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Stemming the Tide of Foster Care Runaways: A Due Process Perspective

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STEMMING THE TIDE OF FOSTER CARE RUNAWAYS: A DUE PROCESS PERSPECTIVE

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Twenty days after his birth, Kevin E. was placed in a foster home.[1] He lingered for eight years in the District of Columbia's overcrowded foster care system before he finally became free for adoption.[2] By then, he had experienced so many changes in placement that his self-esteem and ability to trust others were severely diminished.[3] His behavior eventually reflected this emotional tumult: he endured episodes of head banging, suicidal thoughts, hallucinations and periodic rages.[4] Like many foster children who perceive repeated abandonment, Kevin began running away. Social workers finally moved him to a residential treatment center, but much of the damage to his fragile psyche already appeared permanent.[5] Experts at the center concluded that a family setting would prove unmanageable for Kevin and might prompt him to run away again.[6]

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1. *See* LaShawn A. v. Dixon, 762 F. Supp. 959, 985 (D.D.C. 1991) (holding unconstitutional certain aspects of the District of Columbia's administration of its foster care system).

2. *Id.*

3. *Id.* Dr. William Clotworthy, Jr., a child psychiatrist who evaluated Kevin, "testified that he believed that the frequent changes in placements were each interpreted by Kevin as being his fault and signifying that something was wrong with him. Each was an enormous blow." *Id.*

4. *Id.*

5. *Id.* "Dr. Clotworthy opined that if social workers had been attuned to his special needs earlier, the outcome for Kevin could have been quite different." *Id.*

6. *Id.*

> Reports from the [residential treatment] institution in 1989 indicate that [Kevin] might not be able to tolerate the intensity of a family setting due to his history of abandonment. . . . Dr. Clotworthy expects Kevin to experience regression and an increase in symptoms when he is forced to leave [the treatment center].

Id.

Unlike Kevin, sixteen-year-old, Janet D. waited only three years to run away from foster care for the first time.[7] Although she occasionally ran to her natural family, Janet was never a likely candidate for reunion with them. Her father had died the previous year and her mentally retarded mother was unable to care for herself, let alone her twelve children.[8] When Janet turned up at a local hospital after absconding the first time, the medical staff noticed she had been physically abused[9] and suffered from "acute exposure and feet frostbite."[10] Over the next four months, Janet ran away from foster care at least six more times, often returning in worse condition.[11] She was shuttled among sites and was housed, for most of this period, in a temporary overnight shelter unequipped to treat her emotional disturbance.[12] Instead of receiving rehabilitative counseling,[13] Janet faced punishment each time she

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7. *See* Janet D. v. Carros, 362 A.2d 1060, 1063-64 (Pa. Super. Ct. 1976). Janet ran away after overhearing that she was to be removed from her foster care home by the court. *Id.* at 1064. Although Kevin E. spent more time in foster care, Janet better represents the typical runaway because of her age. In fact, two-thirds of runaways do not abscond until they are at least 13 years old. David Shaffer & Carl Caton, *Runaway and Homeless Youth in New York City: A Report to the Ittleson Foundation* (N.Y. State Psychiatric Inst. 1984).

8. *Janet D.*, 362 A.2d at 1063.

9. *Id.* at 1064.

> At first [Janet] had returned to her mother and sister, but when they refused to keep her, she went to a neighbor's home. There . . . "[t]he man of the house then declared he wouldn't keep her unless she was cleaner and put her on the kitchen floor, sat on her, and shaved all her hair from her head."

Id.

10. *Id.* " 'Janet . . . was very unkempt [sic] and dirty, dressed in clothing that was really heavy winter clothing, [and] had been barefooted.' " *Id.*

11. *Id.* at 1064-66. For example, one summer evening when she was returning to the overnight shelter from which she had absconded, Janet was attacked by a group of boys who undressed her and whipped her so severely that she suffered long welts and abrasions over her body. *Id.* at 1065-66.

12. *Id.* at 1065. Janet was considered mentally retarded because she scored 64 and 76 on two IQ tests. *Id.* at 1063. According to the American Association on Mental Deficiency (now the American Association on Mental Retardation), "mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1 (Herbert J. Grossman ed., 1983). A "significantly subaverage intellectual functioning" refers to individuals whose IQ scores are 70 or below.

Id. However, Janet's teachers believed her school work exhibited academic potential marginally superior to the work expected from a student with her IQ scores. *Janet D.*, 362 A.2d at 1063 n.9. A local social worker, in fact, attributed Janet's problems to emotional disturbance rather than mental retardation. *Id.* at 1063.

13. Even if Janet was properly diagnosed as mentally retarded, she was still a prime candidate for enrollment in a runaway prevention/counseling program. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 n.54 (1985) ("The consequences of the mental impairment, including deficits in adaptive behavior, may be ameliorated through education and habilitation. Therefore, it is not accurate to state categorically that mental retardation is 'permanent' or 'incurable.' ").

returned to the shelter. She was confined to a cottage and forced to wear pajamas during the day as a means of restricting her movement.[14] The local child welfare agency never provided Janet with the individualized treatment[15] necessary for her habilitation. As a result, her absconding behavior persisted.[16]

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14. "[A]lthough [Janet] was required to wear pajamas and robe during the entire six weeks (except for four days) that she was at McIntyre Shelter, she ran away five times." *Janet D.*, 362 A.2d at 1066. She testified at trial that she had kept a set of street clothes downstairs at the shelter, taking them along when she ran away. *Id.* at 1065.

15. *See id.* at 1068. "Training" and "habilitation" describe services provided to the mentally retarded, while "treatment" usually characterizes services rendered to the mentally ill. *See* Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982); John A. Rizzo, Note, *Beyond* Youngberg: *Protecting the Fundamental Rights of the Mentally Retarded*, 51 FORDHAM L. REV. 1064, 1074 n.53 (1983). In this Article, the words "treatment" and "services" are used interchangeably, among other words and phrases, to describe services rendered to children in foster care.

16. *See Janet D.*, 362 A.2d at 1065; *see, e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir.) ("Without a program of individual treatment [for incarcerated youth] the result may be that the juveniles will not be rehabilitated, but warehoused . . .; their interests and those of the state and the school thereby being defeated."), *cert. denied*, 417 U.S. 976 (1974). *See generally* DOROTHY MILLER ET AL., RUNAWAYS—ILLEGAL ALIENS IN THEIR OWN LAND: IMPLICATIONS FOR SERVICE (1980) (suggesting that runaway prevention programs could have measurable success among runaways).

