "deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[21] *Bailey*, 768 F.2d at 509; *Jensen*, 747 F.2d at 194.

[22] *See infra* notes 29–86 and accompanying text.

[23] *See infra* notes 87–111 and accompanying text.

[24] *See infra* notes 112–167 and accompanying text

[25] *See infra* notes 168–257 and accompanying text

[26] *See infra* notes 259–95 and accompanying text.

then discuss the negative social policy implications of exposing the government and its workers to liability for failing to prevent child abuse.[27] Finally, Section III will conclude that, based on these negative implications, the government and its workers should be absolutely immune from civil suits under section 1983 for failing to protect children from abuse inflicted by their parents.[28]

I. Historical Background: The Section 1983 Cause of Action

A. *The Development of a Constitutional Right to Receive Protection by the Government*

Two recent suits in federal courts seeking damages against government child protection workers and agencies for failing to prevent child abuse were brought pursuant to 42 U.S.C. section 1983.[29] Section 1983 provides a civil cause of action in federal court against any person[30] who, acting under color of state law, causes another person to be subjected to the deprivation of a right guaranteed by the laws or Constitution of the United States.[31] In recent years, courts have recognized that an individual has a constitutional right, in certain situations, to be protected by the government from injuries inflicted by private individuals.[32]

The genesis of the notion that the state has a constitutionally based duty to provide protection to persons from the actions of other private individuals can be traced to cases in which inmates, incarcerated in state prisons, asserted that the state's failure to protect them subjected them to a deprivation of their constitutional rights.[33] The Fourth Circuit Court of Appeals, in the 1973 case of *Woodhous v. Virginia*,[34] was the first court to establish the state's duty to protect prisoners from injuries inflicted by other prisoners. In *Woodhous*, a prison inmate brought a complaint in federal district court alleging that the state subjected him to cruel and unusual punishment in violation of the eighth amendment[35] because the state did not protect him adequately from violence and sexual assaults by other prisoners.[36] The Fourth Circuit held that an inmate in a state prison has a right, grounded in the eighth amendment, to be protected from the constant threat of violence and sexual assault by fellow inmates.[37] Thus, the court concluded that the eighth amendment prohibition against cruel and unusual punishment imposed an affirmative duty

---

[27] *See infra* notes 296–339 and accompanying text.

[28] *See infra* notes 340–63 and accompanying text.

[29] *See* Estate of Bailey v. County of York, 768 F.2d 503, 505 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 187 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985).

[30] In Monell v. New York City Dep't of Social Servs., the Supreme Court held that "municipalities and other local government units [are] included among those persons to whom § 1983 applies." 436 U.S. 658, 690 (1978).

[31] 42 U.S.C. § 1983 (1982). For the text of § 1983 and a discussion of its historical basis, see *supra* note 17.

[32] *See, e.g.*, Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983); Davidson v. O'Lone, 752 F.2d 817, 821 (3d Cir. 1984), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986). *See also infra* notes 45–86 and accompanying text.

[33] *See Jensen*, 747 F.2d at 190.

[34] 487 F.2d 889 (4th Cir. 1973).

[35] The eighth amendment to the United States Constitution provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[36] *Woodhous*, 487 F.2d at 889.

[37] *Id.* at 890.

upon the state to provide protection to inmates, not only from injuries inflicted by the state itself, but also from injuries inflicted by other inmates.[38]

Subsequent to *Woodhous*, the Supreme Court in the 1976 decision *Estelle v. Gamble*[39] also held that the state has a duty under the eighth amendment to provide protection to persons the state has incarcerated. In *Estelle*, an inmate of the Texas Department of Corrections who was injured while performing a prison work assignment brought a section 1983 action against prison officials.[40] The inmate alleged that the medical treatment he received subsequent to his injury was inadequate, thereby subjecting him to cruel and unusual punishment in violation of the eighth amendment.[41] The Supreme Court held that deliberate indifference to the serious medical needs of prisoners amounts to "an unnecessary and wanton infliction of pain," which the eighth amendment prohibition against cruel and unusual punishment proscribes.[42] In imposing a duty upon the state to provide protection to inmates in the form of adequate medical care, the Court reasoned that it was only fair to require the public to provide care for inmates who, because of their incarceration, were unable to care for themselves.[43] Thus, the decisions in *Woodhous* and *Estelle*, and their progeny,[44] firmly establish that the state owes a duty, grounded in the eighth amendment, to provide protection to persons it incarcerates.

Other courts have treated prisoners' section 1983 suits against prison officials for failing to protect them as raising claims under the fourteenth amendment.[45] In the 1984

---

[38] *Id.*

[39] 429 U.S. 97 (1976).

[40] *Id.* at 98.

[41] *Id.* at 101, 107. Prison doctors had diagnosed the inmate's injury as a lower back strain and treated it with bed rest, muscle relaxants, and pain relievers. *Id.* at 107. The inmate claimed that the doctors should have better diagnosed and treated the back injury. *Id.*

[42] *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.)). The Supreme Court in *Estelle* went on to find that the allegations of the complaint did not rise to the level of deliberate indifference to the prisoner's medical needs and thus, did not constitute cruel and unusual punishment in violation of the eighth amendment. *Id.* at 107. The Court found that the complaint, at most, alleged a claim for medical malpractice and that the proper forum for such a claim was a state court under the state tort claims act. *Id.* at 106 n.14, 107.

[43] *Id.* at 103–04 (quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

[44] *See, e.g.*, Wade v. Haynes, 663 F.2d 778, 780 (8th Cir. 1981), *aff'd on other grounds sub nom.* Smith v. Wade, 461 U.S. 30 (1983) (verdict sustained against corrections officer for violating eighth amendment by placing prisoner in a dangerous situation where it was foreseeable that another inmate would sexually assault the prisoner); Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980) (constitutional prohibition against cruel and unusual punishment requires prison officials to exercise reasonable care to provide protection to inmates under a known risk of harm of homosexual attacks by other inmates).

[45] *See, e.g.*, Davidson v. O'Lone, 752 F.2d 817, 821 (3d Cir. 1984), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986). *See also* Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982) (involuntarily committed resident of state institution for mentally retarded who was injured on numerous occasions by himself and other residents has a right protected by the fourteenth amendment due process clause to safe conditions of confinement); Stokes v. Delcambre, 710 F.2d 1120, 1125 (5th Cir. 1983) (verdict upheld against sheriff and deputy for depriving prisoner of rights under the fourteenth amendment by failing to prevent beating inflicted by fellow jail inmates); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980) (inmate assaulted by another prisoner is entitled to prove purposeful acts or deliberate indifference on the part of corrections officers in failing to prevent the attack amounting to a violation of due process); Spence v. Staras, 507 F.2d 554, 556–57 (7th Cir. 1974) (allegations that employees and agents of a state hospital failed to protect an inmate from being beaten to death by another inmate stated cause of action under § 1983 for

case *Davidson v. O'Lone*,[46] for example, a state prison inmate brought a claim against prison officials for failing to protect him from injuries inflicted by another prisoner. In finding that the inmate had a right to be protected by the state, the Third Circuit Court of Appeals held that the inmate had a liberty interest, guaranteed by the fourteenth amendment due process clause, in being free from attack.[47] The court stated that this right to be free from attack was not limited to attacks by state officials themselves, but extended also to attacks by fellow prisoners.[48] The *Davidson* court reasoned that because incarcerated persons were not free to leave the confines of the prison, which they were forced to share with other prisoners, the state bore the responsibility of protecting the inmates from the actions of each other.[49] Therefore, whether based on the eighth amendment prohibition against cruel and unusual punishment or the fourteenth amendment due process clause, courts have found that incarcerated persons possess a right to receive protection by the state, including the right to be protected from the actions of fellow inmates.

In 1980, the Supreme Court's decision in *Martinez v. California*[50] began a line of cases which ultimately resulted in the expansion beyond the prison context of the state's duty to protect individuals from the actions of other private persons. In *Martinez*, a parolee murdered a fifteen-year-old girl five months after his release on parole from a California prison.[51] The girl's survivors brought a section 1983 claim against members of the parole board, alleging that by releasing the parolee from prison, the parole board members deprived the girl of her life without due process of law in violation of the fourteenth amendment.[52]

The Supreme Court found that the members of the parole board did not deprive the girl of her life within the meaning of the fourteenth amendment.[53] The Court held that the girl's death was too remote a consequence of the parole officers' actions to hold them responsible and therefore the Court dismissed the plaintiffs' claim. The Court found it significant that the murder occurred five months after the parolee's release and that the parolee was in no sense an agent of the parole board. In addition, the Court noted, the parole board members were not aware that the victim of the murder, as distinguished from the public at large, faced any special danger.

Because the *Martinez* Court dismissed the plaintiffs' claim on causation grounds, it did not address directly the issue of whether the state had a duty under the fourteenth amendment to protect the girl from the actions of the parolee.[54] The Court did leave

---

deprivation of fourteenth amendment due process rights); Curtis v. Everette, 489 F.2d 516, 518 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (due process clause is a valid basis for prisoner's § 1983 action seeking relief for injuries inflicted by another prisoner).

[46] 752 F.2d 817, 819–20 (3d Cir. 1984).

[47] *Id.* at 821–22. The Supreme Court affirmed the *Davidson* case on other grounds in Davidson v. Cannon, 106 S. Ct. 668 (1986). For a discussion of the Supreme Court's decision, see *infra* notes 104–09 and accompanying text.

[48] *Davidson*, 752 F.2d at 822.

[49] *Id.* at 821.

[50] 444 U.S. 277 (1980).

[51] *Id.* at 279–80. The parolee had been sentenced to a term of imprisonment of one to twenty years, with the recommendation that he not be paroled, on the charge of attempted rape. *Id.* at 279. He was paroled after serving five years of the sentence. *Id.*

[52] *Id.* at 279, 283.

[53] *Id.* at 285.

[54] *Jensen*, 747 F.2d at 191.

open the possibility, however, that given another set of circumstances, a parole officer might be found to deprive someone of life by action taken in connection with the release of a prisoner on parole.[55] The Court stated that it merely held that under the circumstances of the particular case before it, the victim's death was too remote a consequence of the parole officers' action to hold them liable under section 1983.[56] Thus, the *Martinez* decision indicated that, given another set of facts, a right to receive protection from the state from the actions of third parties could arise outside of incarceration situations.

Subsequent to the Supreme Court's decision in *Martinez*, the Second Circuit Court of Appeals, in the 1981 decision *Doe v. New York City Dept. of Social Services*,[57] stated that the government could violate a constitutionally protected right by failing to protect a person who had been placed in state custody or care. In *Doe*, a foster father beat and sexually abused a young girl who was in the custody of the New York City Commissioner of Welfare and living in a foster home.[58] The girl filed a section 1983 claim, alleging that the agency in charge of monitoring the foster home violated a constitutional duty of care owed to her when it failed to supervise the foster home adequately.[59] The jury returned a verdict awarding the plaintiff $225,000 in damages against the agency due to the agency's failure to protect the girl.[60]

The *Doe* decision, although not expressly mentioning the fourteenth amendment, has been interpreted as indicating that a duty upon the government can arise under that amendment to protect an individual, placed in state custody or care, from injuries inflicted by other private parties.[61] Thus, the *Doe* court's decision expanded the right to receive protection from the state beyond situations where the individual claiming the right was incarcerated, to include situations where the individual was placed in the custody or care of the state.[62]

In the following year, the Seventh Circuit Court of Appeals in *Bowers v. DeVito*[63] indicated that the state has a constitutional duty to protect individuals who are neither incarcerated nor in the state's custody. In *Bowers*, a former patient in an Indiana state mental hospital murdered Bowers one year after the patient was released from the

---

[55] *See Martinez*, 444 U.S. at 285. The Court reserved the question of what immunity, if any, was available to parole officers sued under § 1983 in connection with a parole decision. *Id.* at 285 n.11.

[56] *Id.* at 285.

[57] 649 F.2d 134, 141 (2d Cir. 1981).

[58] *Id.* at 137.

[59] *Id.*

[60] In *Doe*, the Second Circuit Court of Appeals reversed the trial court's entry of judgment for the defendant agency, holding that the jury had not been instructed properly on the meaning of "deliberate indifference," the standard of conduct necessary to be proved to recover under § 1983. 649 F.2d at 142. On remand to the trial court, the jury returned a verdict for the plaintiff and assessed damages of $225,000. Doe v. New York City Dep't of Social Servs., 709 F.2d 782, 787 (2d Cir.) (Doe II), *cert. denied*, 104 S. Ct. 195 (1983). The trial court judge set aside the verdict and granted the defendant's motion for judgment notwithstanding the verdict, holding that the evidence was so overwhelming that no reasonable jury could conclude that the defendant agency acted with deliberate indifference. *Id.* The Second Circuit reversed the trial court's entry of judgment notwithstanding the verdict, finding that sufficient evidence existed for the jury to find that the agency had acted with deliberate indifference. *Id.* at 792. The Second Circuit therefore reinstated the jury verdict in favor of the plaintiff. *Id.*

[61] *See Jensen*, 747 F.2d at 192.

[62] *See id.* (citing *Doe*, 649 F.2d at 141).

[63] 686 F.2d 616 (7th Cir. 1982).

hospital.[64] Bowers' estate filed a section 1983 claim against officers and physicians of the state mental hospital, alleging that the defendants knew the murderer was dangerous and that they acted recklessly in releasing him from the hospital.[65]

In affirming the district court's dismissal of the complaint, the Seventh Circuit held that the state did not have any federal constitutional duty to protect its citizens from being murdered by "criminals and madmen."[66] The *Bowers* court stated that there is a constitutional right not to be murdered by a state official because the state violates the fourteenth amendment when its officer, acting under color of state law, deprives a person of life without due process of law.[67] The court stated, however, that there is no such constitutional right to be protected by the state from the actions of private persons.[68] The Seventh Circuit reasoned that the federal constitution tells the states to leave people alone; it does not impose upon the states any duty of affirmative action to protect its citizens.[69] Therefore, because the *Bowers* court found that the state had no constitutional duty to protect Bowers, it upheld the district court's dismissal of the complaint.[70]

The *Bowers* court went on to note, however, that if the state had taken some action and placed a person in a position of danger, then a constitutional duty upon the state to protect that person could arise.[71] The court stated that "[i]t is on this theory that state prison personnel are sometimes held liable . . . for the violence of one prison inmate against another."[72] According to the court, the defendants in *Bowers* did not place Bowers in a position of danger; they merely failed to protect her from a "dangerous madman," and such failure did not violate any constitutional duty.[73] Thus, although the *Bowers* court found no general constitutional duty upon the state to protect persons from the actions of other private individuals, the court indicated that such a duty of protection could arise if the state somehow took part in placing a person in a dangerous position.[74]

---

[64] *Id.* at 617.

