

## NOTES

### FOSTER PARENT LIABILITY UNDER SECTION 1983: FOSTER PARENTS' LIABILITY AS STATE ACTORS FOR ABUSE TO FOSTER CHILDREN

The goal and purpose of foster care in the United States is to "provide a temporary, safe haven for children whose parents are unable to care for them."<sup>1</sup> Unfortunately, statistics show that foster children suffer abuse ten times more often than children in the general population.<sup>2</sup>

One example is the case of K.H.,<sup>3</sup> a child born in Chicago in 1981.<sup>4</sup> Foster care left K.H. abused and emotionally disturbed by her sixth birthday.<sup>5</sup> Her foster parents beat and neglected her, while a neighbor of one foster parent sexually abused her.<sup>6</sup> The Illinois Department of Children and Family Services failed to stop the abuse after discovering it.<sup>7</sup>

In *K.H. Through Murphy v. Morgan*,<sup>8</sup> K.H. sued the Department, its director, and the two social workers involved, alleging gross negligence in failing to protect her.<sup>9</sup> The Seventh Circuit upheld the lower court's

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1. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY SERVICES 8 (1975).

2. Michael B. Mushlin, *Unsafe Havens: The Case For Constitutional Protection Of Foster Children From Abuse And Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 206 & n.30 (1988).

3. *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). See *infra* notes 4-8 and accompanying text.

4. 914 F.2d at 848.

5. *Id.*

6. *Id.* The juvenile court of Cook County originally removed K.H. from her parents' custody when she was 17 months old and placed her in the custody of the Illinois Department of Children and Family Services after the discovery that she had gonorrhea from vaginal intercourse. After six transfers in the first 18 months of foster care, the Department placed K.H. with a foster parent who beat and neglected her. In addition, the neighbor of this foster parent sexually abused K.H. The Department subsequently transferred K.H. to another foster parent who also physically abused her. The Department finally transferred K.H. to an institution that provided safe and professional care. *Id.*

7. *Id.* The evidence showed that the Department knew that previous foster parents had sexually abused K.H. and that she required psychotherapy after her seventh foster placement. The Department, however, still placed her with foster parents incapable of caring for the child. In addition, the court noted that K.H.'s nine placements over four years revealed the level of disarray in the state's system of caring for abused and neglected children. Moreover, such shuttling could amount to a breach of the state's constitutional obligation to the children. *Id.*

8. 914 F.2d 846 (7th Cir. 1990).

9. *K.H. brought the action under 42 U.S.C. § 1983 (1982).*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

rejection of the defendant's qualified immunity defense.<sup>10</sup> However, while K.H. may recover from the defendant state employees in their individual capacity, the Seventh Circuit stated, in dicta, that foster parents are not "state actors" and therefore could not be liable under federal law.<sup>11</sup>

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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 (1988).

10. 914 F.2d at 852. The Seventh Circuit assumed that the allegations in the complaint were true for the purposes of adjudicating the motion to dismiss. *Id.* at 847. The defendants moved to dismiss the complaint arguing that they were entitled to qualified immunity. *Id.* See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (government officials can be liable under 42 U.S.C. § 1983 (1988) only if the constitutional right they violated was clearly established at the time of the alleged violation). The defendants claimed that a foster child's right not to be placed with parents known to be incompetent was not clearly established between 1982 and 1986, the period during which K.H. was in foster care. *K.H. Through Murphy v. Morgan*, No. 87C 9833, 1989 WL 105279, at \*13 (N.D. Ill. Sept. 6, 1989), *aff'd in part and remanded in part*, 914 F.2d 846 (7th Cir. 1990). In rejecting this argument, the district court held that *Youngberg v. Romeo*, 457 U.S. 307 (1982), clearly established this right in 1982 and any dissimilarities between the two cases were unimportant. *Id.* at \*14. For a discussion of the qualified immunity defense, see generally John B. Kassel, Note, *Defining the Scope of the Due Process Right To Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 CORNELL L. REV. 940 (1985).

11. 914 F.2d at 852. Various states' laws hold foster parents liable for negligent or intentional torts inflicted on foster children. See DOUGLAS J. BESHAROV, *THE VULNERABLE SOCIAL WORKER* 111-16 & n.23 (1985) (citing, e.g., *Zalak v. Carroll*, 205 N.W.2d 313 (N.Y. 1965) (relatives who care for a child are liable under state tort law for negligence to the child)).

An argument could be made that foster parents should be afforded the same immunity from suits by their children as natural parents. The policy reasons behind natural-parent immunity, preservation of the family unit, domestic tranquility, protection of family resources and reluctance to interfere with family decisions, apply equally to foster parents. Some courts hold that foster parents stand in loco parentis to the foster child and thus have the same rights, responsibilities, duties, and liabilities of natural parents. See *Brown v. Phillips*, 342 S.E.2d 786 (Ga. Ct. App. 1986) (because foster parents stand in loco parentis toward foster children they are immune from liability for alleged negligence that resulted in injury to foster child); *Berry v. Schorling*, 440 N.E.2d 1216 (Ohio Ct. App. 1982) (parental immunity doctrine applies to persons standing in loco parentis).

However, a majority of jurisdictions have started a trend of abolishing parental immunity. In addition, parental immunity only applies in cases of ordinary negligence. Even in those jurisdictions that still recognize parental immunity, the immunity does not apply when abuse results from grossly negligent or intentional conduct. Finally, many of those jurisdictions that still recognize parental immunity do not extend it to foster parents. In *Mayberry v. Pryor*, 374 N.W. 2d 683 (Mich. 1985), the court held that foster parents could not invoke parental immunity. The court reasoned that the policies for affording natural-parent immunity do not apply to foster parents.

However, while states may not afford foster parental immunity, states may provide foster parents governmental immunity from tort actions. See *Pickett v. Washington Co.* 572 P.2d 1070, 1074 (Or. Ct. App. 1977) (shelter care parents are generally immune from liability for acts and omissions

This Note argues that foster parents who abuse foster children are state actors for constitutional purposes<sup>12</sup> and are therefore liable under title 42, section 1983 of the United States Code.<sup>13</sup> Finding "state actors" and "state action" is significant in two ways. First, for constitutional purposes, the actor is responsible for the protections embodied in the Fourteenth Amendment of the Constitution on the same terms as is any state.<sup>14</sup> Secondly, "state action" fulfills section 1983's "acting under color of state law" element.<sup>15</sup> Thus, if a state actor has deprived an individual of rights, privileges, or immunities that the Constitution guaran-

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relating to the supervision of a ward; foster parents perform a government function and are therefore immune from tort liability).

For a list of citations of jurisdictions that recognize parental immunity and those that do not, see 59 AM. JUR. 2d *Parent and Child* § 139 nn.74-76 (1987). For an additional discussion of foster parents' right to parental immunity, see Todd R. Smyth, Annotation, *Foster Parent's Right To Immunity From Foster Child's Negligence Claims*, 55 A.L.R.4th 778 (1987 & Supp. 1990).

12. A state actor "for constitutional purposes" refers to liability under the Fourteenth Amendment. The Fourteenth Amendment affects only conduct considered state action, and provides no enforcement power over purely private conduct. See *infra* notes 87-156 and accompanying text.

13. 42 U.S.C. § 1983 (1988). See *infra* notes 87-156 and accompanying text. See *supra* note 9. In some cases, this liability could extend to the municipality with jurisdiction over the placement of the child. Under § 1983 municipalities face liability only when their policies or customs encourage actions of private parties that deprive an individual's constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). Further, when municipalities entrust decisionmaking authority to private persons, the courts could then treat the decisions as the municipalities' own. *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 nn.9, 11 (11th Cir. 1985). At least five other circuits employ this "rule of final authority." See *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983); *Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied*, 458 U.S. 1008 (1982); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). See generally, Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM L. REV. 213 (1979); Douglas W. Durham, Note, *Inmate's Rights and the Privatization of Prisons*, 86 COLUM L. REV. 1475 (1986).

14.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

15. See *supra* note 9. The interplay between state action and acting "under color of state law" is not altogether clear. See *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) ("under color of law" is the same thing as state action); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 163 & n.26 (1970) (not all conduct that qualifies as "under color of law" is state action). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court held that a finding of state action under the Fourteenth Amendment satisfies the "under color of law requirement" of § 1983. *Id.* at 929. However, the Court noted that the converse is not necessarily true; while a state-law right can trigger § 1983, the Fourteenth Amendment is implicated only where constitutional rights are at issue. *Id.* at 935 n.18. Thus, although previous cases have treated the two requirements as identical, they are analytically distinct. *Id.*

tees,<sup>16</sup> the aggrieved party can recover compensatory relief under section 1983.<sup>17</sup>

Part I of this Note examines the constitutional duties and protections that states owe to foster children, analogizing to inmates in the prison context and to the institutionalized mentally impaired.<sup>18</sup> Part II discusses the Supreme Court's analysis of the state action doctrine and argues that finding foster parents liable as state actors is consistent with the development of that doctrine.<sup>19</sup> The Note concludes that foster parents are state actors and, thus, should be liable to their foster children under section 1983 for any abuse or other constitutional deprivations.<sup>20</sup>

## I. FOSTER CHILDRENS' CONSTITUTIONAL RIGHT TO SAFETY

### A. *The Development of the Right to Safety for Incarcerated and Institutionalized Persons*

The Supreme Court recognized the constitutional right to safety for incarcerated and institutionalized individuals in *Estelle v. Gamble*<sup>21</sup> and *Youngberg v. Romeo*.<sup>22</sup> In *Estelle*, a prisoner brought a section 1983 action, alleging that the state's grossly negligent failure to provide adequate medical care violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>23</sup> In holding that the prisoner stated a claim

16. See *supra* notes 9 and 14.

17. For abused foster children, the injunctive relief available under the Fourteenth Amendment comes too late and serves no purpose. Their only recourse is to recover damages under § 1983 for the pain and psychological trauma of the experience. Therefore, this Note focuses on the foster child's ability to recover money damages from an abusive parent under § 1983.