Janet's and Kevin's stories are not uncommon.[17] Indeed, many foster children[18] suffer from inadequate supervision and care,[19] and a large number resort to running away from their placements.

This Article examines the troubling prevalence of running behavior among foster children, and the disparate factors which contribute to the phenomenon. The author considers whether foster children possess special constitutional rights arising out of the state's custodial relationship to children living in substitute care. Concluding that such a constitutional entitlement

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17. *See, e.g.*, Doe v. New York City Dep't of Social Servs., 670 F. Supp. 1145, 1154-56 (S.D.N.Y. 1987) (describing the case history of Ricardo, a recurrent foster care runaway); *see* Marcia Lowry, *When the Family Breaks Down: Massive and Misapplied Intervention by the State*, *in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 53, 63 (Patricia A. Vardin & Ilene N. Brody eds., 1979).

> [W]hen a child in foster care shows symptoms of disturbance, the child may receive adequate treatment if the disturbance falls within the range of disturbances agencies are comfortable treating. If not, the child will be sent off to a state mental institution, or cycled through the juvenile court as a disruptive child. Or the child may be shipped to one of the increasing number of institutions located in states with lax regulatory standards that make a business of housing the children no one else wants.

Id.

Passage of the Juvenile Justice and Delinquency Prevention Act of 1974 was Congress' response to a marked rise in juvenile arrests, and to the subsequent avalanche of popular criticism attacking the system's preference for punishment over rehabilitation. The Act created one federal agency to tackle the problems of juvenile delinquency and nurture a national, therapeutic response to children in trouble with the law. Federal financial incentives were offered to states whose philosophy and programming comported with certain federal standards. Primary among those standards was a deinstitutionalization requirement that proscribed the imprisonment of minors for behavior that was not also a crime for adults, such as running away. In many ways, however, the system still remains focused on what it knows best—punishment. Runaways account for 20% of the minors incarcerated in secure detention facilities, often a consequence of judicial frustration with recidivist runners. Melissa Sickmund, *Runaways in Juvenile Courts*, JUVENILE JUSTICE BULLETIN (United States Dep't of Justice, Nov. 1990); *see also* MILLER, *supra* note 16, at 52 (finding that sample foster care runaways had experienced suspension or expulsion from school 79% of the time, more than any other class of runaway children); Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988) (arguing that the increased rates of mental health admissions reflect societal inability to deal with difficult children).

18. The words "children" and "youth" are used interchangeably in this Article to refer to individuals under the age of 18.

19. *See, e.g.*, K.H. *ex. rel.* Murphy v. Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (describing the case of a foster child neglected and sexually abused in state care); Taylor v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987) (describing the case of a foster child rendered comatose by physical beatings sustained in foster care), *cert. denied*, 489 U.S. 1065 (1989); LaShawn A. v. Dixon, 762 F. Supp. 959, 974 (D.D.C. 1991) (finding that foster children are not provided with necessary services and proper care); *Doe*, 670 F. Supp. at 1171 (holding that children housed in temporary overnight shelters are deprived of adequate living facilities); Mary Jordan, *Foster Parent Scarcity Causing Crisis In Care*, WASH. POST, July 20, 1986, at F1 (reporting that a Virginia grand jury cited "the acute shortage of suitable shelter for the 6,000 neglected, abused and disabled children" in state care as a factor contributing to the death of a foster child).

does exist, this Article argues that foster children have a right to receive screening and counseling services designed to prevent runaway behavior.[20]

Part I of this Article describes the current conditions of the foster care system. Part II surveys federal court decisions that apply the Fourteenth Amendment due process clause in custodial settings.[21] Furthermore, Part II examines the meaning of state "custody" and concludes that the term should include foster care. Part III criticizes a recent trend among federal courts of withholding due process protections from children voluntarily placed in foster care by their natural parents, arguing that the trend is illogical and unfair. Part IV considers the scope of the due process rights afforded foster care children, and contends that these rights include the provision of mental health screening and runaway prevention services.

I. ADDRESSING THE PROBLEM: FOSTER CARE RUNAWAYS

A recent survey, conducted by the National Association of Social Workers, reported that more than twenty percent of the children living in homeless shelters across the country arrived there directly from foster care, while thirty-eight percent had lived in foster care at some time during the prior year.[22] Another study, published by the New York State Council on Chil-

20. Dr. Edward Schor, an associate professor at the University of New Mexico School of Medicine, Department of Pediatrics, has written extensively on health issues affecting children in foster care. *See, e.g.*, Edward L. Schor, *A Summary of a White Paper on the Health Care of Children in Foster Care*, 8 CHILDREN'S LEGAL RTS. J. 16, 22 (1987). He believes that "[a]ll children should have a placement examination preferably prior to entering their first foster care placement .... A standardized, screening mental health assessment should be completed within 30 days of placement." *Id.* at 17. If Dr. Schor's recommendations were implemented, foster children who comported with the runaway's profile could be identified, supervised and enrolled in a therapeutic prevention program.

21. This Article focuses on the constitutional, rather than the statutory, rights of children in foster care. A recent Supreme Court decision held that a provision of the Adoption Assistance and Child Welfare Act of 1980 (AACWA), 42 U.S.C. § 608(a)(1) (1982 & Supp. 1986), does not afford foster children with an enforceable private right of action to sue states for federal statutory services outlined in the Act. *See* Suter v. Artist M., 112 S. Ct. 1360 (1992). AACWA describes a variety of foster care services, including a case plan system and a follow-up program of case review, and obligates states receiving federal assistance to make "reasonable efforts" to keep families together by preventing removal and facilitating reunion of family members. *See infra* notes 52-54 and accompanying text.

The Supreme Court in *Suter* did not address the constitutional rights of children in foster care. *See Suter*, 112 S. Ct. at 1363; *see also infra* notes 137-38 and accompanying text (discussing *Suter*).

22. *See* THE NAT'L ASS'N OF SOCIAL WORKERS, A SUMMARY OF FINDINGS FROM A NATIONAL SURVEY OF PROGRAMS FOR RUNAWAY AND HOMELESS YOUTH AND PROGRAMS FOR OLDER YOUTH IN FOSTER CARE (1991). Some studies indicate that approximately half of the runaway population have spent time in foster care or lived in a group residence. *See* MARJORIE ROBERTSON, HOMELESS YOUTH IN HOLLYWOOD; PATTERNS OF ALCOHOL USE: A REPORT TO THE NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM (1989);

dren and Families, revealed that as many as half of the nation's homeless youth were raised in foster care.[23] A court-ordered review of the foster care system in the District of Columbia indicated that in August of 1992, twenty-five percent of the city's foster children were missing and designated as "absconders."[24] These sobering statistics are cause for concern, especially since foster children account for only about 0.007% of the total child population.[25] The disproportionate number of foster children among the 3,288 children who run away each day,[26] suggests both a strong susceptibility of foster youth to running behavior and the failure of many foster care agencies to respond effectively. The bleak realities confronting most runaways make this systemic failure both urgent and egregious.