[65] *Id.* The murderer had a history of criminal violence prior to killing Bowers. *See id.* In 1970, he was convicted of aggravated battery with a knife. *Id.* In 1971, he killed a young woman with a knife and was later found not guilty by reason of insanity and committed to the state mental health hospital. *Id.* The murderer was released in April of 1976 from the hospital, and one year later killed Bowers, also with a knife. *Id.*

[66] *Id.* at 618.

[67] *Id.* (citing Brazier v. Cherry, 293 F.2d 401, 404–05 (5th Cir. 1961)).

[68] *Id.*

[69] *Id.* In finding that the state had no federal constitutional duty to protect its citizens, the *Bowers* court reasoned that "the Constitution is a charter of negative liberties; it tells the states to let people alone; it does not require the state to provide services, even so elementary a service as maintaining law and order." *Id.*

[70] *Id.* at 618, 619.

[71] *Id.* at 618. The *Bowers* court stated

> [w]e do not want to pretend that the line between . . . inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id.

[72] *Id.* (citing Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974)).

[73] *Id.*

[74] The Seventh Circuit went on to state that although the failure of the state to protect Bowers violated no federal constitutional duty, and thus was not actionable under § 1983, that failure may have provided a cause of action under the state common law. *Id.* The court noted that "[t]he tendency in the common law has been to impose ever greater liability on officials who negligently

One year after the *Bowers* decision, the Fourth Circuit Court of Appeals in *Fox v. Custis*[75] also indicated that the state has a duty to protect individuals not incarcerated nor in its custody or care. In *Fox*, a parolee named Mason set fire to Fox's home and committed various other crimes of violence shortly after the parolee's release from a Virginia prison.[76] Prior to committing these crimes, Mason had committed several parole violations, for which his parole could have been revoked, yet he was allowed to remain free.[77] Fox and the other victims of Mason's violence filed suit, pursuant to section 1983, against two members of the state Department of Corrections who had been assigned to supervise Mason.[78] The plaintiffs alleged that the parole officers' actions in failing to reincarcerate Mason deprived them of their constitutionally protected rights without due process of law.[79]

The Fourth Circuit stated that the fourteenth amendment right not to be deprived of liberty without due process of law does not impose a general duty upon the state to protect individuals from dangerous persons.[80] The majority noted, however, that a duty

---

fail to protect the public from dangerous criminals and lunatics." *Id.* at 618–19 (citing Homere v. State, 48 A. D.2d 422, 370 N.Y.S.2d 246 (1975); Leverett v. State, 61 Ohio App. 2d 35, 40, 41, 399 N.E.2d 106, 109–10 (1978); Williams v. United States, 450 F. Supp. 1040, 1044–45 (D.S.D. 1978). *But see* Cady v. State, 129 Ariz. 258, 630 P.2d 554 (Ct. App. 1981)). The *Bowers* court chose not to express any view on the rights of the plaintiff under the Illinois tort law. *Id.* at 619. For a discussion of possible causes of action under state tort law against the state for failing to provide protection, see *infra* note 217.

[75] 712 F.2d 84 (4th Cir. 1983).

[76] *Id.* at 85–86. Mason had been convicted in 1976 of arson and grand larceny and sentenced to a term of twenty years in the state penitentiary, with ten years suspended. *Id.* at 86. He was paroled on April 12, 1978. *Id.* at 85. On May 14, 1978, Mason set fire to Fox's home, raped, beat, and set on fire Lisa Morris, and shot and stabbed Wendy Morris. *Id.* at 86.

[77] *Id.* On May 8, 1978, less than one month after his parole, Mason was convicted of defrauding an innkeeper and given a 30-day suspended sentence. *Id.* The officers assigned to supervise Mason were aware of this conviction and considered it a parole violation, yet they did not revoke his parole. *Id.* The parole officers also had information that on May 1, 1978, Mason had committed an arson which resulted in one death, yet they still did not revoke his parole. *Id.*

[78] *Id.*

[79] *Id.* The plaintiffs filed the Section 1983 claims in the Circuit Court of Northampton County, Virginia. *Id.* In addition to the claims brought pursuant to Section 1983, the plaintiffs also brought separate claims under the tort law of the state of Virginia. *Id.* The state law claims asserted that Section 53–250(4) of the Virginia Code required the parole officers to reincarcerate Mason once they became aware of a parole violation and that the officers' negligent failure to perform this duty was the cause of the injuries suffered. *Id.* The defendants, pursuant to 28 U.S.C. § 1441, removed the actions to the United States District Court for the Eastern District of Virginia. *Id.* at 84, 86. The district court dismissed the case, and the plaintiffs appealed to the Fourth Circuit Court of Appeals. *Id.* at 86.

[80] *Id.* at 88. Before discussing the state's duty to provide protection, the Fourth Circuit stated that if it were to decide the case on the basis of the factors deemed relevant by the Supreme Court in *Martinez*, it would conclude that the injuries suffered by the plaintiffs were too remote a consequence of the parole officers' actions to constitute a deprivation of constitutional rights under section 1983. *Id.* at 87. For a discussion of *Martinez*, see *supra* notes 50–56 and accompanying text. The *Fox* court noted, however, that the facts presented a much closer question on the issue of causation than the facts present in *Martinez*. *Fox*, 712 F.2d at 87. The *Fox* majority noted that the factors in this case made the cause and effect relationship between the state conduct and the plaintiffs' injuries less attenuated than that in *Martinez*. The court stated that the cases were similar in that "the defendants were unaware that the claimant-victims, as distinguished from the public at large, faced any special danger." The court noted, however, that the cases differed in two arguably important respects. First, the court stated, the time interval in *Fox* between the state conduct and

upon the state to provide such protection may arise out of a special relationship between an individual and the state.[81] The *Fox* court expressly chose not to attempt a general definition of the type of special relationship which was necessary to give rise to a constitutional right to be protected.[82] Instead, the majority found it sufficient to decide the case before it by stating that no special relationship existed between the state and the plaintiffs in *Fox*.[83] According to the court, the plaintiffs were simply members of the general public, and the parole officers were not aware that the plaintiffs faced any special dangers.[84] Thus, the *Fox* court ruled that because the plaintiffs had no special relationship with the state, the state had no federal constitutional duty to protect them.[85]

In sum, the Supreme Court's decision in *Martinez* left open the possibility that the fourteenth amendment could impose a duty upon the state to provide protection to an individual from the actions of other private parties. Subsequent cases indicate that this duty upon the state can arise if the state places an individual in a position of danger, or if a "special relationship" exists between the state and a particular individual. Courts have not, however, provided a comprehensive definition of the "special relationship" necessary to give rise to the right to protection.[86] Consequently, the circumstances in which an individual can claim a right to protection from the government under the fourteenth amendment are not clear.

B. *The Standard of Conduct Actionable Under Section 1983*

A plaintiff in a section 1983 action who can establish successfully the constitutional right to receive protection from the government next will have the burden of proving that conduct on the part of governmental officials was the type of conduct necessary to constitute a deprivation of that right.[87] The lower federal courts have disagreed over the issue of what type of conduct on the part of government officials is necessary to state a claim under section 1983 for the deprivation of fourteenth amendment due process

---

the injuries was much shorter than the five-month interval in *Martinez*. Second, the court stated, the *Fox* defendants had responsibility for the parolee's supervision after he was released from prison, unlike the situation in *Martinez*. *Id.* (citing *Martinez*, 444 U.S. at 280 n.2). Therefore, the *Fox* court went on to address the question of whether the parole officers owed any constitutional duty to protect the plaintiffs from the actions of the parolee. *Id.* at 88.

[81] *Id.* As an example of the type of relationship which may give rise to a right to protection by the state vindicable under Section 1983, the *Fox* court cited cases in which a duty arose towards inmates in state prisons or patients in mental institutions whom the state knows to be under a specific risk of harm from others. *Id.* (citing Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); *cf.* Orpiano v. Johnson, 632 F.2d 1096, 1101–03 (4th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); *see also* Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Gann v. Delaware State Hospital, 543 F. Supp. 268, 272 (D.Del. 1982); Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982)).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* The *Fox* majority ruled that once it had dismissed the Section 1983 claim, the proper course of action was to remand the state law claims to the state court for it to determine the plaintiffs' rights to recover under state law grounds. *Id.* at 89–90.

[86] *See id.* at 88.

[87] *See* Daniels v. Williams, 106 S. Ct. 662 (1986).

rights.[88] Some circuit courts of appeals have stated that merely negligent conduct on the part of government officials is insufficient and that reckless or intentional conduct is necessary in order to state such a claim.[89] Other circuit courts, however, have found that negligent conduct on the part of government officials can support a section 1983 cause of action for the violation of due process rights.[90] In the 1986 cases of *Daniels v. Williams*[91] and *Davidson v. Cannon*,[92] the Supreme Court attempted to resolve this conflict among the lower courts by holding that negligent conduct is insufficient to establish a violation of the fourteenth amendment. The Court failed to set forth, however, what level of conduct a plaintiff must prove in order to establish a claim for the deprivation of due process rights.

In *Daniels*, a prison inmate allegedly sustained back and ankle injuries when he slipped on a pillow that a correctional officer negligently had left on a stairway.[93] The inmate brought a section 1983 action against the correctional officer, alleging that the officer's negligence deprived the inmate of his liberty interest in being free from bodily injury in violation of the fourteenth amendment due process clause.[94]

The *Daniels* Court, in affirming the lower court's grant of summary judgment for the defendant,[95] ruled that negligent conduct on the part of government officials does not violate the due process clause of the fourteenth amendment.[96] Section 1983 itself, the Court stated, does not prohibit recovery against state officials for negligent conduct.[97] The Court noted, however, that in order to recover in a section 1983 claim, a plaintiff must prove the violation of an underlying constitutional right, and depending on the right, negligent conduct alone may not be sufficient to constitute a violation.[98] The Court stated that it historically has held that the fourteenth amendment due process clause protects against *deliberate* governmental decisions to deprive individuals of life, liberty, or property.[99] According to the Court, the due process clause was intended to protect

---

[88] *Compare* Davidson v. O'Lone, 752 F.2d 817, 826 (3d Cir. 1984) (negligence on part of state officials does not state claim under Section 1983 for deprivation of due process), *aff'd sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986) *with* Howard v. Fortenberry, 723 F.2d 1206, 1209 n.6 (5th Cir. 1984) (negligence will suffice to state cause of action under Section 1983 for violation of fourteenth amendment rights).

[89] *See, e.g., Davidson*, 752 F.2d at 826, 828; Mills v. Smith, 656 F.2d 337, 340 & n.2 (8th Cir. 1981).

[90] *See, e.g.*, McKay v. Hammock, 730 F.2d 1367, 1373 (10th Cir. 1984); Howard v. Fortensberry, 723 F.2d 1206, 1209 n.6 (5th Cir. 1984).

[91] 106 S. Ct. 662, 664 (1986).

[92] 106 S. Ct. 668, 671 (1986).

[93] *Daniels*, 106 S. Ct. at 663.

[94] *Id. See* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (right to be free from unjustified intrusions on personal security is one of historic liberties protected by fourteenth amendment).

[95] 748 F.2d 229 (1984), *aff'd*, 106 S. Ct. 662 (1986).

[96] *Daniels*, 106 S. Ct. at 666.

[97] *Id.* at 664.

[98] *Id.* (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) ("invidious discriminatory purpose required for claim of racial discrimination under the [e]qual [p]rotection [c]lause"); Estelle v. Gamble, 429 U.S. 97, 105 (1976) ("'deliberate indifference' to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the [e]ighth [a]mendment")).

[99] *Daniels*, 106 S. Ct. at 665 (emphasis in original) (citing Davidson v. New Orleans, 96 U.S. 97 (1878); Rochin v. California, 342 U.S. 165 (1952); Bell v. Burson, 402 U.S. 535 (1971); Ingraham v. Wright, 430 U.S. 651 (1977); Hudson v. Palmer, 468 U.S. 517 (1984)).

individuals from arbitrary abuses of power by the government.[100] Negligent conduct, the Court stated, suggests only the failure to conform to the conduct of a reasonable person and does not amount to the deliberate abuse of power which the due process clause historically has been applied to protect against.[101] Therefore, the Court held that negligent conduct does not implicate the fourteenth amendment due process clause.[102] The *Daniels* Court, however, expressly left open the question of whether something less than intentional conduct, such as recklessness or gross negligence, was sufficient to invoke the protections of the due process clause.[103]

In the companion case of *Davidson v. Cannon*,[104] the Court again did not resolve the issue of whether less than intentional conduct on the part of state officials resulting in personal injuries violates the fourteenth amendment due process clause. The *Davidson* Court addressed a section 1983 claim by a prison inmate who alleged that prison officials negligently failed to protect him from another inmate, thereby depriving him of liberty rights guaranteed by the fourteenth amendment.[105] The Court found that *Daniels* controlled the outcome of the case and held that lack of due care does not constitute the abusive governmental conduct which the due process clause is designed to protect against.[106] Justices Blackmun and Brennan filed dissenting opinions in *Davidson*,[107] however, stating that the actions of the prison officials in failing to protect the plaintiff may have risen to the level of recklessness or deliberate indifference. The dissenting justices found that reckless conduct on the part of state officials which causes personal injuries does violate the due process clause.[108] The majority in *Davidson*, however, did not address the issue of whether reckless conduct could violate the fourteenth amendment, stating that the plaintiff only had alleged negligent conduct on the part of the corrections officers.[109]

The *Daniels* and *Davidson* decisions establish that negligent conduct on the part of state officials who fail to protect an individual will not amount to a violation of the fourteenth amendment and hence, will not result in liability under section 1983.[110] The decisions, however, do not resolve completely the question of what level of conduct on the part of state officials a plaintiff must prove in order to establish a claim for the deprivation of due process rights. The Court expressly left open the issue of whether something less than intentional conduct, such as gross negligence or recklessness, on the part of state officials who fail to protect individuals to whom such a duty is owed violates the fourteenth amendment due process clause.[111]

---

[100] *Id.*

[101] *Id.*

[102] *Id.* at 666.

[103] *Id.* at 667 n.3.

[104] 106 S. Ct. 668 (1986).

[105] *Id.* at 669.

[106] *Id.* at 670, 671.

[107] *Id.* at 671 (Brennan, J., dissenting); *id.* at 671–72 (Blackmun, J., dissenting).