While in many cases the foster parent may not have a "deep pocket," the purpose of finding a foster parent a state actor and thus liable under § 1983 goes beyond monetary damages. Finding foster parents liable as state actors might reform the system and minimize the child abuse that does occur. In some cases that might mean discouraging potentially good foster parents. However, finding foster parents liable as state actors would create an incentive for state and private placement agencies to be more careful in their placement of children because a child could possibly recover from the state or home private placement agency for the foster parents' abuse.

18. See *infra* notes 21-91 and accompanying text.

19. See *infra* notes 82-145 and accompanying text.

20. See *infra* notes 153-58 and accompanying text.

21. 429 U.S. 97 (1976).

22. 457 U.S. 307 (1982).

23. 429 U.S. at 101. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The inmate claimed the state failed to treat him adequately for a back injury. 429 U.S. at 99-101. For two months the doctors offered no treatment other than pain relievers. Although the plaintiff complained about the continuing pain and his subsequent high blood pressure, the doctors refused to grant the plaintiff "sick call." The prison therefore ordered the plaintiff to work. When he refused

upon which relief could be granted, the Court found that the government has an obligation to provide medical care to those whom it incarcerates.<sup>24</sup> Because a prisoner relies on state officials to meet his medical needs, the state's failure to provide the care results in a denial of a prisoner's fundamental need. Such a denial constitutes cruel and unusual punishment.<sup>25</sup>

In *Youngberg v. Romeo*,<sup>26</sup> the Supreme Court relied on the reasoning in *Estelle* to find that state officials must guarantee reasonable safety and freedom from unnecessary restraint to involuntarily committed mentally retarded persons.<sup>27</sup> Nicholas Romeo, a mentally retarded man, brought an action for damages against the Pennhurst State School and Hospital and three administrators for injuries he suffered during his commitment to the institution.<sup>28</sup> The claim alleged that the hospital officials knew or should have known of the injuries and that they failed to take the appropriate preventative measures<sup>29</sup> in violation of his Eighth and Fourteenth Amendment rights.<sup>30</sup> In finding that the plaintiff stated a claim for relief

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the prison disciplinary committee placed him in solitary confinement. Later, when the plaintiff experienced chest pains and asked to see a doctor, the guards refused. *Id.*

24. "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

25. *Id.* at 103. The Court has never awarded relief for failure generally to provide safe conditions for prisoners. However, in subsequent cases the Court has referred to *Estelle* as establishing the state's duty to provide a safe environment for prisoners. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989) (*Estelle* and *Youngberg*, taken together, establish that a state assumes some responsibility for the safety of a person whom it took into its custody against that person's will). See also *Hutto v. Finney*, 437 U.S. 678 (1978). But see *Rhodes v. Chapman*, 452 U.S. 337 (1981) (approving of lower court decisions that granted relief for unsafe conditions); *Bell v. Wolfish*, 441 U.S. 520 (1979) (same); *Daniels v. Williams*, 474 U.S. 327 (1986) (negligent failure to protect an incarcerated inmate does not violate due process clause); *Davidson v. Cannon*, 474 U.S. 344 (1986) (same). See *Mushlin*, *supra* note 2, at 223 n.139.

*Estelle* did open the door for lower courts to find that the states are affirmatively obligated to provide prisoners with a safe environment. See *Walsh v. Mellas*, 837 F.2d 789, 795-96 (7th Cir.) (failure to devise system to screen prisoners' files for compatibility with cellmates constituted "deliberate indifference"), *cert. denied*, 486 U.S. 1061 (1988); *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985) ("failure of institutional [personnel] to protect a prisoner from the assaults of other prisoners can . . . rise to the level of an Eighth Amendment violation"), *cert. denied*, 475 U.S. 1085 (1986); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (Eighth Amendment protects prison inmates from environments where "degeneration" is possible), *cert. denied*, 450 U.S. 1041 (1981).

26. 457 U.S. 307 (1982).

27. *Id.* at 319.

28. His own violence and the response of other inmates led to his injuries. *Id.*

29. The complaint alleged that Nicholas suffered injuries on 63 different occasions over a two-year period. *Id.*

30. *Id.* The Third Circuit limited the Eighth Amendment to convicts only. Therefore, the

under section 1983, the Court acknowledged that precedent established the plaintiff's right to adequate food, shelter, clothing, and medical care. Significantly, the Court held that the plaintiff and other institutionalized individuals have Fourteenth Amendment liberty interests in safety and freedom of movement.<sup>31</sup> In contrast, courts in prison cases previously relied exclusively on the Eighth Amendment to find a duty to provide a safe environment.<sup>32</sup> The Court in *Youngberg* refused to expand the Eighth Amendment protections beyond the prison context.<sup>33</sup> However, by finding a liberty interest in safety in the Fourteenth Amendment, the Court expanded the right of safety beyond the prison context.<sup>34</sup>

### B. *The 'Special Relationship' Doctrine*

Soon after *Youngberg*, the Fourth Circuit held that the state may owe a constitutional duty to prevent harm to an abused foster child when the child abuse is reported to the state child protection officials.<sup>35</sup> The Seventh Circuit followed suit, recognizing that the Constitution protects not only those in state custody, but also those the state places in a position of danger and then leaves defenseless.<sup>36</sup> Both courts relied on the state's

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court dropped the Eighth Amendment claim. *Romeo v. Youngberg*, 644 F.2d 147, 156 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982). The Supreme Court thus never addressed the Eighth Amendment issue. *See* 457 U.S. at 313.

31. 457 U.S. at 315-16. The Court first found that the right to personal security was an "historic liberty interest" that the Due Process Clause protects. *Id.* at 315 (citing *Ingraham v. Wright*, 430 U.S. 651 (1977)). It further noted that penal confinement does not extinguish this right, concluding that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed who may not be punished at all in unsafe conditions." *Id.* at 315-16. While the court relied on the right to safety contained in the Eighth Amendment's prohibition of cruel and unusual punishment, it characterized the right as a liberty interest that the Fourteenth Amendment's concept of substantive due process protects. Thus the Court bridged the gap between incarcerated and institutionalized persons. *Id.* This very analysis forms the basis for extending the right to safety to other persons in state custody such as foster children. *See infra* notes 71-74 and accompanying text.

32. Historically, § 1983 claims that allege a specific constitutional right have fared better than claims arising under the Fourteenth Amendment. Thus, the prisoner cases claiming a right to safety relied exclusively on the Eighth Amendment, and rarely brought suit under the Fourteenth Amendment. Garrett H. Smith, Note, *DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484, 490 (1990).

33. *See supra* note 31.

34. *See infra* notes 46-47, and 53.

35. *Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). This duty depends on whether the abuse occurred before or after the law establishing liability was "clearly established." *Id.*

36. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (the Constitution does not require states to protect individuals from criminals, but the Constitution does require a state to protect a

“special relationship” to the plaintiffs to find an affirmative state duty to protect.

C. *Foster Children’s Right to Safety Under the “Special Relationship” Doctrine*

The “special relationship” doctrine led some courts to find a right to safety for foster children. In *Doe v. New York City Department of Social Services*<sup>37</sup> the Second Circuit relied on *Estelle* to find that the child welfare agency responsible for placing children in foster care had an affirmative duty to protect those children.<sup>38</sup> When the government takes individuals into their custody, the custodial relationship creates “affirmative duties” in the custodians; thus the agency had a duty to protect the child from sexual assault while in foster care.<sup>39</sup>

In *Taylor v. Ledbetter*,<sup>40</sup> the Eleventh Circuit held that an involuntarily placed foster child’s situation is so analogous to an inmate in a prison or mental institution that the state assumes a constitutional duty to ensure the safety of the foster-home environment.<sup>41</sup> In *Taylor* the plaintiff

person it puts in danger). See also *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *White*, police stopped a man in a car with three small children as passengers. The police arrested the man, leaving the children alone in the car on the side of a limited access highway in cold weather. The court held that this endangerment of innocent people patently intruded on their personal integrity. *Id.* at 385. A duty to protect arose upon the placement of the children in such a dangerous situation. See generally *Mushlin*, *supra* note 2, at 226-27.

37. 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). See also Amy Sinden, Comment, *In Search of Affirmative Duties Toward Children Under a Post DeShaney Constitution*, 139 U. PA. L. REV. 227, 246-48 (1990); *Mushlin*, *supra* note 2, at 234-37.

In *Doe*, the complaint alleged that the defendant, Catholic Home Bureau (a private placement agency), failed to supervise the placement of the plaintiff in foster care and to report the subsequent abuse to the New York City Department of Social Services. The foster parents raped, beat, and removed the plaintiff from school. 649 F.2d at 137. The district court judge instructed the jury that they could find the defendant liable only if the defendant actually intended to harm the plaintiff. The jury found for the defendant and the plaintiff appealed.

38. 649 F.2d at 141. However, the plaintiff must prove that the state acted with “deliberate indifference,” rather than just simple negligence. *Id.* at 143 & n.3.

39. *Id.* at 141. The Second Circuit relied on *Estelle* and subsequent “special relationship” cases (see *infra* note 41 and accompanying text) for the proposition that government officials may be liable under § 1983 for failing to act when the state takes custody of individuals and then fails to fulfill its custodial obligations.