Many runaways, finding themselves homeless and poor, turn to prostitution as a means of support.[27] Others, particularly foster care runaways, buy

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JOSEPH RYAN & ARTHUR DOYLE, OPERATION OUTREACH: A STUDY OF RUNAWAY CHILDREN IN NEW YORK CITY (1986).

23. *See* NEW YORK STATE COUNCIL ON CHILDREN & FAMILIES, MEETING THE NEEDS OF HOMELESS YOUTH: A REPORT OF THE HOMELESS YOUTH STEERING COMMITTEE 4-7 (1984). Apparently this is not just an urban phenomenon. According to the General Accounting Office, "[h]omeless youth seeking assistance were evident in both rural and urban communities." United States General Accounting Office, Report to the Honorable Paul Simon, U.S. Senate, *Homelessness: Homeless and Runaway Youth Receiving Services at Federally Funded Shelters* 3 (1989) (providing an overview of the Runaway Youth Act and the general plight of homeless youth).

24. Keith A. Harriston, *D.C. Foster Children Are Missing: Sampling of Cases Shows "Absconders,"* WASH. POST, Aug. 6, 1992, at C1.

25. The fraction is the author's estimate, based on the following data. There are approximately 64,083,000 children residing in the United States. *See* UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, tbl.12 (111th ed. 1991) (depicting population trends in 1989). Though no one knows precisely how many children are living in foster care, Dr. Toshio Tatara of the American Public Welfare Association, reports that approximately 429,000 children were being raised in foster care at the end of 1991, the last year for which data was available prior to publication. Telephone Interview with Dr. Toshio Tatara, Director of the American Public Welfare Association's Voluntary Cooperative Information System (VCIS) (Apr. 1, 1993). VCIS has been collecting substitute care data from state child welfare programs since 1982. *Id.*

26. CHILDREN'S DEFENSE FUND, A VISION FOR AMERICA'S FUTURE: AN AGENDA FOR THE 1990S: A CHILDREN'S DEFENSE BUDGET at xxxvi (1989) (depicting "one day in the lives of American children" as being filled with egregious conditions) [hereinafter CHILDREN'S DEFENSE FUND].

27. One study found that two-thirds of all teenage prostitutes were runaways. Silbert & Pines, *Entrance Into Prostitution*, YOUTH & SOC'Y 471-500 (1982); *see* Christopher M. Earls & Helene David, *Early Family and Sexual Experiences of Male and Female Prostitutes*, CANADA'S MENTAL HEALTH J., Dec. 1990, at 7, 11 (describing the runaway/prostitution phenomenon); D. KELLY WEISBERG, CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION 1 (1985) (examining the challenging "social problem[s]" caused by "adolescent prostitution"); *see also* MILLER, *supra* note 16, at 40 (reporting that 19% of boys and 23% of girls who run away resort to prostitution as a means of support). Children who run away from foster care are more likely to become prostitutes than other runaways. *Id.* at 57. Twenty-eight

and sell illegal drugs.[28] The runaway population's penchant for drug use and survival sex accounts for the "alarmingly high prevalence rate" of HIV infection among runaway youth.[29] Compounding the more immediate dan-

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percent of the youth running away from foster care engage in prostitution, and 85% resort to dealing drugs. *Id.* at 40.

New York's legislature reported in the Legislative Declaration and Purpose accompanying its Runaway and Homeless Youth Act of 1978 that "juveniles are running away from home at alarming rates." Runaway and Homeless Youth Act, N.Y. EXECUTIVE LAW § 532 (Consol. 1983). "Runaway youth are without protection and the ordinary means of support, exposed to unnecessary danger and become victims of various illicit businesses which prey upon their vulnerability." *Id.*

A partial explanation for this behavior may be the predisposition of a particular class of foster children, those who have suffered abuse and neglect, to disruptive behaviors. According to Cathy S. Windom, *The Role of Placement Experiences in Mediating the Criminal Consequences of Early Childhood Victimization*, 61 AM. J. OF ORTHOPSYCHIATRY 195, 195-209 (1991), the class of abused and neglected children among the foster care population "may account for the high rates of delinquency, adult criminality and violent criminal behavior often associated with children in foster care." *Id.* at 208; *cf. Child Abuse and Neglect: Issues on Innovation and Implementation*, 1 PROC. OF 2D ANNUAL NAT'L CONF. ON CHILD ABUSE AND NEGLECT 310 (Michael L. Lauderdale et al. eds., 1978) (examining the pervasive problems created by childhood abuse, such as developmental delays, cognitive impairments and behavioral problems, and offering legislative solutions and legal approaches to alleviate this phenomenon). The large number of abused and neglected children in foster care may in part explain why foster children are more likely to be admitted to mental health facilities than children not placed in substitute care. *See Child Support Enforcement: Hearings Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 102-441 (1991) (statement of Douglas J. Besharov) [hereinafter *Hearings*] (featuring Illinois State Adolescent Psychiatric Hospitalization data for Birth Cohort FY 1969); *see also supra* note 17.

28. *See* MILLER, *supra* note 16, at 57.

29. Rachel Stricof et al., *HIV Seroprevalence in a Facility for Runaway and Homeless Adolescents*, 81 AM. J. OF PUB. HEALTH 50, 53 (1991) (reporting that 5.3% of homeless/ runaway adolescents tested HIV positive in a 1987-1989 HIV seroprevalence study conducted at Covenant House New York, a shelter for youth in crisis (Covenant House New York is located on the West Side of mid-Manhattan and, over the past five years, has served an estimated 28,000 discrete adolescents in its "Crisis Center" and "Mother/Child" program)). Another survey of the Covenant House population from 1989-1991 revealed that five percent of the respondents claimed to be HIV positive. Christopher Bohling, Youth At Risk: A Statistical Portrait of a Sample of Adolescents Using the Services of Covenant House New York, 1-3 (1992) (unpublished manuscript, on file with Author) (utilizing research by Neil Margetson, former Research Director, and Cynthia Lipman, former Researcher/ Statistician of Covenant House New York in compiling statistics on homeless children's health).