[108] *Id.* at 671 (Brennan, J., dissenting); *id.* at 675 (Blackmun, J., dissenting). Justice Blackmun, who was joined by Justice Marshall, rejected the majority's position that negligent conduct by state officials could never violate the due process clause. *Id.* at 673 (Blackmun, J., dissenting). The dissent stated that in some cases the Court could find governmental negligence amounts to the abuse of power required to implicate the due process clause. *Id.*

[109] *Id.* at 670.

[110] *Daniels*, 106 S. Ct. at 666; *Davidson*, 106 S. Ct. at 671.

[111] *Daniels*, 106 S. Ct. at 667 n.3.

C. *Immunity from Section 1983 Liability*

Even if a plaintiff establishes the existence of a state's constitutional duty to protect an individual and proves governmental conduct which constitutes a constitutional deprivation, immunity doctrines nevertheless may prevent a plaintiff from imposing liability on the government or its officials under section 1983.[112] The Supreme Court has held consistently that government officials are entitled to some form of immunity from personal liability under section 1983 in order to protect them from "undue interference with their duties and potentially disabling threats of liability."[113] The Court's decisions have recognized immunities of two varying scopes: qualified immunity and absolute immunity.[114]

Most public officials who perform discretionary functions are protected from personal liability by the defense of qualified immunity, under which they will not be held liable for unconstitutional conduct if their actions are taken in good faith.[115] Under the standard enunciated in *Harlow v. Fitzgerald*,[116] courts measure the good faith of government officials by whether or not their conduct violated clearly established rights of which a reasonable person would have been aware. Thus, the defense of qualified immunity will protect government officials from personal liability under section 1983 if their conduct does not violate clearly established federal constitutional or statutory rights.[117] The rationale for providing public officials with the defense of qualified immunity is based on two public policy concerns. First, the defense seeks to avoid the injustice of subjecting officials who are required to exercise discretion to personal liability for actions taken in good faith.[118] Second, the defense seeks to eliminate the danger that potential liability will deter officials from performing their duties with the judgment and decisiveness that their duties require.[119] The Supreme Court has held that the protection of qualified immunity applies to various public officials, including police officers,[120] state prison officials,[121] state governors,[122] the president of a state university,[123] members of the state national guard,[124] public school officials,[125] school board members,[126] and the superintendent of a state hospital.[127]

---

[112] *See* Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[113] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). The *Harlow* case, in which the Court identified the standard for determining whether an official is protected by qualified immunity, involved a claim for damages against federal executive officials for the deprivation of constitutional rights and thus did not involve a Section 1983 action. *Id.* at 802, 818. The Court noted, however, that the standard for determining the applicability of qualified immunity would not differ in a Section 1983 action. *Id.* at 818 n.30 (citing Butz v. Economou, 438 U.S. 478, 504 (1978)).

[114] *Harlow*, 457 U.S. at 807.

[115] *See id.* at 818.

[116] 457 U.S. 800, 818 (1976).

[117] *Id.*

[118] Owen v. City of Independence, 445 U.S. 622, 654 (1980) (citing Scheur v. Rhodes, 416 U.S. 232, 240 (1974)).

[119] *Id.*

[120] Pierson v. Ray, 386 U.S. 547, 557 (1967).

[121] Procunier v. Navarette, 434 U.S. 555, 561 (1978).

[122] Scheur v. Rhodes, 416 U.S. 232, 234, 250 (1974).

[123] *Id.*

[124] *Id.*

[125] Wood v. Strickland, 420 U.S. 308, 321–22 (1975).

[126] *Id.*

[127] O'Connor v. Donaldson, 422 U.S. 563, 564, 577 (1975).

Although the defense of qualified immunity will protect public officials exercising discretion from personal liability, local governmental units sued for the actions of its officials do not enjoy such protection.[128] A local government may be subjected to suit under section 1983 when its employees inflict constitutional deprivations while carrying out the official policies or practices of the government.[129] In *Owen v. City of Independence*,[130] the Supreme Court ruled that the city was not entitled to claim the defense of qualified immunity for the good faith constitutional violations of its employees. The Court noted that the injustice in holding public officials personally liable for good faith constitutional violations did not apply with the same force when the defendant was the government.[131] The Court found that where public officials could not have foreseen that their actions in carrying out government policies would be found to deprive persons of constitutional rights, it was fairer to allocate any resulting financial loss to the costs of government, as borne by all the taxpayers, rather than to the individual who had been wronged.[132] In addition to finding a lack of unfairness in holding the government liable for good faith constitutional violations, the Court found that potential liability for policies which might later be found to violate the Constitution would encourage government policy makers to show greater concern to enact policies which comport with the Constitution.[133] Thus, the Court held that the public policy reasons which justified granting qualified immunity from personal liability to public officials did not justify granting such protection from section 1983 liability to local governments.[134]

In addition to the protection of qualified immunity available to officials exercising discretion, courts have granted absolute immunity to public officials who, for reasons of public policy, require complete protection from damage suits.[135] In *Imbler v. Pachtman*,[136]

---

[128] *See Owen*, 445 U.S. at 657. The eleventh amendment prohibits suits in federal courts against states and agencies which are "arms of the state." *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). The eleventh amendment bar, however, does not extend to suits in federal court against municipal corporations, counties, and their agencies. *Id.* (citing Lincoln County v. Luning, 133 U.S. 529, 530 (1874); Moor v. County of Alameda, 411 U.S. 693, 717–21 (1973)).

[129] Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694 (1978). In *Monell*, the Supreme Court ruled that local governments may not be subjected to suit under Section 1983 on a respondeat superior theory. *Id.* Under this theory, courts deem an employer responsible for the actions of its employees committed within the scope of their duties. W. PROSSER & W. KEETON, THE LAW OF TORTS, § 69–70 (5th ed. 1984). The employer's liability under the respondeat superior theory is not based on any fault on the part of the employer but rather, is based solely on the existence of the employment relationship. *Id.* In order to establish the liability of a local government under Section 1983, however, a plaintiff will have to prove that the complained-of injuries resulted from the employee's execution of an official policy of the government. *Monell*, 436 U.S. at 694.

[130] 445 U.S. 622, 657 (1980).

[131] *See id.* at 654–55.

[132] *Id.* at 655.

[133] *Id.* at 656.

[134] *Id.* at 652–53. The *Owen* Court found only that *municipalities* were not entitled to qualified immunity protection from Section 1983 suits. *Id.* at 657. However, courts have interpreted the *Owen* decision regarding the scope of governmental immunity under Section 1983 as applying to other governmental units as well, including counties and their agencies. *See* Wagner v. Genesee County Bd. of Comm'rs, 607 F. Supp. 1158 (E.D. Mich. 1985); Whelehan v. County of Monroe, 558 F. Supp. 1093 (W.D.N.Y. 1983).

[135] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U.S. 478, 508 (1978); Imbler v. Pachtman, 424 U.S. 409, 424–28 (1976).

[136] 424 U.S. 409, 431 (1976).

for example, the Supreme Court granted prosecuting attorneys the protection of absolute immunity for actions taken within their prosecutorial functions. The Court noted that prosecutors must exercise their best judgment in determining which prosecutions to initiate and how to conduct those prosecutions in court.[137] The threat of potential liability, the Court found, would constrain prosecutors in making these decisions.[138] The Court also stated that without absolute immunity, prosecutors could expect suits for damages to be brought against them with frequency by defendants who resent the prosecutor's decision to prosecute them.[139] Such frequency of potential suits, the Court found, would divert the prosecutor's energy and attention from the important duty of enforcing the criminal law. In addition, the Court pointed out that because prosecutors frequently act under serious constraints of time and information, many of their decisions may give rise to colorable claims of constitutional deprivations. Defending those claims, the Court stated, would impose intolerable burdens on prosecutors who are responsible for hundreds of indictments and trials during the course of a year.[140] Furthermore, the Court stated, although affording prosecutors absolute immunity would deny compensation to an individual wronged by a prosecutor, the greater needs of the general public in having an effective criminal justice system justified such a result.[141] For these reasons, the Court found that the threat of potential liability in the absence of absolute immunity would deter prosecutors from effectively performing their duties, which are essential to the proper functioning of the criminal justice system.[142] Therefore, the Court held that prosecutors require the protection of absolute immunity from suit.[143]

For similar public policy reasons, the Court in *Butz v. Economou*[144] extended the protection of absolute immunity to federal agency officials who, in determining whether or not to initiate administrative proceedings, perform duties analogous to those of a

---

[137] *Id.* at 424.

[138] *Id.* at 424–25.

[139] *Id.* at 425.

[140] *Id.* at 425–26.

[141] *Id.* at 427.

[142] *Id.* at 427–28.

[143] *Id.* at 427. The *Imbler* Court emphasized that granting absolute immunity from civil damages does not leave the public powerless to deter official misconduct. *Id.* at 428–29. The Court stated that even if protected by absolute immunity from civil damages under Section 1983, public officials still could be subjected to criminal sanctions for willful deprivations of constitutional rights pursuant to 18 U.S.C. § 242. *Id.* at 429. That statute provides:

> Whoever, under color of any state law . . . subjects any . . . [person] to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States . . . shall be fined not more than $1000.00 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1982).

The Court in *Imbler* also stated that the duties of a prosecutor also involve actions before the initiation of a prosecution and apart from the courtroom. *Imbler*, 424 U.S. at 431 n.33. The majority noted that in performing some of these duties, the prosecutor acts as an administrator rather than as an officer of the court and that drawing a line between these functions might present difficulties. *Id.* Other courts have relied on this language in holding that prosecutors acting in an administrative or investigative capacity are not entitled to absolute immunity but can claim only a qualified immunity from damage suits. *See, e.g.*, Ryland v. Shapiro, 708 F.2d 967, 975 (5th Cir. 1983); McSurely v. McClellan, 697 F.2d 309, 318 (D.C. Cir. 1982); Mancini v. Lester, 630 F.2d 990, 993 (3d Cir. 1980).

[144] 438 U.S. 478, 515–16 (1978).

prosecutor. Courts also have extended absolute immunity to various other public officials, including legislators,[145] judges,[146] and officials whose functions constitute integral parts of the judicial process.[147]

Courts have answered inconsistently the question of whether the government may claim the protection of absolute immunity from liability for the acts of its officials who are protected by that defense.[148] Although the Supreme Court's decision in *Owen*[149] established that local governments are not entitled to the defense of qualified immunity, the decision did not address the issue of the government's ability to claim the protection of absolute immunity for acts of its officials who are so protected.[150] Some lower courts that have addressed this issue have concluded that local governments cannot claim absolute immunity from suit even when their employees have been found to be entitled to absolute immunity from personal liability.[151] In *Wagner v. Genesee County Board of Commissioners*,[152] for example, the Michigan federal district court held that the government could not claim the defense of absolute immunity from suit for the actions of its officials who were protected from personal liability by that defense. The district court in *Wagner* first concluded that the officials were absolutely immune from personal liability under section 1983 in connection with activities which were within the scope of their duties.[153] The court then ruled, however, that the governmental unit which employed

---

[145] Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979) (regional legislators); Doe v. McMillan, 412 U.S. 306, 312 (1973) (federal legislators); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (state legislators).

[146] *See* Pierson v. Ray, 386 U.S. 547, 554, 555 (1967).

[147] *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 335, 345–46 (1983) (police officers testifying as witnesses); Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984) (Department of Social Services attorney who initiates and prosecutes child protective orders); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (Department of Social Services employees who initiate proceedings to terminate parental rights); Wagner v. Genesee County Board of Commissioners, 607 F. Supp. 1158, 1164–65 (E.D. Mich. 1985) (Friend of the Court employees seeking an order of attachment for non-payment of child support); Boyer v. Spero, No. 84–CV–219 (N.D.N.Y. July 2, 1985) (social workers in the post-investigative stages of child protection proceedings); Pepper v. Alexander, 599 F. Supp. 523, 526 (D.N.M. 1984) (Department of Human Services employees in the filing of an application for the termination of parental rights); Whelehan v. County of Monroe, 558 F. Supp. 1093, 1098–99 (W.D.N.Y. 1983) (social services workers acting in the course of their duties in child protection proceedings).

[148] *Compare Wagner*, 607 F. Supp. at 1167 (government cannot claim absolute immunity defense) *with Whelehan*, 558 F. Supp. at 1108 (government entitled to claim absolute immunity defense).

[149] See *supra* notes 130–34 and accompanying text for a discussion of *Owen*.

[150] *Wagner*, 607 F. Supp. at 1167; Armstead v. Town of Harrison, 579 F. Supp. 777, 782 (S.D.N.Y. 1984); *Whelehan*, 558 F. Supp. at 1104.

[151] *See, e.g.*, *Wagner*, 607 F. Supp. at 1167. *See also* Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680, 681 (9th Cir. 1984) (local government entitled to no immunity from suit for acts of its prosecutors who were absolutely immune from personal liability); Reed v. City of Shorewood, 704 F.2d 943, 953 (7th Cir. 1983) (municipality's liability extends to official acts of municipal policy makers even though officials themselves might enjoy absolute immunity from personal liability).

[152] 607 F. Supp. 1158, 1170 (E.D. Mich. 1985).

[153] *Id.* at 1164, 1165. The individual officials were acting within the scope of their duties in seeking an order of attachment for failure to make child support payments. *Id.* at 1164. The *Wagner* court found that the actions of these officials were integral parts of the judicial process in the enforcement of court-ordered child support payments and thus were entitled to absolute immunity from personal liability. *Id.* at 1164, 1165.

the officials — the county — could not claim the protection of absolute immunity.[154] The *Wagner* court stated that, as the Supreme Court had found in *Owen*, requiring the government to compensate individuals for wrongs it has committed is not unjust.[155] In addition, the *Wagner* court noted, the threat of governmental liability will not deter the exercise of judgment and instead may lead to more careful decision-making on the part of governmental policy makers.[156] Therefore, the *Wagner* court concluded that the county was not entitled to absolute immunity from section 1983 liability.[157]

Other courts, however, have found that local governments are entitled to the defense of absolute immunity from suit for actions of its officials who are so protected.[158] In *Whelehan v. County of Monroe*,[159] for example, parents of an allegedly abused child brought a claim pursuant to section 1983 against the county of Monroe, the county Department of Social Services, and various county employees for actions taken during an investigation into the alleged sexual abuse of the child. The New York federal district court first held that because the duties of the individual employees in child protection proceedings were analogous to those of a prosecutor, the employees were entitled to the protection of absolute immunity for actions taken within the scope of those duties.[160] The court then stated that for several public policy reasons, the governmental defendants — the County and the County Department of Social Services — were absolutely immune from liability for the actions of their employees within the scope of prosecutorial-type duties.[161] The court stated that in the absence of absolute immunity, officials concerned with maintaining the public treasury would be biased in favor of individual rights and that such bias would interfere impermissibly with prosecutorial-type functions.[162] Therefore, the court

---

[154] *Id.* at 1170.