The court found that the plaintiff foster child stated a claim against the defendant for failure affirmatively to act to protect her safety. The court held that the defendant was liable if it was deliberately indifferent to the abuse, and that the trial court erred in its “actually intended” instruction to the jury. *Id.* at 140-45.

40. 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 189 U.S. 1065 (1989).

41. *Id.* at 795.

alleged that the state officials responsible for the child's placement failed to protect the plaintiff. Specifically, the plaintiff alleged that the officials failed to investigate the fitness of the foster home, that they knew or should have known that the foster parents were unfit to be trusted with care, custody, and supervision of the child, and that they failed to supervise and inspect the foster home.<sup>42</sup>

The court analogized to *Youngberg* in finding that the plaintiff stated a claim, saying that in both instances the state placed the person in an involuntary custodial setting where the person was unable to seek alternative living arrangements.<sup>43</sup> The court further noted that physical safety is the primary objective in placement in either an institution or a foster home.<sup>44</sup> Since a child confined to a state mental health facility has a Fourteenth Amendment liberty interest in reasonably safe living conditions, the state assumes a similar responsibility of keeping a child in foster care in a safe environment as well.<sup>45</sup>

#### D. *The Seventh Circuit's Curtailment of the "Special Relationship" Doctrine*

The Supreme Court has not ruled on whether a state has a constitutional duty to protect foster children from abuse.<sup>46</sup> However, the Court recognized the possibility of this duty in *DeShaney v. Winnebago County Department of Social Services*.<sup>47</sup> In *DeShaney*, the Court held that a child under the supervision of the state's child protection system, but in the custody of his father, had no cause of action for the state's failure to

42. *Id.* at 792-93. The plaintiff was an involuntarily placed foster child whose foster mother "willfully struck, sh[ook], th[rew] down, [beat] and otherwise severely abused. . ." her. *Id.* at 792. As a result, the plaintiff suffered severe and permanent injuries and remains, as of this writing, in a coma. *Id.* at 792-93. The plaintiff, through her guardian, brought suit under § 1983 against the state and county officials responsible for her placement. *Id.* at 792.

43. *Id.* at 795.

44. *Id.*

45. *Id.* While the foster child has a Fourteenth Amendment liberty interest in safety, every failure to provide safe foster care does not necessarily amount to a constitutional violation. Instead, courts must balance the liberty interest against any legitimate governmental reasons the state proffers for failing to take action. Only when the liberty interests outweigh the state's interest does the deprivation of the protected interest constitute a Fourteenth Amendment violation. *Id.* For an analysis of *Taylor*, see Douglas D. Selph, Comment, *Taylor v. Ledbetter: Vindicating the Constitutional Rights of Foster Children to Adequate Care and Protection*, 22 GA. L. REV. 1187 (1988).

46. Lower courts are split on whether a constitutional duty to protect foster children exists. See *supra* notes 38-45 and *infra* notes 53-63 and accompanying text.

47. 489 U.S. 189 (1989).



protect him from abuse.<sup>48</sup> The court based its holding on the state's non-custodial relationship with the child.<sup>49</sup> Because the Constitution is a document of negative liberties,<sup>50</sup> meant to protect individuals from state action, it places no affirmative duty on the state to protect individuals from third-party abuse.<sup>51</sup> However, the Court specifically left open the question of whether such a duty arises when a child is placed in foster

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48. *Id.* at 197. In *DeShaney*, a court granted Randy DeShaney a divorce and custody of his year-old son, Joshua. Upon his second divorce, Randy's second wife reported to the police that he abused Joshua. In 1983, Joshua entered a hospital with multiple bruises and abrasions. The physician suspected abuse and reported the situation to the Winnebago County Department of Social Services. The hospital subsequently obtained temporary custody of Joshua pursuant to a court order, but within three days a county team returned Joshua to his father. A month later, Joshua again entered the hospital with suspicious injuries, and the hospital again notified the Department. The assigned caseworker concluded that no basis for action existed. During periodic visits to the DeShaney house, the caseworker observed further injuries and recorded her conclusion that someone was physically abusing Joshua. Finally, the Department removed the child from his father's custody in 1984, but only after his father had beaten Joshua so severely that he fell into a coma; he is expected to spend the rest of his life in an institution for the mentally retarded. Joshua and his mother brought a substantive due process claim under § 1983 against the Department and various employees for failing to protect him from his father's abuse. *Id.* at 191-93.

49. *Id.* at 197-201. Previous cases established that, in certain situations, individuals had a "special relationship" with the state such that the state had an affirmative duty to protect the individual's safety or other rights. *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (due process clause requires the state to provide state-institutionalized mental patients with adequate measures to ensure their safety as well as other services including food, shelter, clothing, and medical care); *Martinez v. California*, 444 U.S. 277, 285 (1980) (*dicta*) (state may be liable for depriving an individual of substantive due process life interest if the state releases a prisoner on parole who then murders the individual); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (prisoners have an Eighth Amendment right to adequate medical care). *Martinez* led to a string of lower court cases finding that once a state perceives a danger to an individual from a third party, the state has an affirmative duty to protect the potential victim. See *DeShaney*, 489 U.S. at 197-98 n.4; *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1425-26 (9th Cir. 1988); *Wood v. Ostrander*, 851 F.2d 1212, 1218-19 (9th Cir. 1988); *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985); *Jensen v. Conrad*, 747 F.2d 185, 190-94 & n.11 (4th Cir. 1984) (*dicta*), *cert. denied*, 470 U.S. 1052 (1985). See also *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (Fourteenth Amendment protection from dangerous parolee may exist if special custodial or other relationship exists between the state and the citizen).

50. 489 U.S. at 194-97. The court of appeals earlier found for the defendant, relying, in part, on language from *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982): "The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989). See also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

51. 489 U.S. at 198-203. The Court drew the line on "special relationship" at custody. Here the state did not have custody of Joshua. Therefore, the state did not have a "special relationship" and, accordingly, had no affirmative duty to protect him. *Id.*

care.<sup>52</sup>

The *DeShaney* Court virtually eliminated the "special relationship" doctrine that the *Doe* and *Taylor* courts used to find an affirmative duty to protect foster children.<sup>53</sup> The Court held that nothing short of custody establishes constitutional liability under the Due Process Clause for a state's failure to protect a child from private abuse. A state's custodial relationship constitutes a "special relationship" and, accordingly, gives rise to due process rights. Absent the custodial relationship, the plaintiff did not acquire due process rights.<sup>54</sup> The question remaining after *DeShaney* is whether state custody of foster children is sufficiently analogous to incarceration or institutionalization to give rise to a constitutional duty to protect a foster child from abuse.

### E. Foster Children's Right to Safety After *DeShaney*

In at least two circuits it appears that a foster child's right to safety has survived *DeShaney*. In *K.H. Through Murphy v. Morgan*,<sup>55</sup> the Seventh Circuit, relying on *Youngberg*, held that the state owes to people over whom it assumes custody a "rudimentary duty of safekeeping."<sup>56</sup> The court found that K.H. had an affirmative right that should have pre-

52.

Had the state by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . . We express no view on the validity of this analogy, as it is not before us in the present case.

*Id.* at 201 n.9. See Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C.L. REV. 113 (1990) (responding directly to *DeShaney* footnote 9, arguing that foster children have a right to safety and the state has a corresponding affirmative duty to protect them).

53. While the Seventh Circuit helped create the special relationship doctrine, it also helped dismantle it. In *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc), *cert. denied*, 439 U.S. 1065 (1989), the court lamented the expansion of the special relationship doctrine, suggesting that it had taken on "a life of its own." Other circuits refused to apply the special relationship doctrine under all but the narrowest circumstances. See *Wideman v. Shallowford Comm. Hosp.*, 826 F.2d 1030, 1035 (11th Cir. 1987); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 926-27 (8th Cir. 1987); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986). For a discussion of what remains of the special relationship doctrine after *DeShaney*, see Smith, *supra* note 32, at 496-508.

54. 489 U.S. at 198-202.

55. 914 F.2d 846 (7th Cir. 1990). See *supra* notes 3-8 and accompanying text.

56. 914 F.2d at 848-49. The court analogized to tort law. Although there is no duty to rescue, a rescuer who saves a person from certain harm cannot then kill him. *Id.* at 849. Thus, in the context of foster care, when the state rescues a child from abusive parents, it may not knowingly place the child in an equally dangerous situation.

vented state officers from placing her in the care of a custodian whom the state knew or had reason to know engaged in child abuse.<sup>57</sup> The court refused to distinguish foster care from institutionalization, reasoning that, while differences exist between the two systems, "it can hardly be thought—and it is not argued—that the Constitution requires a state to adopt one system rather than the other."<sup>58</sup>

Recently the Fifth Circuit found that when the Texas Department of Health and Service removed children from their natural homes and placed them under state supervision, the state had a duty to ensure adequate foster care.<sup>59</sup>

Moreover, in *LaShawn A. v. Dixon*,<sup>60</sup> the District Court for the District of Columbia recently held that foster children have a liberty interest in a reasonably safe placement, including safety from physical, psychological, and emotional harm.<sup>61</sup> In that case, the plaintiff class of foster children alleged constitutional and statutory violations in the D.C. Department of Human Services (DHS) administration of the foster care system.<sup>62</sup> In finding that the DHS violated the children's statutory and constitutional rights, the court analogized foster children to persons involuntarily committed to state care, relying on *Youngberg* to hold that foster children have a liberty interest in safe conditions while in state custody.<sup>63</sup>

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57. *Id.* at 849.

58. *Id.* at 852.

59. *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990). The court based its holding on the "special relationship" between the state and child that gave rise to the duty to protect, rather than the legal custodial relationship. *Id.* The state's physical custody and supervision, as opposed to legal custody, gave rise to affirmative protectional duties. *Id.* Thus, even after *DeShaney*, the "special relationship" doctrine still has force; although the court limited it to custodial contexts. See *supra* notes 36, 49 and accompanying text.