The Hetrick-Martin Institute for Lesbian and Gay Youth in New York City approximated that the number of street youth testing seropositive ranged between 10 and 15 percent. Gina Kolata, *AIDS is Spreading in Teen-Agers: A New Trend, Alarming to Experts*, N.Y. TIMES, Oct. 8, 1989, at A1. *See generally* Fern Shen, *An Entrenched AIDS Incubator: In this Ugly War, Urban Blight is Enemy's Breeding Ground*, WASH. POST, Apr. 13, 1992, at A1. (reporting the prevalence of HIV at-risk behavior among the inner city poor and the role of community outreach workers); Patricia Harty, *Cherish the Children*, IRISH AM. MAGAZINE, May 1992, at 21, 23 (describing the vulnerability of young prostitutes to HIV infection in an interview with Sister Mary Rose McGeady of Covenant House).

gers of street life, such as violence and disease,[30] many runaways succumb to a life of chronic indigence, ensnared by long-term homelessness and poverty.[31] A study of New York homeless men, published in the *American Journal of Psychiatry*, revealed that many of them had spent time in foster care as children.[32] Deficient state intervention yields far-reaching consequences that are best evidenced when ill-served foster children eventually swell state public assistance rolls, and contribute to a new generation of dependent adults and families.[33]

Foster care, however, does not always harm children.[34] In fact, for the majority of children placed quickly in permanent settings, the effects are generally positive.[35] Some studies indicate no long-term differences between foster care youth and non-foster care youth.[36] Given that the system can

30. One study reported that 42% of runaways were assaulted, 18.4% robbed and nearly 13% sexually assaulted while living on the streets. *See* ROBERTSON, *supra* note 22. The prevalence of HIV among runaway and homeless youth, *see supra* note 29 and accompanying text, suggests that many runaways do not achieve safe and healthy returns to state care. The lethal consequences of disease are occasionally compounded by the attendant violence of street life. For example, Kerry Jacobsen, an Ombudsman (child advocate) for the Covenant House in New Orleans from 1987 to 1990, reports several cases in which adolescent residents of the shelter died as a result of street violence. Telephone Interview with Kerry Jacobsen, former Ombudsman, Covenant House New Orleans (July 30, 1992).

31. *See infra* notes 32-33.

32. Ezra Susser et al., *Childhood Experiences of Homeless Men*, 144 AM. J. OF PSYCHIATRY 1599-1601 (1987) (explaining a study of homeless men in New York shelters, which revealed that, as children, they frequently resided without parents).

33. Marcia R. Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE, 265, 267 (Douglas J. Besharov ed., 1988) ("[A] great deal of money is being spent on the consequences of the failure to serve these children at earlier stages, through public assistance payments as these children grow up and start their own dependent families, and as they become clients of publicly funded mental health services and prisons."); Mari B. Maloney, Note, *Out of the Home Onto the Street: Foster Children Discharged Into Independent Living*, 14 FORDHAM URB. L.J. 971, 972 n.12 (1986).

34. Windom, *supra* note 27, at 198 (discussing a study of 200 foster home placements which concluded that substitute care was not the reason children experienced difficulty. The 1979 Palmer study actually concluded that foster children experienced "a decrease in behavior problems . . . from [the] time of placement to discharge.") *Id.* at 198. However, unsupervised foster care, where children do not receive necessary services and treatment "can be worse than the problems it was designed to solve." CENTER FOR ANALYSIS OF PUBLIC ISSUES, IN SEARCH OF THE PAPER CHILDREN 17 (1982) [hereinafter PAPER CHILDREN]; *see also* John V. Penn, *A Model for Training Foster Parents in Behavior*, 57 CHILD WELFARE J. 175 (1978) (examining successful training programs).

35. Douglas J. Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE 185, 190-92 (Douglas J. Besharov ed., 1986) (citing research reported in MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 14 (1988)).

36. David Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study*, 55 CHILD WELFARE J. 143 (1976); *see also* Besharov, *supra*

have a positive impact on children, no single systematic defect explains why so many children run away from foster care.[37] A partial explanation for the high incidence of runaways stems from the nature of the foster child's problems, which, as in Janet D.'s case,[38] often pre-date foster home placement.[39] Most of these children show signs of chronic illness when they enter foster care,[40] chiefly emotional disorders that go untreated because mental health services are scarce.[41] As a result of this phenomenon, a higher incidence of inpatient mental health admissions exists among foster children than among the non-foster care population.[42] The failure of many state pro-

note 35, at 190 ("[T]he available research indicates that foster care meets the emotional needs of many children. Many maltreated children do very well in foster care.") One of the most thorough longitudinal studies of foster children suggests that "the well-being of the majority of the children improved, in terms of physical development, IQ, and school performance, after a six-month period in foster care." WALD, *supra* note 35, at 14 (analyzing the research of David Fanshel, *supra*).

37. Marc Posner, THE RUNAWAY RISK REDUCTION PROJECT ASSESSMENT REPORT, (Educ. Dev. Ctr. 23 1992) (citing L. Kaplan, Conference, *Youth Who Run From Residential Placement: Working Toward A Solution*." (Danvers, MA: Community Program Innovations 1990) At a multidisciplinary Conference on "Youth Who Run From Residential Placement," the author attempted to:

> identify the reasons that youth so often flee residential placements. They suggested that this is the result of a number of factors, including:
>
> the failure of social service agencies to establish a level of trust and a sense of being helped in their clients
>
> inadequate staffing, which makes it difficult for social service workers to get to know youth and respond to their needs in a timely manner
>
> feelings of isolation, disempowerment, and uncertainty caused by placements for indefinite periods (often marked by frequent transfers among placements)
>
> lack of family involvement once the youth is placed
>
> youth perception that placements are unsafe because they are mixed in with others who are different from themselves in terms of age, sex, race, and life experience
>
> lack of consequences: in many situations, nothing happens when a youth runs from placement.

Id.

38. *See supra* notes 7-16 and accompanying text.

39. *See, e.g.*, Matthew B. Bogin & Beth Goodman, *Special Education for Children in State Custody*, 7 CHILDREN'S LEGAL RTS. J. 8 (1986) ("Many children who enter . . . child welfare systems have some type of disability."); Paul Fine, *Clinical Aspects of Foster Care*, *in* FOSTER CARE: CURRENT ISSUES, POLICIES, AND PRACTICES 206, 207 (Martha J. Cox & Roger D. Cox eds., 1985) ("A 1973 study of several hundred New York City foster children found that 45% suffered from at least one chronic medical problem. Seventy percent were rated moderately or severely mentally disturbed . . . . My colleagues and I found similar pathologies . . . in a Nebraska mental health foster care program."); Schor, *supra* note 20, at 17 ("The psychosocial history of children in foster care has a strong impact on their health status.").