[155] *Id.* at 1169.

[156] *Id.* The *Wagner* court also found that the need to provide compensation to victims for wrongs committed by the government outweighed any negative consequences which would result from subjecting the government to liability for the acts of its officials in their quasi-judicial capacities. *Id.*

[157] *Id.* at 1170.

[158] *See, e.g., Armstead*, 579 F. Supp. at 782–83; *Whelehan*, 558 F. Supp. at 1108.

[159] 558 F. Supp. 1093, 1095–96 (W.D.N.Y. 1983). The plaintiffs, parents of the allegedly abused child, asserted that the defendants made statements to the father's employer, the media, and various governmental agencies concerning the father's supposed sexual conduct with his daughter. *Id.* at 1095. These statements allegedly were made with knowledge that they were false and with the intention to harm the father's reputation and endanger his employment. *Id.* at 1095–96. The plaintiffs also alleged that negligent investigatory practices resulted in the removal of the daughter from the home and the father having to leave the home upon the daughter's return, thereby depriving the parents and the child of their constitutional rights to maintain their family life. *Id.* In addition, the plaintiffs alleged that negligent investigatory practices resulted in the institution of court proceedings in which the parents were charged with child abuse and neglect. *Id.* The plaintiffs alleged that the state instituted this proceeding with knowledge that it was without merit, and thus the proceeding constituted a deprivation of due process and a malicious prosecution. *Id.*

[160] *Id.* at 1098–99. *See also* Butz v. Economou, 438 U.S. 478, 515–16 (1978).

[161] *Whelehan*,. 558 F. Supp. at 1105, 1108. The court, before addressing the question of the government's ability to claim the defense of absolute immunity, dismissed the claims against the government defendants because the complaint failed to allege sufficiently that the constitutional deprivations resulted from the carrying out of official government policies. *Id.* at 1104. *See also supra* note 129 and accompanying text. Thus, the court acknowledged that its discussion of the scope of the government's immunity was *obiter dictum*. *Whelehan*, 558 F. Supp. at 1104. (emphasis in original).

[162] *Whelehan*, 558 F. Supp. at 1107. The *Whelehan* court also stated that if it did not grant absolute immunity to the governmental defendants, the need for individual officials to attend

found that the implications of subjecting the government to liability for the actions of its officials in child protection proceedings justified granting absolute immunity to the government as well as to the individual officials.[163]

In summary, a plaintiff who can establish a deprivation of constitutional rights nevertheless may be precluded from recovering damages under section 1983 by immunity doctrines. Most government officials who exercise discretion enjoy a qualified immunity from personal liability for good faith constitutional violations.[164] Courts have granted certain officials, for public policy reasons, the greater protection of absolute immunity from personal liability for constitutional violations, regardless of whether or not their actions were taken in good faith.[165] In addition, although the Supreme Court has ruled that local governments may not claim the defense of qualified immunity for good faith constitutional violations,[166] some lower federal court decisions indicate that a local government may be allowed to claim the protection of absolute immunity when it is sued for the actions of an official who enjoys such protection.[167]

II. The Right to be Protected from Child Abuse: The Cases

A. *Jensen v. Conrad*

In the 1984 case of *Jensen v. Conrad*,[168] the Fourth Circuit Court of Appeals held that an abused child's right to receive protection by the state, grounded in the fourteenth amendment, may arise upon the finding of a special relationship between the child and the state. The *Jensen* court did not decide, however, whether a special relationship had been created between either of the abused children and the state in the case before it.[169] Instead, the court determined that judicial recognition of the right to receive protection by the state under the fourteenth amendment upon finding a special relationship had not emerged until after the abused children in *Jensen* had died.[170] Thus, because the right to receive protection had not been "clearly established" at the time of the alleged deprivations, the *Jensen* court held that the defendants — employees of the state and county Department of Social Services — were entitled to the defense of qualified immunity and dismissed the claims.[171]

In *Jensen*, the estates of Sylvia Brown and Michael Clark, whose caretakers had beaten them to death, filed separate actions in federal district courts.[172] Both children

---

discovery and trial proceedings would frustrate society's compelling interest in protecting endangered children. *Id.*

[163] *Id.* at 1108. *See also* Armstead v. Town of Harrison, 579 F. Supp. 777, 782–83 (S.D.N.Y. 1984) (for reasons of public policy, government defendant entitled to absolute immunity from Section 1983 claim arising out of actions of its prosecutorial officials).

[164] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1976).

[165] *Harlow*, 457 U.S. at 807.

[166] Owen v. City of Independence, 445 U.S. 622, 657 (1980).

[167] *See* Armstead v. Town of Harrison, 579 F. Supp. 777, 782–83 (S.D.N.Y. 1984); Whelehan v. County of Monroe, 558 F. Supp. 1093, 1108 (W.D.N.Y. 1983).

[168] 747 F.2d 185, 194 (4th Cir. 1984).

[169] *Id.* at 194–95.

[170] *Id.* at 194.

[171] *Id.* at 194–95, 196. For a discussion of qualified immunity, see Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also supra* notes 115–27 and accompanying text.

[172] *Jensen*, 747 F.2d at 187.

had died after reports of abuse concerning their families had been received and investigated by child protection agencies in South Carolina.[173] With respect to Sylvia Brown, the complaint alleged that Sylvia, then four months old, was admitted to the Richland Memorial Hospital with a fractured skull on February 28, 1979.[174] The attending physician suspected that Sylvia had been abused after a CAT scan[175] revealed a healing subdural hematoma.[176] This suspicion was confirmed after Mrs. Brown and her boyfriend visited Sylvia at the hospital.[177] During the visit, Mrs. Brown's boyfriend reportedly held Sylvia by the head and neck and slapped her roughly.

The following week, a hospital social worker filed a report of suspected abuse on Sylvia's behalf with the Richland County Department of Social Services. An investigation was conducted, and the Department reached an agreement which required Sylvia and her mother, Mrs. Brown, to live at the home of Sylvia's grandmother. According to the agreement, Sylvia was to be placed in the custody of the Department if Mrs. Brown and Sylvia returned to live in their own home.[178] Despite the mandates of the agreement, Sylvia and her mother returned to their own home, and Sylvia was not taken into the custody of the Department.[179] On May 11, 1979, Sylvia died as the result of brain hemorrhaging, and her mother later pleaded guilty to a charge of involuntary manslaughter in connection with her death.

With respect to Michael Clark, the complaint alleged that on February 28, 1980, the Anderson County Department of Social Services received a report of suspected abuse concerning Michael's older brother. While investigating the report, a caseworker from the Department met with Michael's brother, observed bruises about the child's face, and was told by the child that his father had hit him on several occasions. The caseworker repeatedly attempted to locate the Clark family but was unsuccessful in doing so.[180] After sixty days, the Department classified the report of abuse as unfounded and officially closed the investigation. On June 23, 1980, three-year-old Michael was beaten to death by his mother's boyfriend, who subsequently was convicted of the child's murder.

The estates of Sylvia Brown and Michael Clark brought suits in different federal district courts,[181] pursuant to section 1983, against employees of the state and county

---

[173] *Id.* at 187, 188.

[174] *Id.* at 187.

[175] CAT scan is the abbreviation for "computerized axial tomography." STEDMAN'S MEDICAL DICTIONARY: 5TH UNABRIDGED LAWYER'S EDITION (1982). It is defined as "the gathering of anatomical information from a cross-sectional plane of the body, presented as an image generated by a computer synthesis of x-ray transmission data obtained in many different directions through the given plane." *Id.*

[176] *Jensen*, 747 F.2d at 187. A subdural hematoma is a mass of blood, usually clotted, located beneath the outer surface of the brain. STEDMAN'S MEDICAL DICTIONARY: 5TH UNABRIDGED LAWYER'S EDITION (1982).

[177] *Jensen*, 747 F.2d at 187.

[178] *Id.* at 187–88.

[179] *Id.* at 188.

[180] *Id.* The Clarks did not answer letters and telephone calls and several visits to various addresses failed to locate the Clark family.

[181] The estate of Sylvia Brown filed suit in the United States District Court for the District of South Carolina, Columbia Division. *See* Jensen v. Conrad, 570 F. Supp. 91 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985). The estate of Michael Clark filed suit in the United States District Court for the District of South Carolina, Anderson Division. *See* Jensen v. Conrad, 570 F. Supp. 114 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985).

Departments of Social Services.[182] The plaintiffs alleged that the children possessed a constitutional right, guaranteed by the fourteenth amendment, to receive protection by the state from harm inflicted by their caretakers and that the failure of the state to prevent the children from being abused deprived them of this right.[183] In the *Brown* case, the district court held that the child protection agency had no constitutional duty to protect Sylvia and therefore dismissed the complaint.[184] In the *Clark* case, the district court found that when an individual is legally entrusted to the care or protection of government officials, the failure to protect that individual could constitute a deprivation of life without due process of law in violation of the fourteenth amendment.[185] The court held, however, that because case law had not clearly established this right to receive protection, the defendants were entitled to raise the defense of governmental immunity,[186] and the court granted summary judgment in their favor.[187]

The estates of the deceased children appealed the decisions of the district courts to the Fourth Circuit Court of Appeal, and the two cases were consolidated for appeal.[188] The *Jensen* majority began its analysis by stating that the first inquiry in any section 1983 suit is to determine whether the plaintiff has been deprived of a right secured by the Constitution or laws of the United States.[189] The plaintiffs alleged that the failure of the child protection system to intervene and protect the children from their parents' abuse deprived the children of liberty rights secured by the fourteenth amendment due process clause.[190] In determining whether the children possessed such a right to protection, the Fourth Circuit first examined the line of cases beginning in 1976 with *Estelle v. Gamble*[191] and culminating in 1983 with *Fox v. Custis*.[192] The court concluded that these cases

[182] *Jensen*, 747 F.2d at 187. The complaints named as defendants the Commissioner of the South Carolina Department of Social Services, members of the State Board of the Department of Social Services, members of the board of the Richland and Anderson County Departments of Social Services, and various state-employed caseworkers. *Id.*

[183] *Id.* at 190.

[184] *Id.* at 189–90. The district court in the *Brown* case held that the fourteenth amendment only created a right to receive protection from the state when the individual claiming the right was in the state's legal custody or under its direct supervisory control. *Id.* Because the complaint did not allege that the state had assumed custody or direct supervisory control of Sylvia Brown, the district court held that the complaint failed to state a claim upon which relief could be granted and dismissed the suit. *Id.* at 190.

[185] *Id.* at 189.

[186] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981) (government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights).

[187] *Jensen*, 747 F.2d at 189. The district court's granting of summary judgment for the defendants in the Clark case did not cover the individual caseworkers. *Id.* at 187 n.1. The district court found that it was impossible to determine from the complaint which of the caseworkers were personally involved in the investigation concerning the Clark family. *Id.* Thus, the district court granted the plaintiff additional time to file a more detailed complaint concerning the individual involvement of the caseworkers. *Id.* Therefore, because the district court had not yet entered a final judgment as to the claims against the individual caseworkers, the Fourth Circuit dismissed the appeal by the caseworkers. *Id.*

[188] *Id.* at 187.

[189] *Id.* at 190 (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)).

[190] *Id.*

[191] 429 U.S. 97 (1976). For a discussion of *Estelle*, see *supra* notes 39–44 and accompanying text.

[192] *Jensen*, 747 F.2d at 190–94. For a discussion of Fox v. Custis, 712 F.2d 84 (4th Cir. 1983), see *supra* notes 75–86 and accompanying text.

established an individual's right to receive the state's protection, founded in the fourteenth amendment, if a special relationship exists between the state and the individual claiming the right.[193]

Having determined that a constitutional right to receive protection by the state could exist, the *Jensen* majority next addressed the question of whether the representatives of the deceased children properly could claim that right in the present case.[194] While recognizing that the *Fox* decision firmly established the fourteenth amendment right to receive protection upon the finding of a special relationship, the *Jensen* court stated that the deaths of the abused children occurred before the *Fox* case was decided.[195] Thus, the *Jensen* court found that the defendants could not reasonably have been expected to know that their failure to protect the children from abuse could violate the fourteenth amendment.[196] The *Jensen* majority stated that even if the defendants could have foreseen the *Fox* court's holding that a constitutional duty to provide protection can arise given a special relationship, it was not clear that the defendants could have foreseen that special relationships had existed between the state and the abused children in the cases presented.[197] The court noted that because of the absence of specific guidelines to determine what constitutes a special relationship and the "close" nature of the facts in the present cases, "[it] would be hard-pressed to conclude that the law as it affected the defendants was 'clearly established.'"[198] The court determined, therefore, that the defendants were entitled to the defense of qualified immunity under the standard set forth by the Supreme Court in *Harlow v. Fitzgerald*,[199] in which public officials will not be held liable if the law was not clearly established at the time of the alleged wrongdoing.[200] Accordingly, the *Jensen* court found that the complaints should be dismissed.[201]

Because the *Jensen* court dismissed the claims on the basis of qualified immunity, it did not provide a definition of the type of special relationship necessary to give rise to the right of protection.[202] In addition, the court did not decide whether a special relationship had been created between the state and either of the abused children in *Jensen*.[203] The court did identify, however, three factors that it would look to in assessing whether or not a special relationship existed between the state and an individual claiming the right to protection.[204] The first factor which the court identified was whether the victim or the perpetrator of the incident was in the legal custody of the state at the time of the incident or prior to it.[205] In the *Jensen* case, the court stated, the children and their parents who abused them were not in the custody of the state but instead, were members

---

[193] *Jensen*, 747 F.2d at 194. For a discussion of the historical development of the right to receive protection by the state, see *supra* notes 29–86 and accompanying text.

[194] *Jensen*, 747 F.2d at 194.

[195] *Id.*

[196] *Id.* at 195.

[197] *Id.* at 194.

[198] *Id.*

[199] 457 U.S. 800, 818 (1982).

[200] *Jensen*, 747 F.2d at 195. For a discussion of governmental immunities in Section 1983 suits, see *supra* notes 112–67 and accompanying text.

[201] *Jensen*, 747 F.2d at 196.

[202] *Id.* at 194 n.11.

[203] *Id.* at 194–95.

[204] *Id.* at 194 n.11.