60. 762 F. Supp. 959 (D.D.C. 1991).

61. *Id.* at 991-994.

62. The plaintiff class consisted of children in foster care under the supervision of the District of Columbia Department of Human Services (DHS) and children who, although not yet in care of DHS, were known to the Department because of reported abuse or neglect. *Id.* at 960. The plaintiffs brought their federal statutory complaints under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-27, 670-79 (1988) and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-06 (1988). *Id.* The plaintiffs also alleged that DHS deprived them of liberty without due process of law. *Id.* at 99.

In determining the constitutional issue, the court acknowledged that courts generally should not reach constitutional issues unnecessarily. However, in this case, because finding that the DHS violated statutory rights might leave the plaintiffs with no effective relief, the court felt compelled to address the plaintiffs' constitutional complaints. 762 F. Supp. at 990-91.

63. 762 F. Supp. at 992-94.

While no circuit has precluded the possibility that involuntarily placed foster children have a constitutional right to safety, the right is not universally recognized. The Fourth Circuit in *Milburn v. Anne Arundel County Department of Social Services*<sup>64</sup> read *Youngberg* narrowly, distinguishing between voluntary and involuntary foster children. The court rejected the analogy between voluntary foster children and prison inmates or committed patients, holding that the former are not entitled to the same Fourteenth Amendment right to safety.<sup>65</sup>

#### F. Foster Children Have a Constitutional Right to Safety

Both from a constitutional standpoint and for policy reasons, courts should grant foster children the same constitutional right to safety as prison inmates or patients in a state institution.

The *Youngberg* Court stated that the right to personal security is an "historic liberty interest," that substantive due process protects.<sup>66</sup> While the state has no affirmative duty to provide the general public with a safe environment, the state has an obligation to ensure the safety of those whom it commits and renders dependent on it.<sup>67</sup> The *DeShaney* Court cited *Youngberg* and *Estelle* for the proposition that the affirmative responsibility for the safety of an individual arises when the state takes a person into its custody.<sup>68</sup> A state's use of its power to restrain an individual's liberty, rendering him unable to care for himself, creates a duty to provide for his basic needs, including the right to reasonable safety.<sup>69</sup>

While *DeShaney* left open whether this reasoning applied equally to foster children, commentators have expressed concerns that courts will interpret the language narrowly and deny foster children the right to safety. The argument asserts that since the foster child could not care for himself before placement with the state, the state does not "restrain an individual's freedom to act on his own behalf."<sup>70</sup> However, the narrow

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64. 871 F.2d 474 (4th Cir.), cert. denied, 110 S. Ct. 148 (1989).

65. *Id.* at 479. For a discussion of how the Fourth Circuit found that foster parents are not state actors, see *infra* notes 144-52 and accompanying text. For criticisms of the *Milburn* decision, see Oren, *supra* note 52, at 130-47; Sinden, *supra* note 37, at 250-54.

66. 457 U.S. at 315 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

67. *Id.* at 317-21.

68. 489 U.S. at 195-200.

69. *Id.*

70. Sinden, *supra* note 37, at 243-44. Sinden points out that Justice Brennan, dissenting in *DeShaney*, recognized the implication of the majority's definition of special relationship when he argued that "restraining an individual's freedom to act on his own behalf" was not an element in the *Youngberg* analysis. As Brennan pointed out, the plaintiff in *Youngberg* could not act on his own

reading of the *DeShaney* language is inconsistent with its application in *Youngberg* to the institutionalized mentally retarded. The plaintiff in *Youngberg*, possessed of the mental capacity of a eighteen-month-old child, was unable to care for himself before the state committed him. Nevertheless, the Court found that he had a right to safety. The denial of the right to safety to foster children on this narrow reading of *DeShaney* is thus irreconcilable with *Youngberg*.

The *DeShaney* reasoning logically applies to foster care, since the custodial relationship *Youngberg* and *Estelle* relied on exists in the foster care context as well. A child is placed in foster care in one of two ways: either a court orders the placement or the parent voluntarily places the child.<sup>71</sup> In both situations, the state has legal and physical custody of the child.<sup>72</sup> Although the foster parent assumes physical custody once the state places the child, the state or placement agency retains some degree of day-to-day decisionmaking authority.<sup>73</sup> Once the state assumes this custodial responsibility, the foster child's situation becomes identical to that of prison inmate or state mental patient.<sup>74</sup>

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behalf before his commitment. This inability was not dispositive. Indeed, the Court still found a right to safety. Justice Brennan reasoned that, accordingly, the majority's test is inconsistent with *Youngberg*. 489 U.S. at 206 (Brennan, J., dissenting).

71. In fact, approximately 33% of all foster children are voluntary placements. THEODORE J. STEIN, *CHILD WELFARE AND THE LAW* 39 & n.17, 71 (1991); 1 ROGERS T. YOSHIKAMI & ARTHUR C. EMLIN, *A COMPARISON OF VOLUNTARY AND COURT ORDERED FOSTER CARE: DECISIONS, SERVICES, AND PARENTAL CHOICE* 3 (1983) (voluntary placements account for about one-third of all placements). *But see* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 921-22 (1975) (voluntary placements make up as much as 50% of all placements). *See also* Oren, *supra* note 37, at 117 n.22 (voluntary placements vary from state to state from at least 10%-77%, with the trend most likely downward).

72. The natural parent, however, has visitation rights and power to make major medical decisions. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (natural parent's fundamental interest in "care, custody, and management of their child" exists despite loss of temporary custody to the state); *Sinden*, *supra* note 37, at 248-49.

73. *Sinden*, *supra* note 37, at 249.

74. *See* *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 142 (2d Cir. 1981) (recognizing differences between institutionalization and foster care, but finding the same type of custody).

Professor Laura Oren suggests that "listening to the children's story" provides one ground for according a safety right to foster children. *See* Oren, *supra* note 52, at 147-54. Oren cites a situation in one federal district court case in which the court listened to the stories children told of their experiences in mental hospitals, detention centers, group homes, and individual homes. These stories revealed an overworked, overloaded system that fails to provide essential services to the children. *Id.* at 148. The stories "painted, in the words of the district court judge, 'a bleak and Dickensian picture of life under the auspices of the DFCS.'" *Id.* (citing *B.H. v. Johnson* 715 F. Supp. 1387, 1389 (N.D. Ill. 1989)).

The Fourth Circuit's distinction between voluntary and involuntary placement in *Milburn* is illusory for three reasons. First, placement in foster care is rarely truly voluntary. Just as with parents of severely mentally retarded individuals, most parents who voluntarily place their children in foster care do so because they are economically or emotionally unable to raise a child and hence have no alternative to state care.<sup>75</sup> Additionally, the system encourages social workers to pressure unfit parents to place their child with the state voluntarily. This avoids litigation and forcible removal.<sup>76</sup>

Second, from the perspective of the child, foster care placement is no more voluntary than it is for the severely retarded. Both are usually incapable of informed consent. Even those with consensual capacity rarely act voluntarily under the circumstances.<sup>77</sup> Furthermore, *Youngberg*, by emphasizing "involuntarily institutionalized" individuals, encouraged the distinction between voluntary and involuntary placement. However, the court deemed Nicholas Romeo involuntarily institutionalized, although his mother petitioned for his commitment to the state hospital.<sup>78</sup> Indeed, the Second Circuit explicitly expanded the *Youngberg* protection from those involuntarily committed to encompass all persons in state custody.<sup>79</sup>

Third, as a policy matter, the state should not use the ill-defined voluntary/involuntary distinction to treat foster children with less regard than others in state custody. At least one federal district court has recognized that "[an] individual's liberty is not less worthy of protection merely be-

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75. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 834 (1977) (suggesting that voluntary placements are not voluntary at all); Robert H. Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 601 (1973); Oren, *supra* note 37, at 117 n.22; Mushlin, *supra* note 2, at 239-42; Mark Hardin, *Setting Limits on Voluntary Foster Care*, in FOSTER CHILDREN IN THE COURTS 70, 70-71 (Mark Hardin ed., 1983).

76. See *supra* note 74.

77. *Association for Retarded Citizens v. Olsen*, 561 F. Supp. 473, 484 (D.N.D. 1982), *aff'd in part*, 713 F.2d 1384 (8th Cir. 1983); *Kolpak v. Bell*, 619 F. Supp. 359, 377-79 (N.D. Ill. 1985) ("for all practical purposes, many of the residents of state-run mental institutions are effectively admitted involuntarily").

78. *Romeo v. Youngberg*, 644 F.2d 147, 155 (3d Cir. 1980) (en banc), *vacated*, 457 U.S. 307 (1982). See also *Kolpak*, 619 F. Supp. at 377 (plaintiff in *Youngberg* involuntarily committed).

79. *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984). In this case, residents of a state-operated school for the mentally retarded sought improved living conditions. The court said that whether the residents are voluntarily or involuntarily placed was irrelevant; in either case they are entitled to safe conditions. *Id.* The severely retarded do not understand the distinction between voluntary and involuntary. *Id.* at 1246.

cause he has consented to be placed in a situation of confinement."<sup>80</sup> In contrast, under the Fourth Circuit's holding a state repeatedly could place a voluntary foster child with a known abusive foster parent with no constitutional ramifications, whereas the state must protect an involuntary child from such a dangerous placement. Such a result produces two deleterious effects. First, it encourages a state to treat involuntarily committed children with more care than those voluntarily placed. Second, the voluntary foster child is entitled to less protection simply because her parent decided to avoid litigation and forced removal. Thus the Fourth Circuit discourages parents from voluntary placement. In an already over-burdened court system,<sup>81</sup> the state instead should seek to encourage voluntary placement rather than court-ordered placements.