40. *See* Fine, *supra* note 39, at 207-08. *See generally* FLORENCE KAVALER & MARGARET R. SWIRE, FOSTER-CHILD HEALTH CARE (1983) (detailing the characteristics of foster children and their families).

41. *See* Linnea Klee & Neal Halfon, *Mental Health Care for Foster Children in California*, 11 CHILD ABUSE & NEGLECT J. 63-74 (1987).

42. *See, e.g.*, *Hearings*, *supra* note 27.

grams to extend screening, counseling, and other rehabilitative services—essentially, "treatment"—to runaways and potential runaways results in a higher rate of running behavior among foster youth than among other children.[43]

The failure of state-based child protective programs does not result merely from institutional passivity. Often the problem is not that foster care does too little for children, but that it does too much to them, by encouraging, even forcing, children to run away.[44] This is largely a consequence of the inherent incompatibility between the way the system is designed to work and the way it actually operates. Foster care is intended to be a short-term solution for children whose parents are unable or unwilling to provide them with a proper home. In fact, many children stay in foster care longer than necessary.[45] In 1988, over thirty-seven percent of the nation's foster children had been in substitute care for more than two years, and nearly one-quarter of them had been there for at least three years.[46] As foster care is meant to establish only short-term relationships, most agencies frown on the formation of attachments between children and foster parents.[47] These relation-

43. *See supra* notes 22-26 and accompanying text.

44. *See generally* Besharov, *supra* note 35, at 192 ("There is a dark side of foster care . . . . [F]or a large subset (generally children who cannot be quickly returned home or freed for adoption), foster care is very harmful.").

45. Robert A. Burt, *Children as Victims*, *in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 37, 38 (Patricia A. Vardin & Ilene N. Brody eds., 1979) ("The New York City Comptroller's office reported that some 11,000 children in foster care—more than a third of all city children—had been kept in that status 'an average of five and one-half years longer than necessary. . . .' "); Marsha Garrison, *Child Welfare Decision Making: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1757-58 (1987) (stating that children are frequently placed in foster care unnecessarily and remain there too long); *Children, Twice Neglected*, N.Y. TIMES, Mar. 28, 1992, at A22 (reporting that many New York foster children "have been removed from families unnecessarily and kept in foster care too long"); *Massachusetts Foster Care Shaken by Abuse Cases*, N.Y. TIMES, Oct. 18, 1992, at 33.

> As of July [1992], the state had 13,000 children in foster or group care. Of those, twenty percent have been in temporary placement for more than four years. While forty-five percent have remained where they are placed, twenty-two percent have changed homes at least once and thirty-two percent have changed two or more times . . . .

Id.; *see* LaShawn A. v. Dixon, 762 F. Supp. 959, 966 (D.D.C. 1991) ("Thirty-seven percent of children in the District's foster care system have been in care for four or more years . . . ."); PAPER CHILDREN, *supra* note 34, at 18 ("[A] 1978 New Jersey study showed that the typical child remains in care an average of three and a half years. Of the half million children now in foster care nationwide, 100,000 have been there for over six years.").

46. TOSHIO TATARA, CHARACTERISTICS OF CHILDREN IN SUBSTITUTE AND ADOPTIVE CARE: A STATISTICAL SUMMARY OF THE VCIS NATIONAL CHILD WELFARE DATA BASE 100 (1991) (summarizing data from 23 states which accounted for 65.9% of all children living in foster care in 1988).

47. Lowry, *supra* note 17, at 63.

ships are normally severed when filial bonds develop,[48] sometimes as quickly as 24 hours after the local agency discovers the situation.[49] Despite the consensus that such mobility has a devastating impact on children,[50] it remains commonplace.[51]

Most obstacles to the effective administration of foster care remain prevalent despite numerous reform efforts, most notably congressional enactment

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48. *Id.*; *see, e.g.*, *In re* Jewish Child Care Ass'n, 156 N.E.2d 700 (N.Y. 1959) (upholding a state agency's right to remove a foster child from placement on the basis of bonding between the child and foster parent). The Supreme Court addressed foster care's "attachment problem," in Smith v. Organization of Foster Families, 431 U.S. 816 (1977), as follows:

> The development of such ties [between foster parents and foster children] points up an intrinsic ambiguity of foster care that is central to this case. The warmer and more homelike environment of foster care is intended to be its main advantage over institutional child care, yet because in theory foster care is intended to be only temporary, foster parents are urged not be become too attached to the children in their care. Indeed, the New York courts have upheld removal from a foster home for the very reason that the foster parents had become too emotionally involved with the child.

Id. at 836-37 n.40. (citations omitted); *see also In re* Michael B., 80 N.Y.2d 299 (1992) (bonding with foster parents is not considered an extraordinary circumstance that requires the awarding of parental custody to foster parents instead of natural parents).

49. PAPER CHILDREN, *supra* note 34, at 19 ("[I]n most cases, a child can be removed at a day's notice," in New Jersey, even though the practice is not common.).

50. *Id.*; *see* VICTOR PIKE ET AL., UNITED STATES DEP'T OF HEALTH, EDUC., & WELFARE, PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE: A HANDBOOK FOR SOCIAL WORKERS 4 (1977).

> *A foster child who moves many times, or who constantly fears that he may have to move, can suffer devastating effects on his emotional health.* He may become defensive, fearful, suspicious, and, after repeated moves, he may eventually protect himself from further disappointment and rejection by being less willing to invest in child-parent relationships. Eventually, he loses the capacity.

Id.; *see also* Fine, *supra* note 39, at 208-09 ("[M]ultiple traumatic displacements and reunions are likely to be seriously disruptive and may eventuate in aggressive, hyperactive, or oppositional behaviors."); *infra* note 68.

51. In New Jersey, for example, the average child has two to three foster homes during substitute care. PAPER CHILDREN, *supra* note 34, at 19. In 1982, 43% of foster children had experienced multiple placements nationwide. By 1983, that figure leaped to 53.1%. *See* Theodore J. Stein, *Foster Care for Children*, *in* 1 ENCYCLOPEDIA OF SOCIAL WORK 641 (Anne Minahan et al. eds., 18th ed. 1987).