[205] *Id.*

of the general public.[206] This fact, according to the *Jensen* majority, weighed against the finding of a special relationship.[207]

The second factor identified by the *Jensen* court was whether the state had expressly stated its desire to provide protection to a particular class of specific individuals.[208] The court stated that the preamble of the South Carolina Child Protection Act clearly expressed a desire to locate and protect potentially abused children.[209] Nevertheless, the court stated that this factor did not argue convincingly for or against the finding of a special relationship in the *Jensen* case.[210]

The third factor which the *Jensen* court identified as important in a special relationship analysis was whether the state knew of the plight of the victim.[211] The court found there was some evidence in the *Jensen* case that the state knew the children were being abused.[212] The court stated that this factor therefore strengthened the argument that a special relationship had been established.[213] The court concluded that although it had no need to decide whether special relationships had been created between the state and the deceased children, the factors present in the cases before it would make the resolution of that question a particularly close one.[214]

In concluding its analysis, the Fourth Circuit in *Jensen* recognized that its decision left the plaintiffs without a remedy in the federal courts.[215] The court noted, however, that the plaintiffs still had several causes of action available to them in state court.[216] Although declining to express a view as to the plaintiffs' rights under the tort law of South Carolina, the *Jensen* court observed that the growing tendency in the common law has been to hold government officials liable for failing to protect the public from "dangerous criminals and lunatics."[217]

---

[206] *Id.*

[207] *Id.*

[208] *Id.* at 195 n.11.

[209] *Id.* The South Carolina Child Protection Act provides, in part: "recognizing that abused and neglected children need protection, it is the purpose of this article to save them from injury and harm . . . ." S.C. CODE ANN. § 20–7–480 (Law. Co-op. 1976).

[210] Despite the preamble of the South Carolina Protection Act, the *Jensen* court found it "difficult to conclude that the state intended to 'single out' the decedents and place them in its own care" as the state had done with prisoners whom it had incarcerated. *Jensen*, 747 F.2d at 195 n.11.

[211] *Jensen*, 747 F.2d at 195 n.11.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 194 n.11. Judge Murnaghan, in a concurring opinion, agreed with the majority's holding that the defendants were entitled to the defense of qualified immunity. *Id.* at 196 (Murnaghan, J., concurring). He disassociated himself, however, from the majority opinion's finding that the plaintiffs had established a special relationship between the deceased children and the child protection agencies. *Id.* Judge Murnaghan stated that because of the importance of the right of parents to control the destiny of their children, the Supreme Court might decide that the constitution imposes no duty on the states to protect abused children from the violence of their parents. *Id.* Stating that the question of whether the state has such a constitutional duty is not an easy one to resolve, Judge Murnaghan found that the issue was unnecessary to the resolution of this case. *Id.* Judge Murnaghan reasoned that whether or not a duty to protect abused children exists, such a duty was not established clearly at the time of the deprivations in this case. *Id.*

[215] *Id.* at 196.

[216] *Id.*

[217] *Id.* (citing Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)). An in-depth discussion of the liability of the government and its workers based on state tort law for failing to protect members of the general public is beyond the scope of this article. The plaintiffs in *Jensen*, however, probably

B. *Estate of Bailey v. County of York*

In the 1985 case *Estate of Bailey v. County of York*,[218] the Third Circuit Court of Appeals addressed a section 1983 claim filed by the estate of a deceased child who had been beaten to death by her mother and her mother's boyfriend. The estate alleged that the county child protection agency which had investigated a report of the child's abuse had, in failing to protect the child, deprived her of rights guaranteed by the fourteenth amendment.[219] The Third Circuit held that the complaint stated a proper cause of action against the county under section 1983.[220] The court found that based on the allegations of the complaint, a special relationship had been created between the abused child and the county child protection agency, thus giving rise to a constitutional duty upon the county to protect the child.[221] Therefore, the Third Circuit reversed the district court's dismissal of the claim and remanded the case to the district court to give the plaintiffs an opportunity to prove their allegations.[222]

In *Bailey*, the complaint alleged that on January 11, 1982, relatives filed reports of suspected abuse concerning five-year-old Aleta Bailey, who lived with her mother and her mother's boyfriend, Larry Hake.[223] The following day an employee of the county child protection agency took Aleta to the hospital, where a physician confirmed that Hake had abused Aleta.[224] That day, Aleta was released from the hospital and placed with her mother's aunt. Aleta's mother was informed by the child protection worker that she had twenty-four hours to make arrangements for Hake to move from her home and that thereafter Aleta would be returned to her custody. The following night, Aleta was

---

could not have maintained a successful claim under South Carolina tort law. Traditional common law doctrines of governmental immunity have prevented states, as well as state agencies and political subdivisions, from being subjected to civil suits without the consent of the state. W. PROSSER & W. KEETON ON THE LAW OF TORTS, § 131 (5th ed. 1984). Although these immunity doctrines have been abrogated to a great extent in many states, *see id.*, South Carolina continues to hold governmental units immune from civil damage actions, subject to a few narrow exceptions. *See* Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E.2d 49 (1981). Furthermore, even in jurisdictions where governmental immunities have been largely abrogated, many jurisdictions have retained the immunities for discretionary actions of the government. W. PROSSER & W. KEETON ON THE LAW OF TORTS, § 131 (5th ed. 1984).

In addition to the immunity of governmental units, public officials have traditionally been protected from personal liability by varying scopes of immunity for discretionary, as opposed to ministerial, functions. *Id.* at § 132. A court construing the duties of child protection employees in determining what actions to take in child abuse proceedings likely would find these duties discretionary in nature. *See Jensen*, 747 F.2d at 189. The South Carolina Child Protection Act provides that local child protection agencies may petition for court intervention on behalf of abused children if the agency deems it necessary, but the Act does not expressly require the agency to intervene. S.C. CODE ANN. § 20–7–650(J). Therefore, it would appear that South Carolina tort law would have foreclosed the plaintiffs in *Jensen* from recovery against both the government and individual defendants.

[218] 768 F.2d 503, 505 (3d Cir. 1985).

[219] *Id.*

[220] *Id.* at 511.

[221] *Id.* at 510–11.

[222] *Id.* at 511.

[223] *Id.* at 505.

[224] *Id.* The physician informed the child protection worker that Hake's actions in striking Aleta had been excessive. *Id.* The physician also advised the worker that Hake should not have access to Aleta,and that Aleta should be taken away from her mother if necessary to deny Hake access to her. *Id.*

returned to her mother, and one month later she died from physical injuries that were inflicted by her mother and Hake.[225]

The administrator of Aleta's estate and Aleta's father brought suit in federal district court in Pennsylvania, pursuant to section 1983.[226] The plaintiffs alleged that defective policies and procedures used by the county child protection agency resulted in Aleta's death, thereby depriving Aleta of her right to life and Aleta's father of his right to parenthood.[227] The district court found that the state can be held liable for unconstitutional conduct resulting from omissions only if a person suffers injuries while in the legal custody of the state or if the person whose conduct causes the injuries is under the direct control or supervision of the state.[228] Therefore, the district court found that the complaint did not state a cause of action and dismissed the case.[229] The plaintiffs appealed the district court's dismissal of the claim to the Third Circuit Court of Appeals.[230]

In analyzing the claim, the first question addressed by the Third Circuit was whether the allegations of the complaint were sufficient, if proven, to meet the threshold requirements necessary to impose liability upon the county under section 1983.[231] The court noted that a municipality may not be held liable in a section 1983 action for injuries inflicted by its agents or employees on a respondeat superior theory.[232] The *Bailey* court stated that a municipality may be subjected to such a suit, however, when the injuries complained of are inflicted through the carrying out of the municipality's official policies.[233] According to the *Bailey* court, the complaint alleged that Aleta Bailey died as a result of the county child protection agency's defective policies and procedures.[234] The court held that some of the policies and procedures alleged in the complaint, if proven, were sufficiently connected to the alleged constitutional deprivations to support a section 1983 claim against the county.[235] These policies, the *Bailey* court stated, included not seeking court intervention in cases involving serious child abuse where only one incident of such abuse existed, giving families of suspected abuse victims advance notice of home visits, not checking the observations of independent witnesses, and failing to notify natural parents of the nature and extent of child abuse.[236] Thus, the Third Circuit held that the complaint, in alleging defective policies and practices of the county child pro-

---

[225] *Id.* Hake was convicted of first degree murder and Aleta's mother was convicted of third degree murder in connection with the child's death. *Id.* at 505 n.1.

[226] *See* Estate of Bailey v. County of York, 580 F. Supp. 794 (M.D. Pa. 1984), *rev'd.*, 768 F.2d 503 (3d Cir. 1985).

[227] 580 F. Supp. at 795.

[228] *Id.* at 797. The district court found that because Aleta was not in the state's custody when she was killed, nor were her mother and Hake under the direct control or supervision of the state, the state could not be held responsible for Aleta's death. *Id.*

[229] *Id.* The defendants also filed motions to dismiss on the basis of immunity from suit under Section 1983. *Id.* at 795. Because the district court dismissed the action on the basis that the plaintiffs had not alleged sufficiently a Section 1983 claim, it found no need to address the immunity claims. *Id.* at 797.

[230] *See* Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985).

[231] *See id.* at 506–08.

[232] For a discussion of respondeat superior, see *supra* note 129.

[233] *Bailey*, 768 F.2d at 506 (citing Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694 (1978)).

[234] *Id.*

[235] *Id.*

[236] *Id.* at 507 n.4.

tection agency as the cause of the complained-of injuries, met the threshold requirement necessary to impose liability on the county under section 1983.[237]

The next issue addressed by the *Bailey* majority was the standard of culpable conduct necessary to be proved in order to support a section 1983 cause of action.[238] The Third Circuit stated that in order to meet the standard of conduct necessary to recover in a section 1983 action, the complained-of conduct which causes the constitutional violation alleged must rise to the level of gross negligence, deliberate indifference, or reckless disregard.[239] The *Bailey* court found that the complaint, fairly read, alleged conduct by the agency and its supervisory officials, in the form of defective policies and practices, which amounted to gross negligence, deliberate indifference, or reckless disregard for the safety of the abused child.[240] Thus, the Third Circuit held that the complaint alleged the type of conduct on the part of state officials which is vindicable under section 1983.[241]

The *Bailey* court went on to state, however, that although the complaint alleged the necessary standard of conduct, the plaintiffs would have a difficult burden in proving the existence of that conduct at trial.[242] The court pointed out that an error in judgment, an unforeseen tragic event, a good faith but misinformed professional decision, or mere negligence, would not be sufficient to impose liability under section 1983.[243] Furthermore, the Third Circuit stated, to the extent that the plaintiffs relied on the policies of the agency to impose liability, they would have to prove that the policies were so far below the accepted professional standards as to permit an inference that the agency was recklessly indifferent to the safety of the child.[244]

The *Bailey* majority next turned to the question of whether the child protection agency owed any constitutional duty to provide protection to Aleta from the abuse inflicted by her mother and her mother's boyfriend.[245] The court noted that the district court had dismissed the claim by reasoning that because Aleta was not in the agency's legal custody, the agency had no constitutional duty to protect her.[246] In reversing the district court's decision, the court cited *Jensen v. Conrad*[247] for the proposition that a right to receive protection by the state could arise upon the finding of a special relationship between the state and an individual and that such a right to protection was not limited to situations where the individual claiming the right was in the state's custody.[248] The

---

[237] *Id.* at 508. The *Bailey* court noted that the complaint also alleged that the constitutional deprivations were caused by the actions of the administrator of the county child protection agency, in her official capacity, in "establishing, accepting, and employing" the defective policies. *Id.* The court pointed out that a suit brought against an official in his or her official capacity is merely another way of naming the entity that the official represents as the defendant, which in this case was the county. *Id.* at 508 n.5 (citing Brandon v. Holt, 105 S.Ct. 873, 878 n.21 (1985)).

[238] *Id.* at 508.

[239] *Id.* For a discussion of the standard of state conduct necessary to be proven in order to recover in a Section 1983 claim for the deprivation of fourteenth amendment due process rights, see *supra* notes 87–111 and accompanying text.

[240] *Bailey*, 768 F.2d at 508.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* at 508–09.

[246] *Id.* (citing Estate of Bailey v. County of York, 580 F. Supp. 794, 797 (M.D. Pa. 1984)).

[247] 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985).

[248] *Bailey*, 768 F.2d at 509 (citing *Jensen*, 747 F.2d at 194). The *Bailey* majority traced the

majority, although refusing to provide a general definition of the special relationship necessary to give rise to the right of protection, held that based on the facts alleged in the complaint, a special relationship had been created between the county child protection agency and Aleta.[249] The Third Circuit stated that there was evidence that the county had notice that she was being abused and that the agency was aware that Aleta faced special dangers not faced by the public at large.[250] When the agency knows that a child has been abused, the *Bailey* court reasoned, the argument that a special relationship has been established is strengthened.[251] Thus, the court held, based on the special circumstances alleged in the complaint, the county owed a constitutional duty to Aleta to protect her from child abuse.[252]

The final issue addressed by the *Bailey* majority was causation.[253] The court noted that in *Martinez v. California*,[254] the Supreme Court had dismissed the plaintiff's claim on the basis that the injury complained of was too remote a consequence of the alleged actions of the defendants to hold them liable under section 1983.[255] In distinguishing *Martinez*, the *Bailey* court stated that the child protection agency was aware that Aleta, as distinguished from the rest of the public, faced special dangers, whereas the defendants in *Martinez* were unaware that the victim faced any special dangers.[256] Thus, the *Bailey* majority held that it could not dismiss the complaint as a matter of law on causation grounds.[257] Therefore, the Third Circuit concluded that the complaint stated a proper cause of action under section 1983 and remanded the case to the district court.[258]

---

development of the notion that a duty of protection can arise upon the state based upon the finding of a special relationship between the state and an individual. *Id.* at 510. For a discussion of this development, see *supra* notes 29–86 and accompanying text.

[249] *Bailey*, 768 F.2d at 511.

[250] *Id.* at 510 (quoting Martinez v. California, 444 U.S. 277, 285 (1980)). In finding that a special relationship had been established between the county child protection agency and Aleta Bailey, the court noted several factors: the agency had notice that there was evidence of abuse, took Aleta into custody, received confirmation of the abuse by a physician, placed Aleta into protective custody, informed the child's mother that Aleta would be returned to her custody when she made arrangements for her boyfriend to move from her home, and returned Aleta to her mother without adequately investigating the whereabouts of the child, the mother, and the mother's boyfriend. *Id.*

[251] *Id.* at 510–11 (quoting *Jensen*, 747 F.2d at 195 n.11).

[252] *Id.* at 511.

[253] *See id.*

[254] 444 U.S. 277, 285 (1980).

[255] *Bailey*, 768 F.2d at 511. For a discussion of *Martinez*, see *supra* notes 50–56 and accompanying text.

[256] *Bailey*, 768 F.2d at 511.