## II. THE STATE ACTION DOCTRINE AS APPLIED TO FOSTER PARENTS

The remainder of this Note assumes a foster child's Fourteenth Amendment right to safety.<sup>82</sup> If some party has breached that right, the next question for section 1983 liability is whether the breaching party acted under color of state law.<sup>83</sup> In most foster child abuse cases there are two potentially liable parties: those who abuse the child (the foster parents), and those who fail to protect her (the state officials overseeing her case).

In *K.H. Through Murphy v. Morgan*, the Seventh Circuit assumed the facts as the abused child alleged and found that the state agency officials were state actors and that their failure to protect her was state action.<sup>84</sup> However, the court rejected the idea that foster parents are state actors.<sup>85</sup>

Based on the examination of the Supreme Court's development of the state action doctrine and the role of foster parents in fulfilling the state's

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80. *Wilder v. City of New York*, 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983) (quoting *Association for Retarded Citizens*, 561 F. Supp. at 485).

81. *See An Update: State Caseload Statistics*, 7 STATE CT. J. SUMM. 8 n.3 (1983) (civil filings have increased at an average rate of 5.3% each year; at this rate, filings would double every 13 1/2 years).

82. *See supra* notes 21-81 and accompanying text.

83. *See supra* note 9 and accompanying text.

84. 914 F.2d 846, 852 (7th Cir. 1990). The court cited the articulation in *Youngberg* of the state's duty of safety to children in its custody. The court also cited *Doe* for the corollary that the state could not avoid that duty by substituting private for public custodians. *Id.* Thus the court reasoned that the state officials were responsible for the actions of the private agency employees.

85. *See supra* notes 8-10 and accompanying text.

constitutional obligations to foster children, the Seventh Circuit's assumption that foster parents are not state actors is questionable.

#### A. *The Historical Development of the State Action Doctrine*

The state action doctrine grew from the Supreme Court's interpretation of the scope of Fourteenth Amendment protections. In the *Civil Rights Cases*,<sup>86</sup> the Court held that the Fourteenth Amendment prohibited state, but not private, infringement of personal liberties. The Court enunciated a strict framework for determining state action: only action that a state takes directly constituted state action.<sup>87</sup> The Court expanded the state action doctrine in the *White Primary Cases*,<sup>88</sup> holding that private political organizations that ran white-only primary elections were state actors.<sup>89</sup> Thus, the Court moved away from the rigid "direct state action" requirement, characterizing private conduct, indirectly related to the state, as state action. Since then, the Court has struggled to develop a clear theory for determining when private conduct is state action.

Prior to 1982, the Court developed at least four tests for determining when private action constituted state action: the symbiotic relationship

86. 109 U.S. 3 (1883).

87. *Id.* at 11. The *Civil Rights Cases* concerned a constitutional challenge to the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations. The Court held the Act void because the Fourteenth Amendment prohibited only direct action and that a prohibition on private action would violate the concept of federalism. *Id.* at 11-15. See also Ronna Greff Schneider, *State Action-Making Sense Out Of Chaos-An Historical Approach*, 37 U. FLA. L. REV. 737, 743-46 (1985); Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893, 894-95 (1984); Robert Hornstein, Note, *Drawing New Boundaries Between State Action and Section 1983's Action Under Color of State Law Requirement: Lugar v. Edmondson Oil Co.*, 36 ARK. L. REV. 609, 613 (1983).

88. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

89. *Herndon* involved a challenge to a Texas statute provision that prohibited blacks from voting in a Democratic primary. The Court held the statute unconstitutional. 273 U.S. at 540. In *Condon*, the plaintiff challenged the racially motivated decision of the Texas Democratic Party Executive Committee to refuse him the vote in a primary. The Court found that since the state conferred its authority on the Committee, the party delegates who made the racially discriminatory decision were state agents liable under the Fourteenth Amendment. 286 U.S. at 84-85, 89. In *Allwright*, the Court found that the Democratic State Convention violated the Fifteenth Amendment by excluding a black from the Democratic primary election. The private party's determination was state action because the state delegated authority to the Democratic Party to determine qualifications for participation in the primary. 321 U.S. at 663. In *Adams*, the plurality found that a voluntary political club's exclusion of blacks from voting in a primary election was state action. The club operated as part of the Democratic Party, which was bound by the Fifteenth Amendment under *Allwright*. 345 U.S. at 481-84. See generally Schneider, *supra* note 87, at 746-52.



test,<sup>90</sup> the close nexus test,<sup>91</sup> the joint participation test,<sup>92</sup> and the public function test.<sup>93</sup> In 1982, the Court attempted to clarify and consolidate these different theories in three state action cases.

The first of these cases, *Lugar v. Edmondson Oil Co.*,<sup>94</sup> involved a creditor seeking prejudgment attachment of his debtor's property. The county sheriff executed a writ of attachment pursuant to state statute. A state trial judge subsequently dismissed the order because the creditor failed to establish the statutory grounds for the attachment. The debtor brought a section 1983 action alleging that the creditor acted under color of state law.<sup>95</sup> The Court reasoned that private conduct is state action if

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90. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Private conduct is state action when the "[s]tate has so far insinuated itself into a position of interdependence with [the private actor] that it may be recognized as a joint participant in the challenged activity." *Id.* at 725. The Court found that leasing of space in a state-owned parking garage to a restaurant that discriminated on the basis of race created a situation in which both parties mutually benefitted from the symbiotic relationship. The restaurant enjoyed tax exempt status, and the discrimination benefitted the state since serving blacks allegedly would injure business and hinder the restaurant's ability to pay rent. Therefore, the restaurant, for constitutional purposes, was a state actor. *Id.* at 723-24. For a discussion of *Burton*, see Thomas B. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

91. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Court focused on the connection between government and the private entity's particular actions. The inquiry was "whether there [was] a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. In *Jackson*, a privately owned and operated utility company terminated service to a customer for payment delinquency. *Id.* at 347. The Court held that even though the utility was a heavily regulated natural monopoly, it was not a state actor because no nexus existed between the state's regulation and the challenged action. *Id.* at 358-59. In other words, the state's regulation did not affect the utility's service termination. *Id.* Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

92. See *Dennis v. Sparks*, 449 U.S. 24 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The joint participation test focuses on the degree to which government officials and private parties act together. In *Adickes*, the Court found state action where a restaurant conspired with a town policeman. The restaurant refused to serve the plaintiff who was with six black students, and the policeman subsequently arrested the plaintiff for vagrancy. The policeman's involvement made the restaurant's conduct state action. 398 U.S. at 150-52.

93. See *Marsh v. Alabama*, 326 U.S. 501 (1946). The public function test looks to whether the private actor engages in conduct constituting a traditional and exclusive function of government. In *Marsh*, police in a company-owned town arrested a Jehovah's Witness distributing leaflets for trespassing. The Court held that because the company built and operated the town primarily to benefit the public, its conduct was state action. Accordingly, the company could not infringe the plaintiff's First Amendment rights any more than could a traditional town government. *Id.* at 508-09. See also *Evans v. Newton*, 382 U.S. 296 (1966) (state action when public officials are trustees of a racially discriminatory trust for a city park).

94. 457 U.S. 922 (1982).

95. *Id.* at 924-25. The plaintiff brought the prejudgment attachment motion pursuant to VA. CODE ANN. § 8.01-533 (Miche 1977) The statute required that, in order to obtain a prejudgment attachment, creditors needed only to allege, in an ex parte petition, their belief that the debtor might

it can be said to be "fairly attributable" to the state.<sup>96</sup> The Court required that: 1) the exercise of a state-established right or privilege or state-imposed rule must lead to the deprivation; and 2) the party responsible for the deprivation must be an official or other person either acting with an official or whose conduct is "otherwise chargeable to the state."<sup>97</sup> In this case, a state statute authorized the prejudgment attachment procedure, satisfying the first prong. A state actor, the sheriff, executed the writ and thereby satisfied the second prong.

In *Blum v. Yaretsky*,<sup>98</sup> a group of patients in a nursing home challenged the home's physicians' decision to transfer the patients to a lower level of care pursuant to federal medicaid laws.<sup>99</sup> The patients claimed that since the physicians acted pursuant to state regulations, they were state actors and must afford adequate process before denying the plaintiffs their entitlement.<sup>100</sup> The Court, applying the nexus theory, held that

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sell the property. The debtor's § 1983 action alleged that the creditor had acted jointly with the state to deprive him of property without due process. 457 U.S. at 924-25.

In its analysis, the Court first noted that the state action requirement (for the Fourteenth Amendment) and the "under color of law" requirement (for § 1983) are virtually identical. If the challenged conduct is state action then it is also "action under color of state law." *Id.* at 926-35. See *supra* note 15.

96. 457 U.S. at 937.

97. *Id.* The Court noted that while the two principles are related, they are not the same. When the complaint is directed against a state official, the two prongs collapse into each other. *Id.* (citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). If the claim is against a private party, the prongs diverge. *Id.* For an interpretation of this part of the Court's opinion, see *Ayoub*, *supra* note 87, at 912-16.

98. 457 U.S. 991 (1982).

99. The plaintiffs alleged that the procedure did not afford them adequate process and they sought regulations requiring a pre-transfer hearing. Under federal medicaid laws, in order for participating states to receive money for distribution to needy elderly patients, the states must promulgate regulations requiring the nursing homes to evaluate the patients' needs. The homes establish a review committee of independent physicians to assess the patients' necessary level of care. The physicians determine whether the patients require care in "skilled nursing facilities" or "health related facilities." The latter provide less extensive and expensive care. For the patients to qualify for medicaid benefits, they must transfer to the unit according to the physicians' recommendation. *Id.* at 994-95.