At the close of fiscal year 1988, 22.3% of foster children had experienced three to five placements, and nearly seven percent had endured six or more placements. TATARA, *supra* note 46 (summarizing data which represented 58.9% of the national foster care population at the end of 1988). It is estimated that better than half of all children in foster care during 1988 were subject to more than one placement. *Id.*

In Utah, nearly three quarters of the state's foster children experience at least two placements, and an alarming 31.9 percent endure four or more placements. Marcia Henry, *NYCL Sues Utah Child Welfare System*, YOUTH LAW NEWS, Jan.-Feb. 1993, at 6 (citing UTAH DEPT. OF HUMAN SERVICES, THE NATIONAL FOSTER CARE CRISIS AND UTAH CHILD WELFARE (1992)).

of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[52] Lawmakers intended this legislation as a response to many of the problems associated with foster care, including multiple placements, unnecessary removal and lengthy separations.[53] The Act specifically called for a restructuring of federal financial incentives to encourage state agencies to find permanent homes for foster children "by making it possible for them to return to their own families or by placing them in adoptive homes."[54] The decidedly non-interventionist philosophy which informed much of AACWA

52. Pub. L. No. 96-272, 94 Stat. 500, 513 (1980) (codified as amended at 42 U.S.C. § 608(a)(1) (1982 & Supp. 1986)).

53. During the early 1970s, an increase in state-based child welfare programs led to a sharp rise in the states' reliance on foster care. *See* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 700-17 (1990). It became clear to most child welfare proponents that augmented reliance did not advance the state's "predominantly therapeutic—or, in the vernacular, . . . 'social work'—response to the problems of child abuse and child neglect," but instead created a new series of problems that revolved around the state's failure to rehabilitate troubled families, or offer foster children a short-term, stable haven. DOUGLAS J. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES 76 (1985) (Douglas Besharov is a Fellow at the American Enterprise Institute in Washington, D.C. and the first director of the National Center on Child Abuse and Neglect); *see also* Garrison, *supra* note 45, at 1753-54.

Prior to 1980 and the enactment of AACWA, the federal government made significant financial incentives available to the states in order to maintain local foster care programs, but provided hardly any funding for programs aimed at keeping families united. Passage of AACWA in 1980 was Congress' attempt to shift the balance in favor of family preservation.

54. S. REP. NO. 336, 96th Cong., 2d Sess. 1 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 1450, 1451. The law conditions the receipt of federal funds upon "reasonable efforts" by the states to prevent abused and neglected children from being removed from their homes and to reunite separated biological families. *Id.* at 1451; *see* UNITED STATES COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, REPORT TO THE SUBCOMMITTEE ON PUBLIC ASSISTANCE & UNEMPLOYMENT COMPENSATION OF THE HOUSE COMM. ON WAYS & MEANS, BETTER FEDERAL PROGRAM ADMINISTRATION CAN CONTRIBUTE TO IMPROVING STATE FOSTER CARE PROGRAMS at i (1984).

> [T]he Congress amended the Social Security Act through the enactment of the Adoption Assistance and Child Welfare Act of 1980. This act was aimed at encouraging states to improve their foster care programs through greater efforts to find permanent homes for children. The act provides funds for both maintenance payments (e.g., the cost of basic living expenses, such as food, clothing and shelter) and foster care child welfare services (e.g., counseling and referral services). . . .
>
> Section 427 of the Social Security Act, as amended, provides financial incentives to states to implement and operate a comprehensive set of services, procedures, and safeguards intended to (1) avoid unnecessary removal of children from their homes, (2) prevent extended stays in foster care, and (3) ensure that efforts are made to reunify children with their families or place them for adoption.

Id.; *see also* MaryLee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, *in* FOSTER CHILDREN IN THE COURTS 575-611 (Mark Hardin & Diane Dodson eds., 1983); Ruth Marcus, *Court Shuts Out Foster Care Children*, WASH. POST, Mar. 26, 1992, at A3 (reporting aims of 1980 legislation).

created a forceful movement in child welfare planning.[55] The statute emphasized keeping families together and providing children with stable environments.[56] "Permanency planning,"[57] as it came to be called, basked in the limelight of early success during the late 1970s. Several field experiments demonstrated that it costs states less to offer families intensive reunion-oriented services than to keep children in foster care.[58] These projects and, more directly, AACWA's financial incentives, influenced state intervention markedly. Social workers moved decisively to return many foster children to their biological families and earn federal assistance for their beleaguered agencies. By 1983, the number of children in foster care had plummeted to half the population's high water mark in the late 1970s.[59]

The safety net for children caught in the reapportionment of the foster care population was community-based support services like those offered in the permanency planning field experiments of the 1970s. In practice, however, biological parents received few of these services, often because of underfunding by the state.[60] Even when programs were readily accessible, their efficacy proved limited in certain instances. The success rate of community-based family counseling is largely diminished among "those parents, estimated to be about [forty] percent of substantiated cases, who have serious and deeply ingrained personality disturbances."[61] Most treatment programs do not disturb "deep-seated patterns of child abuse and neglect."[62] As a result of limited services and marginal success rates with the most troubled

55. *See infra* note 59 and accompanying text.

56. For example, the statute mandated that, in order for a state to be eligible for payments under AACWA, each state had to submit a plan which provided, *inter alia*, that the State would make reasonable efforts to prevent or eliminate the need to remove a child from the home and place him in foster care. Pub. L. No. 96-273, 94 Stat. 500, 503 (codied as amended at 43 U.S.C. § 671(a)(15) (1982)).

57. Anthony N. Maluccio & Edith Fein, *Permanency Planning: A Redefinition*, 62 J. OF POL'Y, PRAC. & PROG. 195, 197 (Child Welfare League of America, 1983). "Permanency planning is the systematic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships." *Id.*

58. CHILDREN'S DEFENSE FUND, *supra* note 26, at 179; PIKE, *supra* note 50, at 1.14-1.18.

59. HOWARD J. KARGER & DAVID STOESZ, AMERICAN SOCIAL WELFARE POLICY: A STRUCTURAL APPROACH 235-36 (1990). In 1977, 500,000 children were in foster care. *Id.* at 236. Six years later, that number was nearly halved to 251,000. *Id.* Another study found that the estimated number of children in foster care dipped from 500,000 in 1977 to 237,000 in 1982. ALENE B. RUSSELL & CYNTHIA M. TRAINOR, AMERICAN HUMANE ASSOCIATION, TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE 42 (1984).

