

Human Rights Paradigms for Remediating Governmental Child Abuse

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I. INTRODUCTION

This article examines prior doctrinal approaches to governmental liability for child abuse that occurs in state-ordered foster care or institutional settings. Static Eighth Amendment jurisprudence, amorphous Fourteenth Amendment doctrinal standards, and recent human rights law developments necessitate a fresh judicial approach to protecting our most vulnerable children who otherwise lack meaningful access to legislative or political redress.¹ This article will focus on whether enhanced legal protection for these innocent children may be built upon sound constitutional and tort doctrinal developments coupled with enhanced public policy considerations.

II. FAMILY RELATIONS ARE PARAMOUNT RIGHTS AND LIBERTIES

The U.S. Supreme Court has long recognized the right to familial relations as a constitutionally sanctified, substantive due process right.² The Court has repeatedly enshrined the right of parents to procreate and raise children as perhaps the most fundamental right of all.³

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1. The author thanks the Washburn University School of Law community, Professor Charlene L. Smith in particular, and the distinguished visiting faculty from England and elsewhere for their collegiality and vision shared at the Ahrens Chair tort seminar on this subject in September, 2000. As referenced herein, human rights law includes both U.S. civil rights law and varied sources of international law. The article's title pays homage to the visiting faculty's advocacy of incorporating international human rights law into the domestic law of England.

2. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (there is "a fundamental liberty interest of natural parents in the care, custody, and management of their child."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

3. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children is now established beyond debate as an enduring American tradition."); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) ("[T]he institute of the family is deeply rooted in this Nation's history and tradition."); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship."); *Croft v.*

Equally fundamental are the substantive due process rights of children to be raised nurtured, and sheltered by their parents and their legal status and standing to assert constitutional, tort and other claims against the state for all wrongs that are caused by separation from parental care.⁴ These core principles were articulated most recently in *Troxel v. Granville*, wherein the Supreme Court invalidated a Washington State third-party child visitation statute.⁵ The Supreme Court reiterated that the Due Process Clause “includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’”⁶ The right of parents to decide what is in the best interests of their children trumps any government interest therein unless compelling circumstances of abuse and neglect are found. Substantive due process standards frame evaluation of the constitutionality of government-forced separation of a child from his or her parents.⁷

Of course, the constitutional right to familial integrity is not absolute.⁸ “Indeed, this liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children—particularly when the children need to be protected from their own parents.”⁹ Resulting from a myriad of child welfare concerns, including socio-economic circumstances, crime, drug abuse, mental or physical incompetence, even religious practices, courts are (tragically, too often) required to balance fundamental family integrity rights against the State’s interest in protecting children from abuse, especially in cases where children have been summarily removed from their homes and either placed in foster care or institutionalized.¹⁰ In balancing pertinent

Westmoreland County Children and Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997) (reiterating the constitutionally protected liberty interests that parents have in the custody and care of their children).

4. See *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) (“We recognize that the forced separation of parent from child, even for a short time, represents a serious infringement upon both the parents’ and child’s rights.”) (internal quotations omitted); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (“[A] child’s right to family integrity is concomitant to that of a parent.”); *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) (“Parents and children have a well-elaborated constitutional right to live together without governmental interference.”).

5. See 530 U.S. 57 (2000). *Troxel*, mischaracterized in the media as a “grandparents’ rights” case, was immediately saluted as a “much needed reaffirmation of family privacy, parents’ rights, and limits on government.” Richard W. Garnett, *A Victory for the Family*, WALL ST. J., June 6, 2000, at A26.

6. *Troxel*, 530 U.S. at 65 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

7. See *Croft*, 103 F.3d at 1125 (“The due process clause of the Fourteenth Amendment prohibits the government from interfering in the familial relationship unless the government adheres to the requirements of procedural and substantive due process.”).

8. See *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 392 (4th Cir. 1990) (“Substantive due process does not categorically bar the government from altering parental custody rights.”).

9. *Croft*, 103 F.3d at 1125.

10. See, e.g., *Miller v. City of Philadelphia*, 174 F.3d 368, 373 (3d Cir. 1999). The balancing of competing family and state interests is analogous to the balancing test developed under the Fourth Amendment addressed *infra*. See *Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986); see also *Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000) (“The same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children.”).

family and state interests, courts recognize that the government has no overarching interest in protecting children from their parents unless definite, credible evidence exists to support a reasonable suspicion that a child has been abused or is in imminent danger of abuse.¹¹

III. TAKING CHILDREN INTO CUSTODY: "SEIZURE" ANALYSIS UNDER THE FOURTH AMENDMENT

Before addressing remedial options for child abuse that occurs in governmental institutions or foster care, it is necessary to consider the legal basis for the State's decision to remove a child from the family or other custodial setting.¹² Following any child welfare agency investigation, a state or local court is compelled to consider any constitutional or other challenge to the authority of the State to physically remove and place a child.¹³ In addition to traditional arguments advanced under state law, procedural or substantive due process challenges to the deprivation of liberty interests, including constitutionally protected intra-family relationships, may be framed.¹⁴

Courts analyze any separate liberty claim arising from the State seizure of the child under the more specific requirements of the Fourth Amendment.¹⁵ The Supreme Court has expressly determined that a substantive due process claim is supplanted when a more specific constitutional provision protects the asserted right.¹⁶ The scope of the Fourth Amendment's protection against "unreasonable searches and

11. See *Croft*, 103 F.3d at 1126.

12. For a comparative overview of this subject in England, see Judith Masson, *Representation Of Children In England: Protecting Children In Child Protection Proceedings*, 34 FAM. L.Q. 467 (2000).