100. *Id.* at 1003. The Court recognized that this case differed from more traditional state action inquiries. Here the plaintiffs sought to require the state to adopt regulations to prohibit private parties' actions; specifically, the plaintiffs argued that the nursing homes must provide a hearing before recommending a transfer. This differs from cases in which the complaint seeks to hold a private party liable for its conduct as state action, or cases in which the complaint challenges a state actor's enforcement of state laws. *Id.* at 1003-12. Thus, because the state action doctrine primarily deals with these latter two situations, the *Blum* case was an aberrational fact pattern for a state action inquiry. The Court, nevertheless, applied doctrines from these latter two situations to the *Blum* facts.

the presence of state regulation did not convert private conduct into state action; the regulations neither encouraged nor compelled the decision to transfer, which was left to the physicians' professional judgement.<sup>101</sup> The Court stated that the nexus between the state and private conduct is satisfied when the state exercises coercive power or encourages the private conduct<sup>102</sup> and when the private party exercises a public function.<sup>103</sup>

The final case was *Rendell-Baker v. Kohn*.<sup>104</sup> The plaintiff brought a section 1983 action against the school that had fired her. The state heavily regulated the school and funded approximately ninety percent of its programs. She asserted that her discharge violated her First, Fifth, and Fourteenth Amendment rights.<sup>105</sup> The Court cited *Lugar* for the "fairly attributable" standard and examined each of the prior state action theories to determine if the school's conduct could be "fairly seen as state action."<sup>106</sup> First, since the state's funding and regulation did not encourage or compel the discharge decision, neither alone met the nexus test. Second, the school was not exercising a public function because education is not an exclusive state function. Third, no symbiotic relationship existed between the state and the school; the discharge decision did not benefit the state.<sup>107</sup>

The three cases at first glance seem to further confuse the state action doctrine, but they illuminate identifiable trends with predictive value. First, the "fairly attributable" standard appears to be the Court's primary state action test when a complaint is brought under section 1983.<sup>108</sup>

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101. *Id.* at 1005-10. See *supra* note 99.

102. 457 U.S. at 1004 (citing, *inter alia*, *Flagg Bros. v. Brooks*, 436 U.S. 149, 166 (1978)).

103. *Id.* at 1011. The nursing home did not exercise a public function. The Court stated that decisions made in day-to-day administration are not traditionally and exclusively a state function. *Id.*

104. 457 U.S. 830 (1982).

105. *Id.* at 834. The school was a private institution for students with special needs who had difficulty completing public high school. The school discharged the plaintiff for supporting a student petition advocating greater responsibilities for the student-staff council in making hiring decisions. She alleged that the school discharged her for exercising her First Amendment rights without adequate due process. *Id.* at 831-35.

106. *Id.* at 838. The Court stated that "[t]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal right 'fairly attributable to the State?'" *Id.* at 838 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

107. *Id.* at 839-43.

108. See *supra* note 106. See also Barbara Rook Snyder, *Private Motivation, State Action and The Allocation of Responsibility For Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053 (1990) (as an alternative to the "fairly attributable" standard, the state action inquiry should focus on whether state action provided the impetus for private action; if so, state action exists if a court

Second, the "fairly attributable" standard incorporates the prior state action theories, their use dependent on the particular facts.<sup>109</sup> Thus if a plaintiff challenges a state actor's conduct a court uses the theories to determine whether the state gave aid or granted a privilege to act to the actor, satisfying the first prong of the "fairly attributed" test. If a statute is challenged, on the other hand, the courts will use the different pre-1982 theories to determine if the actor could be said to be a state actor, satisfying the second prong. Finally, if a plaintiff challenges a private actor's conduct, the courts use the theories to determine if both prongs of the "fairly attributable" standard are satisfied.<sup>110</sup> Whether foster parents are state actors and whether their abusive conduct constitutes state action falls under this last scenario.

### B. *The State Action Doctrine in the Prison Context After West v. Atkins*

The Supreme Court has not addressed whether foster parents are state actors, but the Court has decided a state action case involving private parties in the prison context. In *West v. Atkins*,<sup>111</sup> the Court faced the questions of whether a prison physician was a state actor and whether his failure to treat a prisoner adequately was state action.<sup>112</sup>

The plaintiff, a prison inmate, brought suit under section 1983 alleging that the prison physician, acting under color of law, was deliberately indifferent to his injury, in violation of his Eighth Amendment rights.<sup>113</sup>

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would consider the action unconstitutional if a state actor had taken it); *Ayoub*, *supra* note 87, at 912-13.

109. For a further discussion of the interplay between the "fairly attributable" standard and the different state action theories, see *Ayoub*, *supra* note 87, at 912-16. The author finds support for this relationship in each of the three main cases. In each case the Court checked each test as a possible way to attribute the private conduct to the state. *Id.*

110. See *supra* note 109.

111. 487 U.S. 42 (1988).

112. Prior to *West*, the majority of circuits had held that a state-employed physician was a state actor. See, e.g., *Ort v. Pinchback*, 786 F.2d 1105 (11th Cir. 1986); *Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981); *Byrd v. Wilson*, 701 F.2d 592 (6th Cir. 1983).

For a comprehensive list of other citations, see *West*, 487 U.S. at 47 n.7. *But see Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985); *Nash v. Wennar*, 645 F. Supp. 238 (D. Vt. 1986) (doctor's deprivation of prisoner's rights did not have its source in state authority); *Smith v. Huffman*, 670 F. Supp. 176 (W.D. Va. 1987) (registered nurse who was full-time employee of the state prison was not a state actor).

113. 487 U.S. at 44-45. The inmate tore his Achilles tendon and alleged that a doctor, under contract with the state to provide medical care to prisoners, was deliberately indifferent to his treatment. The inmate stated that the doctor acknowledged that the injury required surgery, but that he

The Fourth Circuit, on rehearing, affirmed the district court's dismissal of the complaint.<sup>114</sup> The majority held that full-time, state-employed doctors are not state actors when acting in their capacity as physicians.<sup>115</sup> The court could find state action only if a physician exercised authority outside of his professional judgment, such as in a custodial or supervisory role.<sup>116</sup>

The Supreme Court reversed, applying the *Lugar* "fairly attributable" standard and finding state action.<sup>117</sup> The Court first addressed the lower court's holding that a state-employed physician exercising professional medical judgment is not a state actor. The Court noted that the law considers a state employee acting in his official capacity a state actor.<sup>118</sup> The Court then rejected the idea that an employee's professional judgment is not attributable to the state, arguing that state actors are not "removed from the purview of section 1983 simply because they are professionals acting in accordance with professional discretion and judgment."<sup>119</sup> The state clothes a state-employed physician with authority of state law by virtue of its relationship with the physician. The Court drew the conclusion that this relationship makes the physician's action in treating the inmates "fairly attributable to the state" and, consequently, state action.<sup>120</sup>

The Court then examined the facts in *West*: the physician was not a

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refused to schedule it. The plaintiff argued that this denial of medical treatment constituted cruel and unusual punishment in violation of his Eighth Amendment rights. *Id.* at 45. See *supra* notes 21-25 and accompanying text.

114. *West v. Atkins*, 815 F.2d 993 (4th Cir. 1987) (en banc), *rev'd*, 487 U.S. 42 (1988).

115. *Id.* at 995.

116. *Id.* The court relied on *Polk County v. Dodson*, 454 U.S. 312 (1981), which held that a public defender is not a state actor when performing traditional functions as counsel to a defendant. While the Fourth Circuit did not rely on the Court's rationale in *Blum v. Yaretsky*, 457 U.S. 91 (1982), the two rationales are related. In *Blum*, the Supreme Court held that the state did not mandate the decisions of physicians to transfer nursing home patients. Rather, the decisions resulted from the doctors' professional judgment. Similar to the position taken by the *West* Court, the *Blum* Court held that it could not attribute this professional judgment to the state. See *supra* notes 98-103 and accompanying text.

117. 487 U.S. at 54. The Court followed the two-prong *Lugar* format. *Id.* at 54-57. See *infra* notes 118-21.

118. 487 U.S. at 51-52. This seems to satisfy the second *Lugar* requirement of finding a state actor. See *supra* note 97 and accompanying text.

119. 487 U.S. at 52.

120. *Id.* at 54-55. This portion of the circuit court's analysis seemed to go to the first prong of the *Lugar* test. The relationship between the physician and state is such that the state confers on the physician the right and obligation to treat the inmates, deferring to the physician's discretion. See *supra* note 97 and accompanying text.

state employee, but rather had a contractual arrangement with the state. The Court found this distinction insignificant. In both state-employment and contractual arrangements, the state authorizes physicians to provide medical care for prison inmates. The Court stated that in either case the state delegates to the physician its constitutional duty to provide care to the inmates. In addition, the consequences for the prisoner are the same; he has no one else to turn to for medical care.<sup>121</sup> The Court reasoned that the special relationship between state and physician, and the inmate's dependance on both, is a nexus sufficient to constitute state action. The Court found the employment distinction irrelevant, arguing that "the physician's function within the system, not the precise terms of his employment . . . determines whether his actions can be fairly attributed to the state."<sup>122</sup> Since the physician's function of fulfilling the state's constitutional obligation to the prisoners made his conduct state action, the Court found the physician liable under section 1983.<sup>123</sup>

*C. The Seventh and Fourth Circuits' Determinations That Foster Parents Are Not State Actors*

Currently, two circuits hold that foster parents are not state actors: the Seventh Circuit in *K.H. Through Murphy v. Morgan*,<sup>124</sup> and the Fourth Circuit in *Milburn v. Anne Arundel County Department of Social Services*.<sup>125</sup>

The *K.H.* court reasoned from *DeShaney v. Winnebago County Department of Social Services*<sup>126</sup> that foster parents are not state actors.<sup>127</sup> *DeShaney* held that the state did not have a Fourteenth-Amendment obligation to remove a child from his father's custody, even when the state knew that the father was abusing the child.<sup>128</sup> The Seventh Circuit in *K.H.* explained that if state placement made foster parents state actors, then if the state turned over custody to natural parents, logic would com-

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121. The Court noted that the prisoner was in "close custody" which, under state law, prohibited him from going outside the prison to obtain medical care. 487 U.S. at 44, 55 & n.2. The state caused the deprivation by denying him the ability to seek other medical care combined with the physician's deliberate indifference to the prisoner's medical needs. *Id.* at 55.