[257] *Id.* The *Bailey* majority noted that it had not addressed other legal defenses upon which the district court had not ruled. *Id.* The defendants had filed a motion to dismiss in the district court arguing that they were entitled to immunity. *Bailey*, 580 F. Supp. at 795. Because the district court dismissed the action on the grounds that the defendants owed no constitutional duty to protect Aleta from abuse, the district court did not rule on the immunity claim. *Id.* at 797. On remand to the district court, the defendants would be free to raise the defense of immunity again.

[258] *Id.* As of the writing of this note, the suit was still pending on remand to the Pennsylvania district court.

In a dissenting opinion, Judge Adams disagreed with the majority's view that the case was distinguishable from *Martinez*. *Id.* at 511 (Adams, J., dissenting). The dissent found that the death of Aleta Bailey was too remote a consequence of the actions of the child protection agency to hold the defendants liable under section 1983. *Id.* at 513. Judge Adams stated that, as in *Martinez*, substantial time had elapsed between the child protection agency's control of Aleta and her death,

III. The Government and its Workers Should Be Absolutely Immune from Suit for Failing to Prevent Child Abuse

As the decisions in *Jensen v. Conrad*[259] and *Estate of Bailey v. County of York*[260] indicate, a plaintiff seeking to impose liability on the government and its child protection workers for failing to protect children from abuse inflicted by their parents will face a heavy burden in meeting the elements necessary to recover under section 1983. This heavy burden is appropriate for plaintiffs seeking to recover for the government's failure to prevent child abuse because the government and its workers should not be liable for decisions, made in the face of incomplete and ambiguous information, which have the unfortunate result of allowing a child to continue to be abused. The cases make clear, however, that although a plaintiff will face a heavy burden, such a suit ultimately may lead to damage awards against the government and child protection workers. The potential liability of the government and its workers in these cases will result in several negative practical consequences. Based on these negative consequences, the government and its workers should, for public policy reasons, be absolutely immune from civil suit for failing to prevent parents from abusing their children.

A. *The Courts Have Not Provided Clear Guidance to Determine When The State Is Under a Constitutional Duty to Protect Children from Child Abuse*

Both the *Jensen* and *Bailey* courts accepted the proposition that although no general duty upon the government exists under the fourteenth amendment to protect persons from the actions of other private individuals, such a duty can arise given a special relationship between the government and the individual claiming the right to protection.[261] Neither court, however, provided a comprehensive definition of the type of special relationship necessary to give rise to the duty of protection.[262] Nevertheless, the decisions do provide a framework for assessing when a court might find such a special relationship and resulting duty of protection to exist between the government and an abused child in future cases. Based on the *Jensen* and *Bailey* cases, two inquiries emerge

---

and Aleta was killed by two persons who were in no sense agents of the state. For these reasons, Judge Adams believed that the decision in *Martinez* required the court to dismiss the complaint on causation grounds. Judge Adams recognized that unlike the defendants in *Martinez*, the child protection agency may have been aware that Aleta faced dangers not faced by the members of the public at large. Judge Adams stated, however, that he did not believe the steps taken by the child protection agency created the sort of special relationship that might support the finding of a causal link between the actions of the agency and the abuse inflicted on Aleta.

In addition to finding that the court should have dismissed the complaint because the death of Aleta was too remote a consequence of the county agency's actions to hold the state officials responsible under § 1983, Judge Adams stated that invoking the Civil Rights Act for this type of suit extended the Act beyond the purposes for which Congress enacted it. He noted that Congress enacted Section 1983 primarily to deal with acts of discrimination by state officials and that the courts should not extend this legislation to contexts far beyond what Congress originally intended. *Id.*

[259] 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985). For a discussion of *Jensen*, see *supra* notes 168–70 and accompanying text.

[260] 768 F.2d 503 (3d Cir. 1985). For a discussion of *Bailey*, see *supra* notes 218–58 and accompanying text.

[261] *See Bailey*, 768 F.2d at 510–11; *Jensen*, 747 F.2d at 194.

[262] *See Bailey*, 768 F.2d at 511; *Jensen*, 747 F.2d at 194 n.11.

as critical in determining whether or not a special relationship exists between the government and an abused child: was the child in the government's custody, and was the government aware that the child was being subjected to abuse?

The Third Circuit in *Bailey*, in finding that a special relationship existed on the facts of the case before it, noted that the county child protection agency had taken the abused child into custody and placed her in the protective custody of a relative before returning her to her home where she was fatally abused.[263] The Fourth Circuit in *Jensen* stated that a custodial relationship between the state and an individual was an important factor in the special relationship analysis.[264] Thus, the cases indicate that a plaintiff likely will be able to establish a special relationship and the resulting constitutional duty upon the government to protect a child from abuse if the child was in state custody at the time of the abuse or prior to it.[265]

It is clear, however, that the lack of a custodial relationship between the government and an abused child will not necessarily preclude the finding of a special relationship. In the *Jensen* case, the Fourth Circuit specifically found that the right to be protected by the government was not limited to situations where an individual was in the government's custody.[266] In addition, although the custodial relationship between the abused child and the county child protection agency in *Bailey* was an important factor in the Third Circuit's finding of a special relationship, the *Bailey* court also pointed out that a constitutional duty to protect persons who were not in custody had been imposed on state and local entities.[267] Therefore, although a child who has been taken into the government's custody can claim a constitutional right to receive protection from further child abuse, the lack of a custodial relationship will not preclude the finding of such a right.[268]

Absent a custodial relationship between the state and an abused child, the *Jensen* and *Bailey* decisions indicate that a duty upon the government to protect a child from abuse will exist if the government is aware that a particular child is being abused.[269] In *Jensen*, the Fourth Circuit stated that there was evidence that the state knew the children were being abused and that this fact strengthened the argument that a special relationship had been formed.[270] The Third Circuit in *Bailey*, in determining that a special relationship existed on the facts alleged in the complaint, noted that the county child protection agency was aware of evidence that the child was being abused and received specific confirmation of the abuse by a physician who examined the child.[271]

---

[263] *See Bailey*, 768 F.2d at 510–11.

[264] *See Jensen*, 747 F.2d at 195 n.11.

[265] The Second Circuit's decision in Doe v. New York City Dep't of Social Servs. supports the view that a court likely would find the presence of a special relationship and the resulting duty of protection based solely on a custodial relationship between the state and a child. 649 F.2d 134 (2d Cir. 1981). The *Doe* court found that an agency which had placed a child in a foster home could be held responsible under Section 1983 for the abuse inflicted upon the child by her foster father, even though the agency had no actual knowledge that the foster father was abusing the child. *Id.* at 138, 144–45. Although the *Doe* court did not conduct a special relationship analysis, it did state that when an individual is placed in the custody of the state, affirmative duties are sometimes placed on the state, the nonperformance of which may violate the constitution. *Id.* at 141.

[266] *Jensen*, 747 F.2d at 194.

[267] *Bailey*, 768 F.2d at 510.

[268] *See id.*; *Jensen*, 747 F.2d at 194.

[269] *See Bailey*, 768 F.2d at 510–11; *Jensen*, 747 F.2d at 195 n.11.

[270] *Jensen*, 747 F.2d at 195 n.11.

[271] *Bailey*, 768 F.2d at 510.

In summary, the *Jensen* and *Bailey* cases establish that a constitutional duty to protect a child from the abuse inflicted by a parent may arise upon the finding of a special relationship between the government and the child.[272] Plaintiffs probably will succeed in establishing that a special relationship exists between the government and an abused child by showing that the child had been placed in the custody of the government while or prior to being abused. In addition, a court probably will find a special relationship and resulting duty to protect a child from abuse upon a showing that the government was aware that the child was being abused.

Although the above factors emerge from these cases, the *Jensen* and *Bailey* decisions unfortunately do not provide child protection workers with clear guidance. Neither the *Jensen* nor the *Bailey* court provided a comprehensive definition of the type of evidence that would permit the finding of a special relationship.[273] Instead, both courts indicated that they would determine whether or not a special relationship exists in future cases by looking at the circumstances of each particular case.[274] The failure of the *Jensen* and *Bailey* courts to define clearly the circumstances in which they will find a special relationship leaves child protection workers uncertain as to when they are under a constitutional duty to protect children from abuse.

B. *The Required Level of Culpable Conduct Will Not Be Present in Most Instances When Child Protection Workers Fail to Prevent Child Abuse*

In addition to having the burden of establishing that an abused child possessed a constitutional right to protection, a plaintiff seeking to hold the government and its employees liable under section 1983 for failing to protect a child from abuse also will have the burden of establishing that the type of governmental conduct necessary to recover in such a suit was present.[275] Although section 1983 itself does not impose a standard of conduct requirement, a plaintiff must establish the violation of a constitutional right in order to recover in a section 1983 action.[276] In *Daniels v. Williams*, the Supreme Court held that negligent conduct on the part of government officials which causes unintended loss or injury to life, liberty, or property does not violate the fourteenth amendment due process clause.[277] The *Daniels* Court left open the possibility that less than intentional conduct by government officials, such as recklessness or gross negligence, violates the due process clause.[278] Therefore, a plaintiff seeking to recover in a section 1983 suit based on an alleged violation of the fourteenth amendment due process clause will have to prove that the government's failure to protect a child from

---

[272] *Id.* at 510–11; *Jensen*, 747 F.2d at 194.

[273] *Bailey*, 768 F.2d at 511; *Jensen*, 747 F.2d at 194.

[274] The *Bailey* court held that on the facts of the case before it, the plaintiff had alleged sufficiently the presence of a special relationship in the complaint. 768 F.2d at 510–11. See *supra* note 250 for the factors the *Bailey* court found sufficient to support that finding. The *Jensen* court listed three factors it would look to in future cases in conducting a special relationship analysis. 747 F.2d at 194 n.11. *See also* notes 250–58. The presence or absence of any particular factor, however, would not appear to be decisive to the *Jensen* court. *See id.*

[275] *See* Daniels v. Williams, 106 S. Ct. 662, 664 (1986).

[276] *Id.*

[277] *Id. See also* Davidson v. Cannon, 106 S. Ct. 668, 670, 671 (1986). For a discussion of *Daniels* and *Davidson*, see *supra* notes 87–111 and accompanying text.

[278] *Daniels*, 106 S. Ct. at 667 n.3.

abuse was the result of governmental conduct that consisted not merely of a lack of due care, but instead consisted of at least recklessness or gross negligence.[279]

Conduct which rises to the level of recklessness or gross negligence probably will not be present in most situations in which the government fails to protect a child from abuse. In investigating reports of suspected child abuse, conflicting, ambiguous, and incomplete evidence often confronts child protection workers.[280] Based on this evidence, workers must exercise their professional judgment in deciding whether abuse exists in any given case.[281] Furthermore, if a child protection worker makes a determination that a child has been abused, he or she again must exercise professional judgment in deciding what type of action is necessary to ensure the future safety of the child.[282] For example, the worker must determine whether the child must be removed from the family home, or whether a less intrusive means of state intervention into the family will be sufficient to protect the child.[283] Therefore, child protection workers must use a great deal of discretion in determining what actions to take in response to a report of suspected abuse.[284]

In the event that a worker's determination of the appropriate action to take in a particular case has the unfortunate and unintended result of allowing a child to suffer further abuse, liability should not result under section 1983. In order to recover, a plaintiff will have to prove that the worker's conduct in choosing the most appropriate course of action rose at least to the level of gross negligence or recklessness.[285] As the Third Circuit stated in *Bailey*, an error in judgment, an unforeseen tragic event, a good

---

[279] *See id.* at 666, 667 n.3. Courts have difficulty drawing the line between grossly negligent or reckless conduct and conduct that is merely negligent. *See* W. PROSSER & W. KEETON ON THE LAW OF TORTS § 34 (5th ed. 1984). The usual meaning associated with recklessness and gross negligence is conduct which is in "disregard of a known or obvious risk that was so great to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Id.* Mere negligence, however, usually is described as the failure to exercise reasonable care. *Id.* The uncertain and vague standards associated with these differing standards of conduct are extremely difficult to apply in a given fact situation. *Id.*

[280] *See generally* Besharov, *Future Directions*, *supra* note 3, at 163; Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 496 (1978) [hereinafter Besharov, *Legal Aspects*]; CHILD PROTECTIVE SERVICES: A GUIDE FOR WORKERS 47, 48 (1979 U.S. DHEW) [hereinafter GUIDE FOR WORKERS]. For a discussion of the conflicting evidence which faces child protection workers in investigating reports of suspected abuse, see *infra* notes 298–303 and accompanying text.

[281] GUIDE FOR WORKERS, *supra* note 280, at 45, 48 (assessing the validity of reports of child abuse is a combination of hard evidence, professional judgment, and gut reaction); Besharov, *Legal Aspects*, *supra* note 280, at 501 (verifying to a certitude reports of suspected child abuse is almost always difficult and often impossible). *See also infra* notes 304–05 and accompanying text.

[282] *Guide for Workers*, *supra* note 280, at 45, 48. *See also* Besharov, *Legal Aspects*, *supra* note 280, at 502 (even after child protection workers determine that a child is being abused they often cannot assess the immediate danger to the child or the treatment needs of the family).

[283] For a discussion of the types of intervention methods available to child protection workers in providing services to abuse victims and their families, see *infra* notes 306–10 and accompanying text.

[284] *See* Whelehan v. County of Monroe, 558 F. Supp. 1093, 1099 (W.D.N.Y. 1983) ("[A] social service worker is . . . called upon to exercise discretion at crucial points in cases of suspected child abuse . . . in deciding whether the available information warrants removal of the child from the home . . . ."). *See also* Boyer v. Spero, No. 84–CV–219 (N.D.N.Y. July 2, 1985) (quoting *Whelehan*, 558 F. Supp. at 1099).