13. Developing principles of human rights law may also become relevant. See *European Convention on the Exercise of Children's Rights and Explanatory Report: Representing Children*, art. 4 at 9-29, Council of Europe (1996). The heart of the Convention on the Rights of the Child is the core value that public policies be made and structures and processes be established and implemented that are always and invariably in the best interests of the child. See generally *The State of the World's Children 2000* (report published by UNICEF). Antipathy to the Convention, however, threatens not only its ultimate signing by the U.S., but any meaningful importation and incorporation in domestic U.S. law and public policy of its nascent human rights principles. U.S. Attorney General John Ashcroft, who generally views the United Nations as a threat to U.S. sovereignty, stated in a 1998 fund-raising letter that this Convention specifically was "an unconscionable surrender of parental rights" because it would "make spanking a crime." Laurie Goodstein, *Ashcroft's Life and Judgments are Seeped in Faith*, N.Y. TIMES, Jan. 14, 2001 at A22.

14. Professor Phillip B. Kurland has noted that specific liberties are judicial creatures created to define and constitutionally protect Judge L. Hand's concept of "the sacredness of the individual." Professor Phillip B. Kurland, Lecture comments at the Seventh Circuit Bar Association meeting in Chicago (April 29, 1991). *The Federalist No. 84*, authored by Alexander Hamilton to promote, *inter alia*, the proposed Bill of Rights, was cited by Professor Kurland for the propriety of judicial enforcement of individual liberties judicially established.

15. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

16. See *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

seizures” encompasses not only criminal arrests, but seizure of the person under civil process, including a child’s removal from the home by social workers under state or local law.¹⁷ Courts have analyzed a variety of circumstances involving state assumption of physical control over individuals, including children, under Fourth Amendment standards.¹⁸ Thereunder, courts are compelled to examine whether the specific governmental conduct involved in removing a child constituted a “seizure” and if so, whether the seizure was “unreasonable.”¹⁹ “[A] person has been ‘seized’ within the meaning of the Fourth Amendment . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”²⁰ However, “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . . its proper application requires careful attention to the facts and circumstances of each particular case.”²¹ In *Brokaw v. Mercer County*,²² the court recently examined legal standards applicable to the removal of a child from the family home and concluded that such a “seizure” may be adjudged reasonable if it was: (a) undertaken pursuant to a court order; (b) supported by probable cause; or (c) was otherwise justified by exigent circumstances, meaning that state officers “‘have reason to believe that life or limb is in immediate jeopardy.’”²³

The Supreme Court articulated in *Tennessee v. Garner*²⁴ that the Fourth Amendment’s guarantee of reasonableness also extends to the physical intrusiveness and manner in which an otherwise lawful seizure

17. *Wooley v. City of Baton Rouge*, 211 F.3d 913, 925 (5th Cir. 2000).

18. *See* *Tenenbaum v. Williams*, 193 F.3d 581, 601-06 (2d Cir. 1999) (discussing state seizure of a child during an abuse investigation analyzed under the Fourth Amendment); *J.B. v. Washington County*, 127 F.3d 919, 928-31 (10th Cir. 1997) (stating that county officials’ temporary removal of child is a Fourth Amendment seizure); *Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000); *Cf. Darryl H. v. Coler*, 801 F.2d 893, 900 (7th Cir. 1986) (discussing visual inspection of child in neglect investigation analyzed under reasonableness standard of the Fourth Amendment).

19. *Donovan v. City of Milwaukee*, 17 F.3d 944, 948 (7th Cir. 1994).

20. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

21. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

22. 235 F.3d 1000, 1010 (7th Cir. 2000). *Brokaw* sets forth a succinct survey of relevant Fourth (and Fourteenth) Amendment legal history. *See Wooley*, 211 F.3d at 925-26 (holding that statements made to police casting doubt on mother’s fitness insufficient to create reasonable belief that the child was in danger of imminent harm so as to justify removal, especially in light of the child’s apparent safety at his home); *J.B.*, 127 F.3d at 929 (applying probable cause standard to removal of child); *Wallis*, 202 F.3d at 1138 (“[S]tate may not remove children from their parents’ custody without a court order unless there is specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse.”); *Landstrom v. Illinois Dep’t of Children and Family Servs.*, 892 F.2d 670, 676 (7th Cir. 1990) (stating that search or seizure of child by DCFs must be “reasonable,” but that does not necessarily require probable cause or warrant); *accord Darryl H.*, 801 F.2d at 902, 903 n.8 (reporting of child neglect *per se* does not constitute exigent circumstances); *Croft v. Westmoreland County Children and Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir. 1997) (discussing allegations of neglect insufficient to establish that caseworker had reasonable grounds to believe that a child was in imminent danger so as to justify removal without court order).