122. *Id.* at 55-56.

123. *Id.* at 56-57.

124. 914 F.2d 846 (7th Cir. 1990).

125. 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 148 (1989).

126. 489 U.S. 189 (1989). *See supra* note 53 and accompanying text.

127. 914 F.2d at 852.

128. 489 U.S. at 202.

pel courts to hold natural parents to be state actors. According to the court, this would “undo *Deshaney*.”<sup>129</sup>

The Fourth Circuit in *Milburn* similarly found that foster parents are not state actors and thus are not liable under section 1983.<sup>130</sup> The court cited *Lugar*<sup>131</sup> for the “fairly attributable” test, but focused mainly on the state action analysis derived from *Blum v. Yaretsky*.<sup>132</sup> The court noted first that for state action to exist, there must be a sufficiently close nexus between the challenged conduct and the state such that the state may be held responsible for the conduct. Second, a state is not responsible for the specific conduct unless it has coerced or encouraged the action. Third, the nexus may exist if the private party exercises an exclusive state function.<sup>133</sup> In this case, the conduct complained of was the foster parent’s child abuse. The court held that, although the foster parents had a contract with the county and the state regulated the foster home, the contract and regulations did not encourage the child abuse.<sup>134</sup> In addition, the court stated that care of foster children is not an exclusive state function. Accordingly, the court held that the foster parents were not state actors.<sup>135</sup>

#### D. Foster Parents Are State Actors

The *West* rationale, finding that the prison physician was a state actor, is equally persuasive when applied to foster parents who abuse foster children. Courts generally do not consider foster parents or the physician in *West* state employees. Rather, the law views them as contract service providers.<sup>136</sup> Foster children, like the prisoners in *West* who had

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129. 914 F.2d at 852.

We emphasize that the issue is not whether the state’s duty follows the child into the private home in which he is placed. We may assume, without having to decide, that it does not, that foster parents . . . are not state agents. . . . Certainly if the state decides to return a child whom it has taken custody of to the child’s natural parents, those parents do not become state agents.

*Id.*

130. 871 F.2d at 479.

131. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982). See *supra* notes 94-97 and accompanying text.

132. 457 U.S. 830 (1982). See *supra* notes 98-103 and accompanying text.

133. 871 F.2d at 477-78.

134. *Id.* at 479.

135. *Id.*

136. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 826 (1977) (“Foster parents who are licensed by the State or an authorized foster care agency . . . provide care under a contractual arrangement with the agency, and are compensated for their services”). In *New*

no choice in their medical care, have no choice in their parental care. The state removes them from their natural parents and decides who will have physical custody of the children. They are completely dependant on the state.<sup>137</sup> In addition, one could argue that foster children are even more deserving of constitutional protections since, unlike criminals, the state exercises custodial power over them through no fault of their own. Moreover, like the state regulation of physicians in *West*, states regulate who may and may not be foster parents through license procedures and qualification requirements.<sup>138</sup> Just as only state-authorized doctors treat inmates, the state may place foster children solely with state-authorized

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York, for instance, the courts have uniformly treated foster parents as contract service providers. See *New York ex. rel. Ninesling v. Nassau County Dep't of Social Servs.*, 386 N.E.2d 235 (N.Y. 1978) (foster parents enter into a contractual arrangement to provide care for children with the express understanding that the placement is temporary); *Minella v. Amrhein*, 516 N.Y.S.2d 494 (App. Div. 1987) (foster parents are essentially contract service providers); *Harris v. State*, 502 N.Y.S.2d 760 (App. Div. 1986) (custodians of state-certified family-care home for mentally disabled individual are like foster parents and are contract service providers, not employees of the state); *Blanca C. v. County of Nassau*, 480 N.Y.S.2d 747 (App. Div. 1984) (foster parents are not county employees, but state contract providers), *aff'd*, 481 N.E.2d 545 (N.Y. 1985). See also *Bartels v. County of Westchester*, 429 N.Y.S.2d 906 (App. Div. 1980); *In re Mavis M.*, 441 N.Y.S.2d 950 (Fam. Ct. 1981). See generally Sanford N. Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283 (1971) (foster parents most commonly are not considered employees, their rights and duties are determined by contract); Mnookin, *supra* note 75, at 610.

The distinction in the above cases turns on state law. In Illinois, state laws give the Department of Children and Family Services ("Department") authority to contract with agencies or parents for care of a child in its custody. ILL. REV. STAT. ch. 23, para. 5005 (1988 & Supp. 1990). The assorted foster parents in *K.H.* either had a contract with the Department, or with the Central Baptist Family Services, a state-authorized agency. *K.H. Through Murphy v. Morgan*, No. 87C 9833, 1989 WL 105279, at \*8 (N.D. Ill. Sept. 6, 1989), *aff'd in part and remanded in part*, 914 F.2d 846 (7th Cir. 1990). Therefore, although Illinois courts never explicitly addressed the question, it seems that Illinois treats foster parents not as state employees, but as contract service providers.

137. In placing a child, Illinois law mandates that the court consider the minor's preferences. ILL. REV. STAT. ch. 37, para. 802-27 (1990). In addition, the minor may apply to the court for a change of custody or appointment of a new custodian. ILL. REV. STAT. ch. 37, para. 802-28(3) (1990). However, the court is the final decisionmaker and the child must comply. Moreover, almost 33% of foster children in Illinois are five years old or younger, and do not possess the capacity to indicate a preference or apply for a change in custody. See ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, HUMAN SERVICES DATA REPORT PHASE 1: FISCAL YEARS 1986-1988, at 71 (1988) (29% of the total foster children in Illinois were less than five years old; 32% between ages 6-12; 33% between 13-17).

138. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 826 (1977). Illinois law requires that the Department of Children and Family Services promulgate policies and standards for licensing. ILL. REV. STAT. ch. 23, para. 2213 (1990). All applicants must submit to a criminal background investigation and applicants who have been convicted of various sex crimes or kidnapping are not eligible for a license. ILL. REV. STAT. ch. 23, para. 2214.2 (1990).



agencies or families.<sup>139</sup>

Furthermore, the relationship between foster parents and the state is analogous to the relationship between prison physicians and the state. States owe a constitutional duty of safety to those taken into custody, including foster children.<sup>140</sup> The state delegates this duty to either foster families or private agencies<sup>141</sup> who, in turn, delegate to foster parents.

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139. In *West v. Atkins*, 487 U.S. 42 (1988), the state actor question (the *Lugar* second prong) turned on the combination of state authorization of the physicians and the inmates' inability to choose who treats them. *Id.* at 54-57. Similarly, courts should consider foster parents state actors because the child is dependent on the state for care, and the state authorizes foster parents to provide the care. This combination satisfies *Lugar's* second prong for foster parents just as it did for prison physicians in *West*. See *supra* notes 117-23 and accompanying text.

140. See *supra* notes 21-81 and accompanying text.

141. Generally, courts hold that private foster placement agencies are state actors. See *Wilder v. Bernstein*, 848 F.2d 1338, 1341 (2d Cir. 1988) (child-care agencies fulfill what would otherwise be a state function); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1979) (private foster care agency's conduct is state action); *Campbell v. Philadelphia*, No. 88-6976, 1990 WL 102945, at \* 3 (E.D. Pa. July 18, 1990) (private foster care agency under contract with the state is a state actor); *Zemola v. Johnson*, No. 89C 0798, 1989 WL 111868, at \*4 (N.D. Ill. July 24, 1989) (a private placement agency that contracts with the Department of Children and Family Services acts as an agent of the Department and thus is a state actor); *McAdams v. Salem Children's Home*, 701 F. Supp. 630 (N.D. Ill. 1988) (an individual contracting with the state to provide for a child in state custody is sufficiently connected to the state to be a state actor); *Arneith v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988) (to the extent that a Catholic mission is financed with state or city funds, the mission is engaged in state action under the Fourteenth Amendment); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979) (authorized agency empowered to care for and take custody of state wards acts under color of state law).

Courts also have held agencies for the mentally impaired liable as state actors. See *Fialkowski v. Greenwich Home For Children, Inc.*, 683 F. Supp. 103 (E.D. Pa. 1987) (when a state chooses to delegate its constitutional duties to a private entity, the entity acts under color of state law); *Davenport v. Saint Mary Hosp.*, 633 F. Supp. 1228, 1234 (E.D. Pa. 1986); *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc.*, 556 F. Supp. 677, 680 (D. Mass. 1983).

In other contexts as well, courts have found state action when the state delegates its duties to a private party. In *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir.), *cert. denied*, 476 U.S. 1124 (1986), the court held that a court-ordered guardian of an incompetent young adult was a state actor. *But see Taylor v. First Wyoming Bank*, 707 F.2d 388 (9th Cir. 1983). In *Horton v. Flenory*, 889 F.2d 454 (3rd Cir. 1989), the court held that a private club owner was a state actor. The police had a policy of deferring the investigation of thefts occurring in private clubs to the clubs themselves. The police in this case left a theft suspect who was also an employee of the club with the club's owner for interrogation. The club owner subsequently beat the employee to death. The court held that the police clothed the owner with the authority of state law, and therefore he was a state actor. See also *Milo v. Cushing Memorial Hosp.*, 861 F.2d 1194 (10th Cir. 1988) (privately run public hospital is public entity and its conduct is state action).