[285] *See Daniels*, 106 S. Ct. at 666, 667 n.3.; *Davidson*, 106 S. Ct. at 670.

faith but misinformed professional decision, or mere negligence, will not be sufficient to impose liability under section 1983.[286] Although the line between gross negligence and mere negligence is difficult to draw,[287] only when a child protection worker disregards clear evidence that a child has been abused and is in danger of further abuse should a court find that the worker's conduct amounts to the grossly negligent or reckless conduct which is required to impose liability.[288]

A plaintiff seeking to impose liability not only on an individual child protection worker but also on the government for the actions of its employee will face additional burdens in establishing the standard of conduct necessary to recover. In order to impose liability on a local government under section 1983, a plaintiff will have to prove that the execution of an official government policy by a government agent or employee resulted in the injuries suffered by the child.[289] In addition, in order to establish a deprivation of fourteenth amendment due process rights, the plaintiff will have the burden of proving that the adoption of the official government policy at issue was the result of culpable conduct on the part of policy making officials that rose to the level of recklessness or gross negligence.[290] As the Third Circuit indicated in *Bailey*, policies which are accepted widely by government child protection agencies and are reasonably considered sufficient to protect abused children will not give rise to an inference of the type of conduct necessary to establish a violation of the fourteenth amendment.[291]

In summary, a plaintiff will have a difficult burden in establishing that the government and its workers who fail to protect a child from abuse engaged in the type of conduct required to support the finding of a violation of the fourteenth amendment due process clause and enable recovery under section 1983.[292] A mere mistake in judgment or even the failure to exercise due care will not be sufficient to impose liability in such an action.[293] Plaintiffs will have to prove that the conduct of government officials who fail to protect an abused child rose to the level of at least gross negligence or recklessness.[294]

The difficult burden confronting plaintiffs who seek to recover damages for the government's failure to protect abused children is justified. The government and its child protection workers should not be subjected to civil liability for judgments, made in the face of ambiguous and incomplete evidence, which have the unintended result of allowing a child to suffer further injuries from an abusing parent. Such erroneous judgments by child protection officials do not amount to the type of arbitrary abuse of governmental power which the fourteenth amendment due process clause historically has been applied to protect against.[295]

---

[286] *Bailey*, 768 F.2d at 508.

[287] *See supra* note 279.

[288] *See Bailey*, 768 F.2d at 508.

[289] *See* Monell v. Dep't of Social Servs., 436 U.S. 658, 694 (1978). *See also supra* note 129 and accompanying text.

[290] *Bailey*, 768 F.2d at 508. *See also Daniels*, 106 S. Ct. at 666, 667 n.3.

[291] *Bailey*, 768 F.2d at 508.

[292] *Id.* at 508, 511.

[293] *See id.* at 508. *See also Daniels*, 106 S. Ct. at 666.

[294] *See Daniels*, 106 S. Ct. at 666, 667 n.3.

[295] *See id.* at 665. A plaintiff also will have the burden of establishing a causal link between the government's conduct and the injuries suffered by an abused child in order to recover in a section 1983 claim. *See Bailey*, 768 F.2d at 511. Section 1983 provides a cause of action against the govern-

C. *The Practical Implications of Governmental Liability for Failing to Prevent Child Abuse — A Rationale for Absolute Immunity*

As the *Jensen* and *Bailey* decisions indicate, a plaintiff seeking to impose liability on the government and its child protection workers for failing to prevent child abuse will confront difficult burdens in establishing the elements necessary to recover in a section 1983 action.[296] Despite these difficult burdens, the cases clearly indicate that recovery in such a suit is possible. Although the protection of children from the abuse of their parents is clearly a desirable social objective, subjecting the government and its workers to potential liability for failing to protect abused children will have several far-reaching and harmful repercussions. First, the potential for liability will deter child protection workers from exercising their professional judgment in child abuse proceedings and thus inhibit the effective performance of their duties. In addition, the threat of liability if a child suffers further injuries from abuse likely will result in needless and potentially harmful government overintervention into the families of suspected abuse victims. Furthermore, substantial financial burdens will be imposed on the child protection system as a result of the possibility of liability. Based on these negative practical implications, the government and its child protection workers should be absolutely immune from damage suits arising out of the failure to protect children from abuse.

The duties of investigating reports of suspected child abuse and determining how to protect abused children in the most effective way require child protection workers to exercise professional judgment.[297] In investigating child abuse reports, workers are often confronted with inconsistent and incomplete evidence.[298] For example, a parent may

---

ment and its workers for conduct which *causes* a person to be subjected to the deprivation of a constitutional right. See *supra* note 17 for the text of Section 1983. The decisions in *Bailey* and *Martinez* provide a basis for determining how a court will analyze the issue of causation in a section 1983 action against the government and its child protection workers who fail to prevent children from being abused by their parents.

In *Martinez*, the Supreme Court affirmed the dismissal, on causation grounds, of a section 1983 claim seeking to impose liability on members of a state parole board for a murder committed by a parolee. 444 U.S. 277, 285 (1985). In concluding that the plaintiffs had not established a sufficient causal connection between the parole decision and the murder, the Court noted that the perpetrator of the murder was not an agent of the parole board, the murder occurred five months after the parole decision, and the parole officers were unaware that the victim, unlike the members of the general public, faced special dangers. *Id.* The Third Circuit in *Bailey*, in distinguishing *Martinez*, found that the complaint alleged a sufficient causal connection between the conduct of the county child protection agency and the fatal abuse of Aleta Bailey. *Bailey*, 768 F.2d at 511. The *Bailey* majority held that the county child protection agency, unlike the defendants in *Martinez*, was aware that Aleta faced special dangers not faced by the general public. *Id.*

The critical factor in determining whether the plaintiff has established the causation element in a section 1983 suit against the government for failing to prevent child abuse appears to be whether the government was aware that the particular child, as distinguished from the rest of the public, was being subjected to abuse. If the government had reason to know that the child was being abused, then a court relying on *Bailey* and *Martinez* likely would find a sufficient causal link between the government's failure to act to protect the child and the injuries received by the child at the hands of a parent. Therefore, the element of causation probably will be established if the government previously had received a report identifying the child as a suspected victim of abuse.

[296] *See supra* notes 259–95 and accompanying text for a discussion of the elements necessary to be proven in order to recover.

[297] GUIDE FOR WORKERS, *supra* note 280, at 45, 48. *See also supra* note 284.

[298] *See* Besharov, *Future Directions*, *supra* note 3, at 163; Besharov, *Legal Aspects*, *supra* note 280, at 496; GUIDE FOR WORKERS, *supra* note 280, at 47, 48.

explain a child's injury as resulting from some cause other than child abuse.[299] Medical evidence may establish, however, that the injury could not have occurred as the parent explained.[300] Nevertheless, the evidence may not establish conclusively that the cause of the injury was abuse.[301] In addition, because child abuse frequently occurs in the privacy of the family home, there are often no independent witnesses to question.[302] Furthermore, abusing families often conceal information from child protection workers during child abuse investigations.[303] Due to the lack of conclusive evidence available during child abuse investigations, child protection workers face difficult decisions in determining whether children actually have suffered abuse.[304] The child protection worker must weigh the available evidence and based on professional judgment, make a determination as to whether or not a child has been abused.[305]

If a child protection worker determines that a child has been abused, the worker again must exercise judgment in determining what method of intervention into the family will be appropriate to protect the child from further abuse.[306] The methods by which child protection workers may intervene into families to protect abused children range from providing supportive services such as parental aides, parental education programs, day care, counselling, and homemaker care to more intrusive types of intervention, such as removing the child from the home and instituting court proceedings charging the parents with abuse.[307] In deciding what method of intervention to use in any particular case, the child protection worker must assess the likelihood and extent of future danger faced by the child and determine what action will sufficiently protect the child from that danger.[308] The lack of conclusive evidence in child abuse investigations and the possibility that the child's home situation may deteriorate rapidly without any warning to the child protection worker complicates the determination of what intervention is most appropriate.[309] Therefore, based on the imprecise nature of the child abuse investigation process, the decision as to what, if any, governmental intervention is appropriate in a particular case must be based on the child protection worker's evaluation of the available evidence in light of the worker's training and professional judgment.[310]

Subjecting child protection officials to civil liability for decisions which have the unfortunate result of allowing a child to suffer further abuse will color their evaluation

---

[299] Besharov, *Legal Aspects*, *supra* note 280, at 501–02; GUIDE FOR WORKERS, *supra* note 280, at 47, 48.

[300] GUIDE FOR WORKERS, *supra* note 280, at 48.

[301] Besharov, *Legal Aspects*, *supra* note 280, at 501–02.

[302] *Id.* at 496.

[303] Besharov, *Future Directions*, *supra* note 3, at 163.

[304] Besharov, *Legal Aspects*, *supra* note 280, at 501–02.

[305] GUIDE FOR WORKERS, *supra* note 280, at 45, 48.

[306] *Id.*

[307] *See* Besharov, *Future Directions*, *supra* note 3, at 160; Besharov, *Legal Aspects*, *supra* note 280, at 495; RESOURCE MATERIALS: A CURRICULUM ON CHILD ABUSE AND NEGLECT 80 (U.S. DHEW 1979). All states allow for the emergency removal of children from their homes in circumstances where the child's life or health is in imminent danger. *See State Child Abuse Statutes*, *supra* note 3, at 264; Besharov, *Legal Aspects*, *supra* note 280, at 485; GUIDE FOR WORKERS, *supra* note 280, at 50. Following the removal of the child from the home, the removing authority must file a petition in court for a review of the removal decision, usually within 48 hours of the removal. GUIDE FOR WORKERS, supra note 280, at 50; *Agency Procedures*, *supra* note 4, at 48.

[308] GUIDE FOR WORKERS, *supra* note 280, at 48.

[309] *See* Besharov, *Future Directions*, *supra* note 3, at 163.

[310] *See* GUIDE FOR WORKERS, *supra* note 280, at 45, 48.

of the evidence in child abuse investigations and deter them from the impartial exercise of their professional judgment.[311] The threat of potential liability if a child were to suffer further injuries from abuse probably will result in workers more readily confirming reports of suspected abuse and using more drastic methods of intervention into families in order to avoid liability.[312] For example, a child abuse investigator faced with conflicting evidence may conclude that a child has been abused, not on the basis of an impartial weighing of the evidence in light of the worker's training and experience, but rather on the basis of an attempt to avoid liability.[313] Likewise, a worker's decision as to what method of intervention to pursue may not be determined by the worker's assessment, based on all the evidence, of what method is sufficient to protect the child, but rather by the threat of liability should the child suffer additional injuries.[314] For example, a worker faced with a close question as to whether a child is in danger of suffering further abuse may decide to remove the child from the family home and institute court proceedings charging the parents with abuse just to avoid the possibility of being subjected to liability.[315] Thus, the threat of liability for failing to protect children from abuse will deter child protection workers from exercising the professional judgment which is essential to the effective performance of their duties.[316]

In addition to deterring child protection workers from exercising professional judgment, subjecting the government and its workers to liability for failing to protect abused children will result in needless and potentially harmful governmental intervention into the family.[317] Faced with the threat of liability if a suspected abuse victim suffers further

---

[311] *See* Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (state employees responsible for the prosecution of child neglect proceedings must be able to perform their tasks without fear of liability); Boyer v. Spero, No. 84–CV–219 (N.D.N.Y. July 2, 1985) (liability for actions taken in child protection proceedings would deter workers from filing and pursuing "indicated" reports of abuse); Whelehan v. County of Monroe, 558 F. Supp. 1093, 1099 (W.D.N.Y. 1983) ("if social services workers were required to guard against Section 1983 claims . . . " arising from decisions on whether or not to file a petition charging child abuse and neglect, "their evaluation of the information at hand could easily be colored"). *See also* Butz v. Economou, 438 U.S. 478, 515 (1978) (the threat of liability for their decisions would distort the discretion exercised by federal agency officials charged with functions analogous to those of a prosecutor); Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (threat of potential liability would constrain prosecutors from exercising their best judgment in deciding which suits to initiate and how to prosecute them).

[312] *See generally* Owen v. City of Independence, 445 U.S. 622, 651–52 (1980) (potential liability of municipality for unconstitutional policies would cause municipal policy making officials to act to avoid unconstitutional conduct). *See also* D. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND YOUTH 114 (1985). [hereinafter *VULNERABLE SOCIAL WORKER*].

[313] *See* VULNERABLE SOCIAL WORKER, *supra* note 312, at 136, 137.

[314] *See id.*

[315] *Id.* at 137 ("social workers may more quickly — but prematurely — remove children from troubled families rather than risk being sued on behalf of an abused child").

[316] *See id.* at 136, 137. *See also* cases at *supra* note 311.

[317] Intervention by the government into the family to protect children from abuse involves two competing social policies: the protection of abused children and the right of the family to be autonomous. *See* BOURNE & NEWBERGER, CRITICAL PERSPECTIVES ON CHILD ABUSE AND NEGLECT 97 (1981) [hereinafter CRITICAL PERSPECTIVES]; Wingo and Freitag, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401 (1982). The Supreme Court has recognized continually the right of the family to be free from undue state interference. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). The right of parents to raise their children as they see fit yields, however, when in conflict with the best interests of a child. *See* Prince v. Massachusetts, 321 U.S. 158 (1944). Thus, government

injuries, child protection workers probably will use more drastic methods of intervention into the family in order to ensure that the child is protected.[318] The fact that child protection workers previously have been granted absolute immunity from suit for depriving parents of parental rights in the course of child abuse investigations also will lead to increased intervention.[319] Child protection workers faced with liability if a child suffers further abuse, but immunity for overintervention, obviously will choose to overintervene and avoid liability. Similarly, in an effort to avoid liability, government agencies probably will institute policies which support the use of overly drastic methods of intervention,[320] including policies which encourage the removal of suspected abuse victims from their homes and the institution of court proceedings charging parents with abuse.[321]

While, at first glance, increased intervention into the family may further the protection of children from abuse, drastic governmental intervention usually has been viewed by commentators as being unnecessary.[322] Commentators agree that removing a child from the home should be considered only as a last resort if necessary to protect the child from imminent danger.[323] Only rarely, however, are suspected abuse victims subjected to such imminently dangerous situations as to require removal from the family home.[324] Generally, the use of less intrusive types of government intervention will sufficiently protect victims of child abuse from further harm.[325] Commentators have stated that the use of supportive family services, such as counselling, day care, homemaker care, and parental aide programs, which do not require the removal of children from their homes, usually are sufficient to prevent abuse victims from suffering further injuries.[326]

In addition to the likelihood that removing a suspected abuse victim from the family home will not be necessary to protect the child, removing a child from the home presents the possible danger of causing psychological harm to that child.[327] A child who is removed from the home and placed in protective custody may view such removal as punishment,[328]

---

intervention when necessary to protect children from abuse has been found to be a justified intrusion on the parent/child relationship. *See* CRITICAL PERSPECTIVES, *supra* note 317, at 97.

[318] *See* VULNERABLE SOCIAL WORKER, *supra* note 312, at 136.

[319] *See generally* Whelehan v. County of Monroe, 558 F. Supp. 1093, 1098–99 (W.D.N.Y. 1983) (social workers absolutely immune from suit for alleged deprivation of parental rights during the course of a child abuse investigation).

[320] *See generally Owen*, 445 U.S. at 651–52. *See also* VULNERABLE SOCIAL WORKER, *supra* note 312, at 158 ("Agencies, through the use of rules, incentives, and discipline, may explicitly or implicitly rely on the same risk-aversion techniques that individual officials currently use").