23. *Tennenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir. 1999) (quoting *Good v. Dauphin County Soc. Servs. for Children and Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989)).

24. 471 U.S. 1, 8 (1985).

is carried out by law enforcement actors. In *Graham v. Connor*,²⁵ the Court reiterated that the relevant circumstances and manner in which a seizure occurs properly is analyzed under the Fourth Amendment's objective reasonableness standard. Thus, children traumatized during the process of physical removal from their parents or guardian (recall, e.g., the seizure of Elian Gonzalez at gunpoint) may have a claim for resultant emotional injuries. Furthermore, if social welfare officials knew that the allegations of child neglect are false, or if they withheld material information, and nonetheless removed a child from home, they violated the Fourth Amendment rights of the removed child.²⁶

IV. WHEN DOES A GOVERNMENTAL DUTY ARISE TO PROTECT INSTITUTIONALIZED AND FOSTER CHILDREN?

Children under the legal control of the State have substantive constitutional rights to non-arbitrary custodial or physical placement decisions and to a reasonably safe and secure placement in a foster home or institutional setting.

In a landmark case regarding a child's constitutional right to safety, the Supreme Court rejected Joshua DeShaney's substantive due process claim against social service officials for their failure to protect him from severe abuse by his father.²⁷ Although county social workers had numerous contacts with Joshua over a two year period, they did nothing except to document suspicions of abuse in their files. A final beating left four-year old Joshua profoundly impaired. The Supreme Court held that Joshua was not entitled to protection by the State because Joshua's father, a private citizen, inflicted the harm upon him. Consequently, the State had no constitutional duty to act under those circumstances. *DeShaney*, thus, foreclosed substantive due process claims when a child suffers abuse while in his or her parents' physical custody. However, the decision left a possible liability basis open for abused foster children. Had Joshua been in the State's custody, the Court intimated, its holding may have been different. The decision noted:

Had the State by the affirmative exercise of its power removed Joshua 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.²⁸

25. 490 U.S. 386, 397 (1989).

26. See *Brokaw v. Mercer County*, 235 F.3d 1000, 1012 (7th Cir. 2000); *Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999) (holding that government officials who obtain a court order to remove children based on materially distorted or incomplete information violate the Fourth Amendment).

27. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

28. See *id.* at 201 n.9.

“Two exceptions have grown out of *DeShaney*. One exists if the State has a ‘special relationship’ with a person, that is, if the State has custody of a person, thus cutting off alternate avenues of aid.”²⁹ State liability turns on whether the child is in physical custody of the State, like prisoners and institutionalized patients.³⁰ The Third Circuit, recognizing this analogy, noted:

A relationship between the state and foster children arises out of the state’s affirmative act in finding the children and placing them with state-approved families. By so doing, the state assumes an important continuing, if not immediate, responsibility for the child’s well-being. In addition, the child’s placement renders him or her dependent upon the state, through the foster family, to meet the child’s basic needs.³¹

A special relationship is created which imposes a duty of care whenever an individual is physically taken into the State’s custody.³² Several courts have applied these principles specifically in foster care cases. For example, the Seventh Circuit reiterated the substantive due

29. *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998), *reh’g en banc denied*, *cert. denied* 528 U.S. 810 (1999) (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) (requiring services to involuntarily committed mental patients)); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (requiring medical care for suspects in police custody); *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (holding that a child in state custody has a liberty interest in not being placed in an abusive foster-home).

30. Various circuits have accepted the test of physical custody. *See, e.g.*, *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1368-73 (3d Cir.1992) (en banc); *Yvonne L. ex rel. Lewis v. New Mexico Dep’t of Human Servs.*, 959 F.2d 883 (10th Cir. 1992); *Norfleet v. Arkansas Dep’t of Human Servs.*, 989 F.2d 289 (8th Cir. 1993).

31. *See Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (citing *D.R.*, 972 F.2d at 1372), *cert. denied*, 506 U.S. 1079 (1993)).