One exception to these general principles is *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.), *cert. denied*, 479 U.S. 828 (1986). There the court held that a private, non-profit organization that made foster homes available for state agencies and made recommendations for placement was not a state actor. The state did not regulate, or have a contract with, the organization. In addition, the court found the plaintiff's allegation of state action "bald and conclusory." *Id.* at 710-11. This case

Foster parents' nonemployment relationship with the state is not determinative. The foster parents' function in carrying out the state's constitutional obligations makes their actions "fairly attributable" to the state.<sup>142</sup>

The Seventh Circuit's dicta in *K.H. Through Murphy v. Morgan*, suggesting that foster parents are not state actors, is in error for two reasons. First, the court's reliance on *DeShaney* is misplaced. In *DeShaney*, the state ceded both legal and physical custody of the child to his father.<sup>143</sup> The Court's holding turned on the lack of a custodial relationship between the state and the child, not on whether the abusing party was the parent. In the foster care context, the state always retains *legal* custody; when it places a child it cedes only *physical* custody.<sup>144</sup> Thus, finding a

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is distinguishable on its facts and faulty pleading; almost all states regulate and contract with the foster care agencies.

Another case distinguishable on its facts is *Fike v. United Methodist Childrens' Home*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). There the court held that a home for state wards did not engage in state action when it fired an employee. The court did not consider whether the home was a state actor for services related to the wards.

Privatization of prisons is another area in which courts have not yet developed the state action doctrine. However, some legal scholars argue that the role of private correction facilities satisfies the *Lugar* "fairly attributable" test, the nexus test, and the public function test. Moreover, in certain situations, the facility's employees should be considered state actors as well. See Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U. L. REV. 933, 941-46 (1989); Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1478-81 (1986) (since prison operation and management is an exclusive state function and private operation of prisons also satisfies the nexus test, private prisons should be considered state actors).

142. This nexus between the state and foster parent clothes the foster parent with authority of state law, fulfilling *Lugar*'s first prong. See *supra* notes 95-97 and accompanying text.

Another state action theory that might apply in this context is the public function doctrine. In *West* the Court acknowledged that while medical care is not traditionally an exclusive state service, the Court, under the public function analysis, should examine the context of the performance. 487 U.S. at 56 n.15. In *West*, the doctor provided medical care in the correctional setting, which is an exclusive state function. Similarly, parenting, like medical care, is not a traditionally exclusive state service. Seen in the context of assuming legal custody of a child, however, providing parental and custodial care is a traditional state function. This public function analysis also would satisfy the first *Lugar* prong.

At least one writer has stated that *West* relied on a public function theory without explicitly so stating, because the Court disfavors that theory. Elizabeth Alexander, *West v. Atkins: Prison Doctors Remain State Actors*, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 139 (Barbara H. Wolvovitz ed., 1989). This argument has some merit particularly since the Fourth Circuit's dissent relied expressly on a public function theory.

143. 489 U.S. at 191.

144. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 827 n.18 (1977) (foster parent does not have full authority of a legal custodian); *Vonner v. State*, 273 So. 2d 252 (La. 1973) (when Department of Public Welfare places a child with foster parents, the Depart-

foster parent a state actor, even in a placement with natural parents, is consistent with *DeShaney*. The state would still have legal custody of the child, and thus would be responsible to act if it knew of the child abuse.<sup>145</sup>

Second, the court wrongly assumed that a child's natural parent could be considered a foster parent. Placing a child with a natural parent does not transform that parent into a foster parent. The natural parent has much greater decisionmaking power and more legal rights with regard to the child in its custody than does a foster parent.<sup>146</sup> Moreover, as a matter of policy, natural parents should not be considered foster parents. A fundamental tenet of federal and state foster care policy mandates removal from a natural parent only if absolutely necessary; but if removal is necessary, the state is to use reasonable efforts to reunite the child with his or her natural parents.<sup>147</sup> In contrast, custody with foster parents is

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ment, not the foster parents, has legal custody). See Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *FOSTER CHILDREN IN THE COURTS* 128, 140 (Mark Hardin ed., 1983) (when a child is placed in foster care, the child welfare agency obtains custody; thus the agency, not the foster parent, has the power and duty to make decisions for the child); *supra* note 71 and accompanying text.

145. The Seventh Circuit in *K.H.* interprets *DeShaney* to stand for the proposition that the state does not have an affirmative obligation to remove a child from his father when the state knows of abuse. 914 F.2d at 848-49. This interpretation is flawed, however, because the Court based its decision on the child's custodial status, not on the identity of the abuser. The state did not have custody of the child, therefore it had no obligation to help the child. In the foster care context, where the agency has legal custody of the child, it has an affirmative duty not to place the child with known abusive parents, whether they are his natural parents or not. The reasoning in *K.H.* is inconsistent with *DeShaney* because of the existence of a custodial relationship between the child and the state in the foster child context. See Oren, *supra* note 52, at 143-47.

146. See *supra* note 72 and accompanying text.

147. Congress passed the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620-28, 670-79 (1988) as a comprehensive reform of the national child welfare system. Congress had two objectives: to prevent children's removal from their own homes, and to facilitate the child's placement in a permanent foster home or return to his or her natural parents. 42 U.S.C. § 625 (1988). For instance, the Act states that for a state to qualify for federal funds, "in each case reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home and (B) to make it possible for the child to return to his home . . ." 42 U.S.C. § 671(a)(15) (1988).

Illinois echoes this policy, defining child welfare services as ". . . public social services directed toward the accomplishment of the following purposes: . . . (3) preventing the unnecessary separation of children from their families . . . (4) restoring to their families, children who have been removed. . . ."

See generally STEIN, *supra* note 71, at 36-39; Mary Lee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* 575-609 (Mark Hardin ed., 1983).

intentionally only temporary.<sup>148</sup> This policy rests on the state's interest in the special relationship between parent and child. Thus, finding that foster parents are state actors is consistent with *DeShaney* if courts recognize the factual and legal differences between placement with natural and foster parents.

The *Milburn* analysis, determining that foster parents are not state actors, is flawed because it fails to consider *West v. Atkins*.<sup>149</sup> The *Milburn* court's holding cannot be reconciled with *West* for several reasons. First, the Fourth Circuit failed to recognize the similarity between foster children and incarcerated persons. Consequently, the court ignored an important part of the *West* analysis: the special relationship between the state and the physician based on the inmate's dependence on the state for medical care.<sup>150</sup> Accordingly, the court did not consider the foster child's dependence on the state for care and safety and the special relationship this creates between the state and the foster parents.

Second, the court did not make the analogy between a physician fulfilling the state's constitutional duty to provide prisoners with medical care and the foster parent fulfilling the state's constitutional duty to provide safety and care for foster children.<sup>151</sup> Instead, the court looked only at the contractual and regulatory relationship between the foster parents and the state, overlooking their unique functional relationship.

Third, the court's public function argument is inconsistent with *West*. *West* emphasized that a public function analysis must consider the context of the case.<sup>152</sup> However, the *Milburn* court looked only at care of foster children generally, not considering the case in which the state retains legal custody of the child. In this context, the state still bears the responsibility for the child's care and safety. The state merely delegates this responsibility to the foster parents. In the fulfillment of this obligation, the foster parents perform an exclusive state function.

## CONCLUSION

Courts currently recognize a constitutional right to safety and ade-

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148. See *supra* note 1 and accompanying text.

149. 487 U.S. 42 (1988). See *supra* notes 112-29. This omission is particularly curious because *West* originated in the Fourth Circuit. *West v. Atkins*, 815 F.2d 993 (4th Cir. 1987). For a critical analysis of *Milburn*, see Oren, *supra* note 52; Sinden, *supra* note 37, at 248-58.

150. 487 U.S. at 55. See *supra* notes 114-23.

151. See *supra* notes 21-81 and accompanying text.

152. 487 U.S. at 56 n.15. See *supra* note 132 and accompanying text.

quate care for prisoners and the mentally impaired in state custody.<sup>153</sup> While authority exists for a right to safety for foster children, there is no general consensus.<sup>154</sup> As a matter of legal principle and policy, this right should extend to foster children. Courts distinguish prisoners and the institutionalized mentally impaired from all others because of their custodial status.<sup>155</sup> However, the same conditions apply to foster children. In addition, the state removes foster children from their parents, possibly placing them in a more dangerous position.<sup>156</sup> As a matter of policy, the law should hold the states accountable for the child's safety and care.

Since states should have a duty to provide safe conditions for foster children, the law should hold foster parents liable as state actors.<sup>157</sup> Because of the unique relationship among the state, foster children, and foster parents, courts must consider foster parents state actors. When the state delegates its constitutional duty of care and safety to foster parents, the parents' conduct in that context is "fairly attributable" to the state.<sup>158</sup> As a consequence of finding a constitutional duty of care and safety, and correspondingly of finding that foster parents are state actors, substitute care systems will provide a safer haven for all foster children.

*Terrence J. Dee*

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153. *See supra* notes 21-34 and accompanying text.

154. *See supra* notes 37-45, 53-81 and accompanying text.

155. *See supra* notes 21-36 and accompanying text.

156. *See supra* note 1 and accompanying text.

157. *See supra* notes 82-152 and accompanying text.

158. *See supra* notes 124-30 and accompanying text.