60. *See* KARGER & STOESZ, *supra* note 59, at 235-37.

61. Besharov, *supra* note 35, at 185.

62. *Id.* at 192 (citing Douglas J. Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAMILY L.Q. 151, 165 (1983)).

families, many children were returned to foster care in the 1980s.[63] Ironically, "permanency planning" came to mean exactly the opposite of its conceptual agenda for many youth.[64] Instead of giving children a stable home environment, agencies shuttled them from foster care to their original homes, and back to foster care when local support services proved insufficient.[65] Given the deleterious effects on children of even one episode of separation from their families,[66] multiple reunions and separations must have compounded the already damaging and traumatic experience.[67]

For today's generation of long-term foster children, the failings of foster care persist. The child welfare system continues to exacerbate separation trauma by forcing children into a bureaucracy of multiple placements and deficient services.[68] Some studies even conclude that the incidence of abuse

63. After an initial dip in the number of children living in foster care during the early 1980s, there has been a marked increase in the number since 1982. The House Select Comm. on Children, Youth and Families estimates that 276,000 children were in foster care in 1985. STAFF OF HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 100TH CONG., 2D SESS., REPORT ON CHILDREN AND FAMILIES: KEY TRENDS IN THE 1980S 45 (Comm. Print 1988).

Dr. Tatara estimates that the number of children in foster care has risen from 280,000 in 1986 to 429,000 at the close of 1991. Telephone Interview with Dr. Toshio Tatara, *supra* note 25.

64. *See supra* note 57.

65. KARGER & STOESZ, *supra* note 59, at 235-36. Local community support services have not failed all families. Fourteen states are presently committed to the "family-preservation movement," a program whose goal is to keep parents and children united. Katrine Ames et al., *Fostering The Family*, NEWSWEEK, June 22, 1992, at 64. Within one year of finishing "intense, short-term intervention to remove the risk, not the child," 80% of the client families remain intact. *Id.*

66. *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, 889 (1975) ("While separation may protect a child from being beaten by his family, the separation itself may seriously damage the child's emotional health, particularly if the child is shifted from one temporary home to another during the separation."); Fine, *supra* note 39, at 208 ("Separation from the biological family almost certainly causes the child short-term distress."); *see also* JOHN BOWLBY, 3 ATTACHMENT AND LOSS 397 (1980) (discussing the fact that, while in foster care, a child often regards the care as "second best" and yearns for the absent parent); Ner Littner, *The Importance of the Natural Parents to the Child in Placement*, 54 J. CHILD WELFARE LEAGUE 175, 197 (1975) (emphasizing the importance of foster parent recognition of the crucial significance of the natural parents to the placed child).

67. *See generally* Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAMILY L.Q. 233 (1986) (discussing the importance of the foster child's relationship to her natural parents).

68. Lowry, *supra* note 33, at 268 (stating that "child welfare systems often inflict additional harm on already damaged children"); 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, 207-08 (1988) (shuttling foster children from site to site compounds existing feelings of rejection and loss experienced as a result of removal from the biological family). *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9-26 (1979) (discussing the negative effects of foster care on children).

and neglect is significantly greater in foster homes than in non-foster homes.[69] Of course, public programs can never fully replace healthy families. Nevertheless, it is imperative that an acknowledgement of the government's limitations be tempered by a commitment to providing the best possible foster care. Unfortunately, such a commitment appears tenuous in states now pinched by a recessionary climate and changing popular priorities.

There is still some good news amidst the gloomy reality. Evidence suggests that much runaway behavior is avoidable,[70] particularly when the running is recurrent, as is the case with most foster care runaways.[71] In a two year study of California runaways published in 1980, one-third of the representative population responded affirmatively when asked if anything could have changed their minds about leaving.[72] Nearly half those who said "yes" would have stayed at home if longstanding problems were resolved and eleven percent—all foster children—would not have run if an alternative placement was offered.[73] These responses suggest that foster children might

69. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 10-11 (1978) (listing statistics on perpetrators and causes of abuse among foster children); *see also* KENNETH WOODEN, WEEPING IN THE PLAYTIME OF OTHERS 36 (1976) (discussing the national dilemma regarding the treatment of juvenile offenders, specifically the flaws of the juvenile correction system which punishes a "condition, not a crime"); Mushlin, *supra* note 68, at 205-06 (stating that children in foster care are severely beaten, even killed, and that they are also subject to sexual and verbal abuse, as well as a greater chance of abuse than children in the general population).

There are no precise figures on how frequently children are abused in foster care or how much abuse triggers running behavior. However, remarkable similarities exist between the family dynamics of runaways and the family dynamics of abused and neglected children. Sharon Kirsch, *Adolescent Problems: Dynamics and Practice*, *in* CHILD WELFARE: A SOURCE BOOK OF KNOWLEDGE AND PRACTICE 289, 299 (Frank Maidman et al. eds., 1984). Abuse by foster parents is more likely to trigger running behavior than abuse by biological parents to the extent that children are free of psychological ties to their abusers. *See supra* note 66.

70. MILLER, *supra* note 16, at 209 ("Runaways often come from multiproblem families . . . and between efforts of school counselors, welfare workers, and medical services, should be relatively easy to identify and isolate to determine if running away is being planned"); Kirsch, *supra* note 69, at 298-99 (summarizing research of four studies on runaway youth published between 1973 and 1978, and reporting that early warning signs can indicate the possibility of runaway behavior).

Prior to absconding, runaways are more likely than non-runaways to have experienced a loss of respect for their parents, mobility and transience, physical abuse, and non-parental supervision. *Id.* at 298-302. These are the same characteristics of foster children—separated from their parents, shuttled through numerous foster placements and subjected to abuse.

71. MILLER, *supra* note 16, at 209. Foster care runaways tend to run away chronically, that is, five or more times. *Id.* at 46-7. Hence, their behavior is more foreseeable once the first (typically brief) episode ends. *Id.* at 47, 209.

72. *Id.* at 207 ("The runaway's own perception of the prevention possibilities is an important ingredient in any prevention program . . . .").