32. Diverse factual circumstances, including but certainly not limited to those classifiable as custodial settings, may give rise to “special relationships” between the government and the employee or member of the public and corresponding duties to protect from danger. *See Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (holding that state owed duty to suspect in private club based on functional custody by police officer); *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *reh’g denied*, *cert. denied*, 489 U.S. 1012 (1989) (holding that when state transported a released prisoner to the victim’s store, that “transportation link” placed the victim in a custodial-like unique, confrontational encounter with a person who had exhibited violent propensities, and thus established a “special relationship” and duty to protect); *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1034 n.6 (11th Cir. 1987) (“special relationships” analyzed on a continuum from institutionalization (total deprivation of liberty) to members of the general public at large (total liberty)); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (“[[A] constitutional right to protection by the State] may arise out of special custodial or other relationships created or assumed by the state.”); *Lichtler v. County of Orange*, 813 F.Supp. 1054, 1056 (S.D.N.Y. 1993) (“Since power implies responsibility, where governmental agencies or entities utilize sovereign compulsion to exercise coercive powers, a correlative duty exists of due care toward those subjected to such compulsion.”). A special relationship was found between the State and a confidential informant’s wife. *See G-69 v. Degnan*, 745 F.Supp. 254, 265 (D.N.J. 1990). Indeed, at least two circuits have stated that a special relationship is not required to find custody or a duty to protect individuals. *See Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) (citing *Canton v. Harris*, 489 U.S. 378, 387 (1989) & *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 493 U.S. 820 (1989)); *see also Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) as discussed in *Swader v. Virginia*, 743 F.Supp. 434, 439 (E.D.Va. 1990) (stating *Jensen* survives *DeShaney*) (“[[A] right to affirmative protection need not be limited by a determination that there was a ‘custodial relationship.’ The *Fox* [v. Curtis], 712 F.2d 84 (4th Cir. 1983)] court ruled that a right to protection could arise from a custodial or other relationship.”) (emphasis in original).

process right of a child not to be taken and placed with a custodian who cannot exercise appropriate care and supervision in *Camp v. Gregory*³³ and *Hutchinson v. Spink*.³⁴ In *Norfleet v. Arkansas Department of Human Services*,³⁵ the Eighth Circuit denied qualified immunity to a Human Services Director, caseworker, and foster parent because, it held, the state obligation to provide adequate medical care, protection, and supervision with respect to children removed from parents and placed in foster homes was well established as of 1991. Affirmative duties of care and protection are imposed upon the state because the state has rendered institutionalized persons unable to care for themselves.

The affirmative duty to protect arises, not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation that it has imposed on his freedom to act on his own behalf.³⁶

These principles are particularly pertinent to the circumstances which children are placed into by the state: removed from any family support structure, children are also unable to secure private alternative sources of assistance and are thus wholly at the mercy of the state or the will of strangers.

In *Reed v. Gardner*,³⁷ the Seventh Circuit stated that *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger."³⁸ This second potential liability principle derives from *DeShaney*'s express findings that the State had done nothing to create any danger, had done nothing to render Joshua more vulnerable to danger, and had "placed him in no worse position than that in which he would have been had it not acted at all. . . ."³⁹ In *Reed*, the Seventh Circuit characterized as potentially reckless—and thus, actionable—the conduct of police officers who failed to arrest a drunk passenger who subsequently drove a vehicle into a collision with total strangers who were totally unforeseeable as potential victims.⁴⁰ The court analogized this conduct

33. 67 F.3d 1286 (7th Cir. 1995).

34. 126 F.3d 895, 900 (7th Cir. 1997).

35. 989 F.2d 289 (8th Cir. 1993).

36. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

37. 986 F.2d 1122 (7th Cir. 1993), cert. denied, 510 U.S. 947 (1993).

38. *Id.* at 1125.

39. *DeShaney*, 489 U.S. at 201.

40. The danger creation or enhancement doctrine was well established before *Reed*. Judge Posner's analysis in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) set forth illustrative "snake pit" terminology in analyzing this legal principle:

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

Id. at 618. See Lawrence G. Albrecht & Curry First, *Constitutional Justice for Konerak*

to that of the officer who left a passenger alone in a high crime area in *Wood v. Ostrander*,⁴¹ and the officers who had arrested a driver but left young children stranded on the expressway in the seminal case of *White v. Rochford*.⁴² The concurring opinion in *Ellsworth v. City of Racine*,⁴³ surveyed prior “danger” cases and isolated two key factors: “whether the danger which the defendant allegedly had a duty to prevent was directed at the public at large or only at a specific individual. . . [and] how closely the danger to the plaintiff is linked to actions of the defendant.” Or, as the court succinctly framed the constitutional issue in *Wallace v. Adkins*,⁴⁴ what dangers would the plaintiff have faced absent the affirmative acts actually taken by the defendants?⁴⁵ This doctrine is tailor-made for application in circumstances when social services officials fail to undertake an adequate, professional investigation of the custodial environment in which children are involuntarily placed by the State.