[321] All states have statutory provisions which allow either the police or child protection officials to remove a child from the home, without a court order, if the child is in imminent danger of further abuse. *See supra* note 307.

[322] *See State Child Abuse Statutes*, *supra* note 3, at 264; Besharov, *Legal Aspects*, *supra* note 280, at 484.

[323] *Agency Procedures*, *supra* note 4, at 48; GUIDE FOR WORKERS, *supra* note 280, at 50.

[324] *See* V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's 184 (1974).

[325] *See State Child Abuse Statutes*, *supra* note 3, at 264; Besharov, *Legal Aspects*, *supra* note 280, at 484.

[326] *See* Besharov, *Legal Aspects*, *supra* note 280, at 484.

[327] *See id. See also* GUIDE FOR WORKERS, *supra* note 280, at 50 (emergency placement of a child may cause serious disruption of the family unit as well as emotional problems for the child).

[328] *State Child Abuse Statutes*, *supra* note 3, at 264–65; Besharov, *Legal Aspects*, *supra* note 280, at 484.

thus protective custody may result in the child's confusion. Such drastic intervention by the government also may cause the parent/child relationship to deteriorate, resulting in even more danger to the child if and when the child returns to the home.[329] Furthermore, studies indicate that removing a child from the home, even for a short period of time, can have drastic effects on a child's development.[330] According to child psychologists, separating a child from his or her parents can disrupt the child's attachments and affect the course of the child's emotional development.[331]

An additional harmful consequence of removing a child from the family home is that many children taken into protective custody are placed in foster homes which are often unstable and inadequate.[332] Because of the many problems associated with foster care, some clinicians have concluded that placing a child in a foster home often is more harmful to a child than the original home situation may have been.[333] Despite these negative consequences, child protection officials likely will resort to routinely removing suspected victims of abuse from their homes in an effort to avoid potential liability for failing to protect children.[334] Thus, subjecting the government and its child protection officials to liability for failing to prevent child abuse will result in unnecessary and possibly harmful governmental overintervention into the families of suspected abuse victims.

Potential liability for failing to protect abused children also will impose substantial financial burdens on the child protection system. Child protection agencies are forced to devote substantial resources to investigating the many reports of suspected abuse which turn out to be unfounded.[335] In 1983, approximately 1.3 million children were reported to child protection agencies as suspected victims of abuse,[336] and studies indicate that approximately 60% of all reports of abuse are determined to be unfounded.[337] Because child protection agencies must expend substantial resources investigating these unfounded reports, they often are unable to respond promptly and effectively when children actually are in serious danger.[338] Potential liability for failing to protect children from abuse likely will result in child protection workers confirming reports of abuse in cases which otherwise would have been deemed unfounded in an effort to avoid liabil-

---

[329] *See State Child Abuse Statutes*, *supra* note 3, at 265; Besharov, *Legal Aspects*, *supra* note 280, at 484.

[330] *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31–34 (1973) [hereinafter BEST INTERESTS]; CRITICAL PERSPECTIVES, *supra* note 317, at 132 n.135 (citing Klaus & Kennell, *Mothers Separated from Their Newborn Infants*, 17 PEDIATRIC CLINICS OF NORTH AMERICA 1015 (1975); Sameroff & Chandler, *Reproductive Risk and the Continuum of Caretaking Casualty*, in REVIEW ON CHILD DEVELOPMENT RESEARCH (F. Horowitz ed. 1975)).

[331] *See* BEST INTERESTS, *supra* note 330, at 32–34.

[332] *See Agency Procedures*, *supra* note 4, at 48.

[333] Besharov, *Future Directions*, *supra* note 3, at 167 (citing J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1980)); *Agency Procedures*, *supra* note 4, at 49 (citing C. GOULD & D. RUNYAN, FOSTER CARE FOR THE MALTREATED CHILD (1982)).

[334] *See supra* notes 311–16 and accompanying text. In some instances, a child will be in such danger that immediate removal from the family home is appropriate. The child protection worker should be left to make this decision, however, on the basis of his or her training and professional judgment and without the interference of the threat of liability.

[335] Besharov, *Future Directions*, *supra* note 3, at 162.

[336] Besharov, *Child Welfare Malpractice*, *supra* note 6, at 56.

[337] Besharov, *Future Directions*, *supra* note 3, at 162 (citing U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978) 18, Table 5 (U.S. DHEW 1979)).

[338] Besharov, *Future Directions*, *supra* note 3, at 162.

ity.[339] Providing protective services to children and families in these cases will result in an even further drain on resources which child protection agencies could more properly use in cases where children are actually in serious danger. Thus, exposing the government to liability for failing to prevent parents from abusing their children will exacerbate the financial burdens which the child protection system faces.

Based on the potentially harmful repercussions of subjecting the government and its child protection workers to liability for failing to prevent child abuse, courts should grant the government and its workers absolute immunity from such suits. Courts afford most public officials who exercise discretion the protection of qualified immunity from damage suits.[340] Under this protection, public officials will not be held liable for unconstitutional conduct if their actions are not in violation of clearly established constitutional duties.[341]

Qualified immunity, however, is not a sufficient protection for public officials who perform child protective duties.[342] As the *Jensen* and *Bailey* cases indicate, whether a child protection worker is under a constitutional duty to provide protection to a suspected victim of abuse will depend on a court's analysis of the mix of factors in the particular case.[343] The *Jensen* and *Bailey* decisions do not provide child protection workers with clear guidelines to determine when a court will impose upon them a constitutional duty to protect an abused child.[344] Thus, because of the difficulty in determining when courts will deem the constitutional duty to protect a particular child as "clearly established," the application of the qualified immunity standard in suits against child protection workers is uncertain. In addition, the mere possibility that child protection workers could be exposed to large damage awards for the consequences of their decisions will serve to chill the exercise of their professional judgment in determining how to respond most effectively to cases of suspected abuse.[345] Therefore, because even potential liability will have this detrimental impact on the effective performance of child protective duties, qualified immunity from suit is not a sufficient protection for child abuse workers.

Accordingly, because their special functions require complete protection from damage suits, child protection workers should be granted the defense of absolute immunity from section 1983 liability for failing to prevent child abuse. The Supreme Court has found that certain public officials, because of the nature of their duties, require complete protection from damage suits.[346] For example, the Court has found that prosecuting attorneys[347] and other public officials who perform analogous functions[348] are absolutely immune from damage suits for acts taken within the scope of their prosecutorial-type

---

[339] *See supra* notes 311–16 and accompanying text.

[340] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[341] *Id.* See *supra* notes 115–27 and accompanying text for a discussion of qualified immunity.

[342] *See* Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984); Boyer v. Spero, No. 84–CV–219 (N.D.N.Y. July 2, 1985); Whelehan v. County of Monroe, 558 F. Supp. 1093, 1099 (W.D.N.Y. 1983).

[343] *See Bailey*, 768 F.2d at 511; *Jensen*, 747 F.2d at 194 n.11. *See also supra* notes 273–74 and accompanying text.

[344] *See supra* notes 273–74 and accompanying text.

[345] *See supra* notes 311–16 and accompanying text.

[346] *See Harlow*, 457 U.S. at 807; Butz v. Economou, 438 U.S. 478, 508 (1978); Imbler v. Pachtman, 424 U.S. 409, 424–28 (1976).

[347] *Imbler*, 424 U.S. at 431.

[348] *Butz*, 438.U.S. at 515.

duties. The Court has reasoned that these officials require complete protection from damage suits in order to preserve the exercise of judgment which is necessary to the proper performance of their important duties.[349]

The functions of child protection workers — investigating reports of suspected child abuse and determining what actions to take in response to the evidence gathered — are comparable to the functions of prosecutors in the criminal justice system.[350] A prosecutor must exercise judgment in determining which criminal violations should be prosecuted, how the prosecution should proceed, and what sanctions should be sought.[351] Similarly, child protection workers must exercise professional judgment in determining whether the available evidence warrants a conclusion that a child has been abused[352] and what methods of intervention are necessary to protect a child from further abuse.[353] These determinations could result in the decision to remove a child from the home and the initiation of court proceedings charging a parent with abuse.[354] Like prosecutors and other officials who perform analogous duties, child protection workers will be deterred from exercising their best judgment in performing their duties if they are exposed to liability for their decisions.[355] Therefore, because child protection workers serve a vital social function in identifying child abuse and determining how best to protect abused children, they should be absolutely immune from suits which would inhibit the proper performance of their duties.[356]

---

[349] See *supra* notes 137–44 and accompanying text for a discussion of the policy reasons for granting prosecutorial-type officials the protection of absolute immunity.

[350] *See Kurzawa*, 732 F.2d at 1458; *Boyer*, No. 84–CV–219; *Whelehan*, 558 F. Supp. at 1098.

[351] *See Imbler*, 424 U.S. at 425; *Butz*, 438 U.S. at 515.

[352] *See supra* notes 297–305 and accompanying text.

[353] *See supra* notes 306–10 and accompanying text.

[354] *See supra* note 307 and accompanying text.

[355] *See Kurzawa*, 732 F.2d at 1458; *Boyer*, No. 84–CV–219; *Whelehan*, 558 F. Supp. at 1098–99. *See also supra* notes 311–16 and accompanying text.

[356] *See Kurzawa*, 732 F.2d at 1458; *Boyer*, No. 84–CV–219; *Whelehan*, 558 F. Supp. at 1098–99. Granting social workers absolute immunity for their actions in connection with child abuse investigations is not a novel proposal. For example, in *Boyer v. Spero*, a child abuse investigator was sued under section 1983 for alleged conduct during the course of a child abuse proceeding which resulted in the plaintiff, the mother of the suspected abuse victim, being terminated from her employment. No. 84–CV–219 (W.D.N.Y. 1985). The plaintiff had been employed as a child counselor with a youth and family service agency. *Id.* After an investigation into the alleged abuse of plaintiff's son, the child abuse investigator filed a report with the state Central Register indicating that some credible evidence of abuse had been found. *Id.* The plaintiff alleged that she was not given notice that she was the subject of an "indicated" abuse report. *Id.* The plaintiff was terminated from her employment after the state Central Register notified the plaintiff's employer of the existence of the abuse report. *Id.* Subsequent to her termination, plaintiff received a hearing to contest the abuse report, and the hearing board ultimately found that no credible evidence of abuse existed. *Id.* In her complaint, the plaintiff alleged that the child abuse investigator's failure to provide her with notice of the abuse report resulted in her losing her job, thus depriving her of liberty and property rights without due process. *Id.*

For public policy reasons, the *Boyer* court held that child protection workers are entitled to the defense of absolute immunity from suits arising out of their conduct during the post-investigatory stages of child protection proceedings. The court stated that potential liability for such conduct would deter child protection workers from performing their duties. *Id.* The court stated that because child protection workers serve a vital social function, they must be protected from the fear of liability for the performance of their duties. *Id.*

See also Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (Department of Social Services employees responsible for prosecuting child neglect petitions must be able to perform tasks of

In addition to granting child protection officials absolute immunity from personal liability, courts also should grant the government absolute immunity from suits arising out of the failure of its child protection employees to prevent child abuse. Although the Supreme Court in *Owen* held that the government was not entitled to qualified immunity for the good faith constitutional violations of its employees,[357] the *Owen* decision did not address the issue of whether the government can claim the defense of absolute immunity when its officials are entitled to that defense.[358] Moreover, the *Owen* case did not present the potentially devastating implications which holding the government liable for failing to prevent child abuse presents. In *Owen*, the Court dealt with a police chief's suit against a city for the actions of City Council members in discharging the police chief without notice of the reasons for the discharge and without a hearing.[359] The Court found that holding the city liable would encourage policy making officials, in an effort to avoid potential liability, to enact policies which comport with constitutional rights.[360] In *Owen*, holding the city liable would encourage officials to enact policies which provide city employees with procedural due process protections before being discharged from their jobs. These policies do not present the kinds of dangers which government policies enacted in an attempt to avoid liability for failing to prevent child abuse would present. In order to avoid such suits, government policy makers likely would enact policies mandating drastic intervention into the families of suspected abuse victims, including policies requiring the removal of suspected victims from their homes and the institution of court proceedings charging the parents with abuse.[361] Such policies will deter child protection workers from exercising the professional judgment necessary to perform effectively their duties in responding to cases of suspected abuse.[362] In addition, in most cases such drastic methods of intervention will not be necessary to protect a child and may even cause harm to a child's psychological development.[363] Therefore, in order to avoid these potentially harmful implications, the government, as well as its child protection officials, should be absolutely immune from suits arising out of the failure to protect children from abuse inflicted by their parents.

CONCLUSION

In recent suits filed in federal courts under section 1983 of the Civil Rights Act of 1871, plaintiffs have attempted to impose civil damages against the government and its officials who, after receiving and investigating reports of suspected child abuse, fail to prevent children from suffering further abuse at the hands of their parents. The plaintiffs have alleged that the state's failure to protect children from abuse deprived the

---

protecting health and well-being of children without fear of harassment and are entitled to absolute immunity); Whelehan v. County of Monroe, 558 F. Supp. 1093, 1099 (W.D.N.Y. 1983) ("if social services workers were required to guard against § 1983 claims" arising from decisions on whether or not to file a petition charging child abuse and neglect, "their evaluation of the information at hand could easily be colored").

[357] Owen v. City of Independence, 445 U.S. 622, 657 (1980).

[358] *Whelehan*, 558 F. Supp. at 1104.

[359] *Owen*, 445 U.S. at 630.

[360] *Id.* at 651–52. For a discussion of the *Owen* Court's reasoning in refusing to grant qualified immunity protection to municipalities, see *supra* notes 131–34 and accompanying text.

[361] *See supra* notes 320–21 and accompanying text.

[362] *See supra* notes 297–310 and accompanying text.

[363] *See supra* notes 322–31 and accompanying text.

children of liberty rights guaranteed by the fourteenth amendment due process clause. The decisions indicate that a plaintiff will face difficult burdens in establishing the presence of several elements necessary to recover in such suits. Although a plaintiff will have difficulty in proving the elements necessary to recover, the decisions clearly indicate that recovery in a section 1983 action against the government and its workers for failing to protect abused children is possible.

Subjecting the government and its officials to liability in such cases will result in several far-reaching and harmful repercussions. First, potential liability will deter child protection workers from exercising the professional judgment which is necessary to the effective performance of their vital duties. In addition, potential liability likely will result in overly drastic methods of intervention by the government into the families of suspected abuse victims. Yet, such drastic intervention into the family probably will not be necessary to protect abused children, and may even cause harm to a child's emotional development. In order to avoid these potentially devastating consequences, the government and its child protection workers should be absolutely immune from civil suits for the failure to prevent parents from abusing their children.

TIMOTHY J. COURVILLE