Under the state-created danger doctrine, an abused child must prove that a governmental act either created a specific danger which the child was forced to face, or rendered the child more vulnerable to an existing danger.⁴⁶ Physical custody by the State, however, is not a prerequisite for a civil rights claim against a third party or stranger to the State-child special relationship who causes injury.⁴⁷ Consequently, the State may have constitutional liability imposed upon its social service officials even in circumstances where a child has been abused outside of a state-imposed custodial setting, although *DeShaney* presents a formidable analytical obstacle to expanding its liability

Sinthesomphone and Other “Snake Pit” Victims: Litigating Post—DeShaney “Special Relationship” Cases in 8 STEVEN SALTZMAN & BARBARA WOLVOVITZ, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK ch. 11 at 147 (1992). In Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984), the Seventh Circuit reiterated the fundamental principle that government may violate substantive due process via the conduct of third parties over whom it has some degree of control:

We agree that the state can deprive a person of life either by directly inflicting harm on him or by preventing others from rescuing him. For example, if the police were arbitrarily to prevent a doctor from saving the life of an accident victim, the state could be said to ‘deprive’ the victim of life within the meaning of the Fourteenth Amendment.

Id. at 1448. In *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986), the Seventh Circuit bluntly concluded that “when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection.” These cases exemplify a myriad of circumstances under which a constitutional duty to protect institutionalized or foster children may arise.

41. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

42. 592 F.2d 381 (7th Cir. 1974). *Cf.*, *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996).

43. 774 F.2d 182, 187 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

44. 115 F.3d 427, 430 (7th Cir. 1997).

45. In *Shepherd v. Washington County, Ark.*, 962 S.W.2d 779 (1998), the Arkansas Supreme Court held that a patient could sue under the danger creation doctrine when an inmate shot the plaintiff’s husband during an escape from custodial transfer. A special relationship existed between the plaintiff and the defendants because the defendants had relocated the “custodial environment.”

46. See *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1991) (*en banc*); *Newman v. Holmes*, 122 F.3d 650 (8th Cir. 1997).

47. See *L.W. v. Grubbs*, 974 F.2d 119, 122 (9th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993). See also *Shepherd*, 962 S.W.2d 779.

openings.

V. EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT
STANDARD: DELIBERATE INDIFFERENCE

The Supreme Court has ruled on two major cases regarding the State's affirmative duty to protect individuals held in state custody, but those two cases have presented different minimum liability standards.⁴⁸ Most federal circuits agree that claims involving a child held in state custody fall under one of the two standards, but these courts have split regarding the level of apathy and neglect that state officials must exhibit for civil rights liability to be imposed. If a child's circumstances are compared to those of a committed mental patient, the State is held to a "professional judgment" standard. Conversely, if a foster child is compared to a convicted prisoner, the more lenient "deliberate indifference" standard applies.

*Estelle v. Gamble*⁴⁹ involved a prisoner's claim that the State violated his Eighth Amendment right to be free from cruel and unusual punishment because of its failure to provide adequate medical care.⁵⁰ The Supreme Court held that because of the custodial relationship between a prisoner and the State, the State has an obligation to provide basic necessities, including medical care, to those whom it incarcerates. The Court concluded that the State is liable when it shows "deliberate indifference to a prisoner's serious illness or injury."⁵¹ Under the *Estelle* deliberate indifference standard,⁵² the State's duty to protect its institutionalized or foster children is equal to its duty to prisoners. Thus, institutionalized or foster children need not show that an "official acted or failed to act believing that harm actually would befall . . . it is enough that the official acted or failed to act despite her knowledge of a substantial risk of serious harm."⁵³ However, the Supreme Court has equated this standard to a criminal recklessness standard that traditionally has contained a subjective component—a far more demanding burden of proof for civil rights victims than demonstrating gross negligence.⁵⁴

Currently five circuits (the Second, Fourth, Sixth, Eighth and Eleventh) apply the deliberate indifference standard to the foster care

48. See generally P. Kearse, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 COLUM.J.L. & SOC. PROBS. 385 (1996).

49. 429 U.S. 97 (1976).

50. The Eighth Amendment prohibits excessive bail, excessive fines, and the infliction of "cruel and unusual punishment." U.S. CONST. amend. VIII.

51. *Estelle*, 429 U.S. at 105.

52. The specifics of this standard admittedly are unclear. As Justice Stevens noted in his dissent to *Estelle*, the deliberate indifference standard, "describes the State's duty in ambiguous terms." *Estelle*, 429 U.S. at 109.

53. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

54. See *id.* at 839-40; see also *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir. 2000).

context.⁵⁵ For example, in *Taylor v. Ledbetter*⁵⁶ the plaintiff child's foster mother severely abused the two-year-old girl until she fell into an irreversible coma from brain damage. The Eleventh Circuit found that "a child abused while in foster care, in order to successfully recover from state officials in a section 1983 action, will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home."⁵⁷ In *Doe v. New York City Department of Social Services*,⁵⁸ the Second Circuit held that the State violated a foster child's constitutional rights because the child welfare agency was deliberately indifferent when it failed to investigate or remove her from a foster home although it had knowledge that the child's foster father may be sexually abusing her. Similarly, in *Norfleet v. Arkansas Department of Human Services*,⁵⁹ the Eighth Circuit affirmed deliberate indifference as the appropriate standard in upholding the validity of a claim that the state neglected to provide adequate medical care, protection and supervision to a foster child, with fatal consequences.⁶⁰ Notwithstanding these selected outcomes, the deliberate indifference standard— which, in the absence of direct evidence of state officials' knowing indifference to the safety of children, must be proven by a compelling mosaic of circumstantial evidence—often presents insurmountable proof problems addressed, also outlined *infra* at VI.⁶¹

55. See Kearse, *supra* note 48 for a survey.

56. 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989). Kathy Jo Taylor was in state custody because her grandmother was concerned about some bruises and took her to the doctor. The county removed the two-year-old and placed her with the abusive foster family. Within two months, the toddler was in a coma.

57. *Id.* at 796.

58. 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

59. 989 F.2d 289 (8th Cir. 1993). In *Norfleet*, the court denied qualified immunity to the Human Services Director and caseworker involved because the state obligation to provide adequate medical care, protection, and supervision with respect to children placed in foster care was well established as of 1991.

60. The four-year-old child's pleas for help were ignored by his foster father, and he died of an asthma attack. The family asserted that human services workers failed to supervise administration of the necessary medication.

61. Though beyond the scope of this article, it may be argued that state-sanctioned and intentional imposition of the death penalty upon children is the most egregious human rights violation and the ultimate form of child abuse. Thus, many constituent members of the European Community have vigorously objected to the United States Senate's reservation to the International Covenant on Civil and Political Rights prohibition on death sentences for offenders who committed crimes before turning age eighteen. The Universal Declaration of Human Rights (1948) declared that all human beings have "the right to life, liberty and the security of person," and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948). See generally Katherine Corry Eastman, Note, *The Progress of our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 WASHBURN L.J. 526 (2000). Thirty-eight states have a death penalty law and capital punishment also is authorized for certain federal offenses. See *id.* at 527. There appears to be no legal, political, or moral consensus in the United States that it is unacceptable for the State to sentence individuals, even children, to death. See *Penry v. Lynaugh*, 492 U.S. 302 (1989). The author participated in the ABA 2000 Annual Meeting in which speaker after speaker excoriated state-sponsored violence in the U.S. through administration of the death penalty, particularly in regard to the legality of executing children. See Symposium: *International Perspectives on the Death Penalty*, Inner Temple Hall,

VI. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS
STANDARD: PROFESSIONAL JUDGMENT

*Youngberg v. Romeo*⁶² held that states are liable under the Fourteenth Amendment for medical decisions made for involuntary mental patients when those decisions are “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”⁶³ The Ninth Circuit, in *Estate of Connors v. O’Connor*,⁶⁴ equated *Youngberg*’s “objectively unreasonable” standard to gross negligence in ordinary tort cases. The next year, the Third Circuit held that the *Youngberg* “professional judgment” standard places a greater duty on professionals than does the Eighth Amendment’s “deliberate indifference” standard.⁶⁵

Indeed, in our view, professional judgment more closely approximates—although as we have discussed remains somewhat less deferential than—a recklessness or gross negligence standard.⁶⁶

Certainly, the professional judgment standard is less deferential to governmental actors than the deliberate indifference standard. The Third Circuit specifically identified classes of “professionals” in *Strackhouse* who were subject to the less deferential *Youngberg* standard, and applied the deliberate indifference standard to identified classes of “nonprofessionals.” If the two standards were analytical twins, the demarcation between professionals and nonprofessionals would be meaningless. The Second Circuit held that *Youngberg* “requires more than simple negligence on the part of the doctor but less than deliberate indifference.”⁶⁷ The Seventh Circuit has affirmatively cited *Strackhouse* and held that the deliberate indifference standard would “undermine” *Youngberg*, and that the professional judgment standard, “somewhere between simple negligence and intentional

London, England, July 18, 2000. See also Ronald J. Tabak (mod.), Panel Discussion: *Human Rights and Human Wrongs: Is The United States Death Penalty System Inconsistent With International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793 (1999). May we one day fulfill former Justice Brennan’s vision of the truly civil society:

With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.

William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 1090 *HARV. L. REV.* 313, 331 (1986). On Jan. 25, 2001, Sen. Russell Feingold (D-WI) introduced a bill to abolish the death penalty under federal law (S. 191).

62. 457 U.S. 307, 323 (1982).

63. *Accord* *Farmer v. Brennan*, 511 U.S. 825 (1994).

64. 846 F.2d 1205, 1208 (9th Cir.), cert. denied, 489 U.S. 1065 (1989). See also *Estate of Porter v. Illinois*, 36 F.3d 684, 688 (7th Cir. 1994) (stating that the *Youngberg* professional judgment standard falls between simple negligence and intentional misconduct). Compare to analysis of the deliberate indifference standard, *infra*, at IV.

65. *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1147 (3d Cir. 1990).

66. See *id.* at 1146.

67. *Kulak v. City of New York*, 88 F.3d 63, 75 (2d Cir. 1996).

misconduct,” applies to claims by involuntary mental patients.⁶⁸ The Seventh Circuit had previously applied *Youngberg*—though without definition of the professional judgment standard or its liability standard—to the conduct of government social workers in *K.H. Through Murphy*.⁶⁹ This seminal case held that if state officials placed children in hands they knew to be dangerous or otherwise unfit without justification based on considerations of professional judgment, they exposed themselves to liability.

If the State’s foster care placement decision harms the child as a result of the State agents’ failure to exercise appropriate professional judgment in their care and supervision of the child, there is a violation of the clearly established due process norm set forth in the *Youngberg* case.⁷⁰

In *Estate of Collignon v. Milwaukee County*,⁷¹ a case involving the suicide of a former pre-trial detainee, the Seventh Circuit recently stated: “the substantive due process standard (in this context we’ll call it the professional judgment standard) is at least as demanding as the Eighth Amendment ‘deliberate indifference’ standard.”⁷² In *Yvonne L. by and through Lewis v. New Mexico Department of Human Services*,⁷³ the professional judgment standard was expressly applied to the conduct of social workers with respect to injuries suffered by a child placed in a private foster care facility. The Tenth Circuit found that there was a clearly established constitutional right to a reasonably safe and secure placement in a foster home. “Failure to exercise professional judgment . . . implies abdication of the duty to act professionally in

68. *Estate of Porter*, 36 F.3d at 688 (citing *Strackhouse*, 920 F.2d at 1146). See also *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996), cert. denied 519 U.S. 1109 (1997), (applying *Youngberg* to a range of medical well-being decisions); *Armstrong v. Squadrito*, 152 F.3d 564, 577 (7th Cir. 1998), where the Seventh Circuit reformulated the deliberate indifference standard for Fourteenth Amendment claims as “conscious disregard of known or obvious dangers, . . . even though the defendant obtusely lacks actual knowledge of the danger.” (citations omitted).

69. 914 F.2d 846, 854 (7th Cir. 1990).

70. See *id.* at 859 (Coffey, J., concurring in part and dissenting in part).

71. 163 F.3d 982, 988 (7th Cir. 1998).

72. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court analyzed a substantive due process claim in the context of an automobile police chase and addressed “mid-level” substantive due process liability (between negligent and intentional conduct) by starkly contrasting the emergency judgments required of officers confronting a fleeing suspect or a prison riot, with other extended opportunities (i.e. “luxury”) for making professional judgments. The Court implicitly, though incompletely, attempted to examine the full range of tort standards relevant to corresponding constitutional claims. The “shocks the conscience” substantive due process standard applied in *County of Sacramento* has its origins in Justice Frankfurter’s majority opinion in *Rochin v. California*, 342 U.S. 165 (1952). The Seventh Circuit applied this standard in *White v. Rochford*, 592 F.2d 381, 385-86 (7th Cir. 1979); see also *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990) (favorably citing *White*). This standard—the most deferential to governmental actors except for intentional conduct—is disfavored because of its lack of precision, but was rearticulated in *County of Sacramento*. Approaching the other end of the liability spectrum, and despite any assumption to the contrary, the Supreme Court has *not* decided that gross negligence is insufficient to establish a Fourteenth Amendment claim. See *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986).

73. 959 F.2d 883 (10th Cir. 1992).

making the placements.”⁷⁴ Consistent with these authorities, the Wisconsin Supreme Court held that the professional judgment standard—and not deliberate indifference—was the appropriate standard as of 1990 for “those entrusted with the task of ensuring that children are placed in a safe and secure foster home.”⁷⁵

The extent to which *Youngberg* imposes (or may impose) a greater duty of care than the Eighth Amendment deliberate indifference standard remains an open question.⁷⁶ In the *post-Youngberg* landscape, the clearly defined liability principle articulated by the Ninth Circuit in *Estate of Connors* has been overlooked, though not rejected, by other circuit courts of appeals. Exactly where the professional judgment standard is located within the spectrum of traditional tort liability doctrines remains a judicial mystery, not unlike a child’s puzzled scrutiny of an *I Spy* book’s panorama.

VII. TOWARDS A NEW PARADIGM OF CONSTITUTIONAL PROTECTION FOR ABUSED CHILDREN

Although the Constitution incorporates neither tort law nor codes of professional conduct, settled case law under the Eighth and Fourteenth Amendments clearly incorporates both common law tort standards and professional conduct standards. The following chart is designed to present an analytical overview of prior governmental child abuse liability standards pegged to leading authorities and to propose the locus of a precise, reformulated and unified standard which incorporates principles of both constitutional tort law and respective professional malpractice standards.

74. *Id.* at 894.

75. *Kara B. v. Dane County*, 158, 555 N.W. 630 (1996). Consequently, qualified immunity was denied to Dane County social workers.

76. See analysis in *Estate of Cole v. Fromm*, 94 F.3d 254, 259 n.1 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997); *Mathis v. Fairman*, 120 F.3d 88 n.3 (7th Cir.), *cert. denied*, 522 U.S.1016 (1997).

Constitutional Torts Liability Chart

	Eighth Amendment	Fourteenth Amendment	Reformulated Professional Judgment Standard
Liability	Intentional Conduct		
		“Shocks the Conscience” <i>County of Sacramento v. Lewis</i>	
	Criminal Recklessness/ Deliberate Indifference <i>Estelle v. Gamble</i> <i>Farmer v. Brennan</i>		
		Professional Judgment <i>Youngberg v. Romeo</i> <i>Shaw by Strain v. Strackhouse</i> ; <i>Yvonne L. v. NM Dep’t of Human Servs.</i>	
Non Liability	Gross Negligence		“Objectively unreasonable conduct” <i>Youngberg v. Romeo</i> <i>Estate of O’Connor</i>
	Negligence		

In sum, after unavailing expeditions through Eighth Amendment jurisprudence and poorly-defined substantive due process forays, children’s rights advocates, like wizened sherpas, should retrace their path forward by revisiting *Youngberg’s* core principles as were applied with clarity and relative certainty by the Ninth Circuit in *Estate of Connors*, see *supra* notes 62-65, and advance the law from that point.

VIII. CONCLUSION

Analytical inconsistency within the ongoing enigma of both sovereign and qualified immunity from suit are the hallmarks of prior

governmental child abuse jurisprudence.⁷⁷ The Eighth Amendment liability framework—applicable to convicted criminals—should be jettisoned in its entirety and replaced with contextually nuanced standards under the Fourteenth Amendment that properly allocate to each state actor a duty of professional care consistent with legally-imposed responsibilities, whether exercised or not. Within traditional tort doctrine, the professional judgment standard serves to benchmark the duty of care respective professionals owe to children.⁷⁸ As contextually applied to Fourteenth Amendment liberty claims, the professional judgment standard must impose a duty of care less exacting than either criminal recklessness or deliberate indifference Eighth Amendment standards, and must become more reflective of and analogous to respective professional malpractice standards above simple negligence. Further, reformulated Fourteenth Amendment liability standards must also trump the artifice of policy-based immunities shielding government actors from liability for negligent conduct which, if undertaken by private actors, otherwise would be fully culpable. Surely, innocent children, more than any other class of victims, are entitled to justice—and justice should never be denied solely because an otherwise redressable injury was caused by a governmental actor

77. Notwithstanding unique situations in which this defense has been overcome, *see supra* notes 59, 75, qualified immunity presents a formidable shield in civil rights cases, generally, and in governmental foster care or institutional care cases, specifically, as practitioners well know. Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability or civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlan v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity does not shield state social welfare officials who knowingly break the law or those who are plainly incompetent. *See Millspaugh v. County Dep’t of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991), *cert. denied*, 502 U.S. 1004 (1991). Qualified immunity analysis focuses on the objective legal reasonableness of each individual conduct, “not the state of mind or good faith of the officials in question.” *Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997). Particularly in child abuse cases, a social worker’s plea of “how could I have known?” or “we had no reason to believe” that abuse would occur may be compelling when a child has been removed from a dangerous situation and placed in a presumed safe environment. While it is true that a deliberate failure to consult available files or other information may establish liability and that “[d]eliberate ignorance and positive knowledge are equally culpable,” *United States v. Jewel*, 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) and that the totality of knowledge (or lack of knowledge)—may defeat qualified immunity, *see Anderson v. Creighton*, 483 U.S. 635, 639, 641 (1987) & *Mitchell v. Forsyth*, 472 U.S. 511, 532 n. 12 (1985), nevertheless, as *DeShaney* teaches, courts are loathe to expose state social welfare officials to monetary damages for tragedies which they did not initially create through their own conduct. Qualified immunity defenses raised in summary judgment motions offer a convenient justification for courts to avoid addressing ultimate issues of governmental responsibility. Adoption of the “objectively unreasonable conduct” standard proposed herein would premise a qualified immunity defense on the objective legal reasonableness of the governmental actor’s conduct—a more outcome-predictable standard to be assessed prior to filing the complaint which also satisfies a core qualified immunity doctrinal rationale: the avoidance of suit in meritless circumstances.

78. Tort law is increasingly viewed by some children’s rights advocates as an enlightened remedial strategy to combat the darkness of pervasive and systemic state and local governmental foster care neglect. As one former state social and health services head put it: “Money talks, and money makes policy.” Nina Bernstein, *Foster-Child Advocates Gain Allies in Injury Lawyers*, N.Y. TIMES, Oct. 27, 2000 at A18. However, policy, subsumed within judicial considerations of proximate cause or other tort law liability limits, may also serve the political *status quo*.

charged with express human rights duties to prevent such harm.⁷⁹

79. Empathy is the “invisible gate” of the human heart which opens the judicial system to the opportunity to exercise inherent discretion to render full and true justice. Hon. Jack B. Weinstein, Senior U.S. District Judge, E.D. N.Y., *Three Gates to Justice*, Address at the Seventh Circuit Bar Association Luncheon in Milwaukee (May 24, 1999). Empathy may be expressed and subsumed properly within judicial policy consideration.