73. *Id.* at 208.

forego homelessness and street life if state intervenors ask the right questions and follow through on their findings. Unfortunately, this rarely happens, as many foster care programs fail to act therapeutically to prevent runaways from leaving. At best, the current condition of available state care belies the best aspirations of a system originally "designed to do good."[74]

Foster children are entitled to, and in need of, screening and counseling services designed to prevent runaway behavior. This right is rooted in a theory of constitutional entitlement which arises out of the state's custodial relationship to children living in foster care. A survey of federal common law applications of the Fourteenth Amendment's Due Process Clause to custodial settings strongly supports the view that foster care is a form of state custody. Unfortunately, a recent trend apparent among the lower courts has endorsed the withholding of due process protections from children voluntarily placed in foster care by their natural parents and guardians. This trend casts a dark shadow of vulnerability on the thousands of children currently being raised in foster care. The main hope for these children now rests with the courts, and specifically, judicial recognition of a foster child's right to mental health screening and runaway prevention services as constitutionally guaranteed by virtue of the child's due process right to safety.

II. VIEWING FOSTER CARE AS STATE CUSTODY

A. The Custody Test: DeShaney

Proponents of the foster child's right to adequate care and safe custody frequently rely for support on the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[75] Although the Clause ex-

74. Lowry, *supra* note 33, at 256. The author, Marcia Lowry, is the Director of the American Civil Liberties Union's Children's Rights Project. *Id.* at 255. She describes foster care as "a public response to thousands of private crises and tragedies." *Id.* at 256. In the context of assailing the inadequacies of the child welfare system, she characterizes its conceptual origins as benevolent. *Id.*

75. U.S. CONST. amend. XIV § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* Some advocates have also cited the Eighth Amendment's proscription against cruel and unusual punishment as a basis for enforcing safe foster care. *See* Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). In *Santana*, juvenile residents of two Puerto Rican institutions, which housed dependent and delinquent youth, filed a class action suit against Puerto Rico under 42 U.S.C. § 1983, alleging violations of their Eighth and Fourteenth Amendment right to safe custody. *Id.* at 1174. While granting the children relief, neither the district court nor the United States Court of Appeals for the First Circuit identified which constitutional basis it had applied. *See id.* at 1174-87; Santana v. Collazo, 533 F. Supp. 966, 978 (D.P.R. 1982), *aff'd in part and vacated in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 446 U.S. 974 (1984).

However, in Ingraham v. Wright, 430 U.S. 651, 671 (1977), the Supreme Court flatly rejected an Eighth Amendment challenge to corporal punishment in public schools. The Court held that the Eighth Amendment is a check only on punishments delivered in the criminal

pressly restricts the exercise of governmental power,[76] several federal courts have interpreted it as establishing a foster child's affirmative right to safe custody.[77] The liberty interest that foster children invoke under the Fourteenth Amendment is a substantive due process right rather than a procedural one.[78] Thus, the foster child's right involves liberties that, like those articulated in the Bill of Rights, the state may not infringe without substantial justification.[79] The Supreme Court has not yet addressed the foster

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context. *Id.* at 669. Under this reasoning, the *Santana* Court would likely have had to rely on the fact that some of the children had been adjudicated delinquent, to arrive at an Eighth Amendment right to safe custody. *But see id.* at 692 (White, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) (rejecting the majority's position that the Eighth Amendment protects only convicted criminals).

Despite possible use of an Eighth Amendment claim in some cases, lower courts have interpreted *Ingraham* as foreclosing Eighth Amendment challenges to foster care living conditions. *See, e.g.*, Rubacha v. Coler, 607 F. Supp. 477, 479 (N.D. Ill. 1985) (rejecting Eighth Amendment grounds for a foster child's claim alleging violation of her right to safe placement because "the Eighth Amendment applies only to convicted criminals").

76. The Constitution is viewed by scholars differently. Some observe that it requires the government to perform certain affirmative duties for its citizens (positive rights), while others see the Constitution as a charter of negative rights, that limits what government can do to the people. For a general discussion of some affirmative government obligations which arise from the negatively phrased Due Process clause, see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 1-6, 15-13 (2d ed. 1988) (asserting that affirmative government duties extend from the Constitution). *But see* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them." (citing Harris v. McRae, 448 U.S. 297, 318 (1980); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982))), *cert. denied*, 465 U.S. 1049 (1984). *See also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (discussing affirmative, court-imposed state duties).

77. *See, e.g.*, K.H. *ex. rel.* Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990) (holding that a foster child has a negative liberty interest not to be placed in an abusive foster home); Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990) (holding that children in state-regulated foster care have an affirmative due process right to be free from the infliction of unnecessary harm), *cert. denied*, 498 U.S. 867 (1990); Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987) (holding that an involuntarily placed foster child has the right to be free of unnecessary pain and has a fundamental right to safety in custody), *cert. denied*, 489 U.S. 1065 (1989).

78. Lee Teitelbaum & James Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 13 FAMILY L.Q. 153 (1978). "Traditional due process analysis comprises three distinct inquiries: Has a constitutionally recognized liberty been infringed? If so is that infringement attributable to state action? If both of these are true, what procedures are required by the state in so limiting the liberty interest involved?" *Id.* at 156. Substantive due process analysis is concerned with the first and second questions, while procedural claims focus on the third question.

79. There are several rights not listed in the Bill of Rights, which are recognized as fundamental by the Supreme Court. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Whalen v. Roe, 429 U.S. 589 (1977) (right to privacy); Roe v. Wade, 410 U.S. 113 (1973) (right to an abortion); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (women's right to an abortion, subject to framework protecting state's interest). In contrast, the Supreme Court recognizes the right of individuals in a custodial setting to be free from

child's right to safe custody. However, in *DeShaney v. Winnebago County Department of Social Services*,[80] the Court decided that a child living at home with his natural parent, under the supervision of a local child protective agency, does not have a substantive due process right to protection from the state.[81] Nearly from the moment of its publication, the *DeShaney* decision influenced subsequent lower court discussions of the foster child's right to safety, even though the case did not involve a foster child. *DeShaney* concerned a four-year-old boy named Joshua DeShaney who was attacked so severely by his father that he was rendered permanently paralyzed and profoundly retarded.[82] A medical examination, and later emergency surgery, revealed that Joshua suffered from extensive cumulative injuries sustained over many months.[83]

Joshua's final beating did not come as a complete surprise to hospital and social services staff. The child had come to the emergency room the previous year, suffering from injuries similar to those he sustained from his father's last attack. At the time, the hospital suspected child abuse.[84] Officials from the local Department of Social Services arranged for the child to remain in the hospital's custody while it investigated the cause of his bruises and scars.[85] Although abuse was suspected, investigators did not uncover enough evidence to keep Joshua out of his father's custody,[86] so they returned the boy to his home. A social worker was assigned to monitor and

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harm and physical restraint. However, it does not characterize those rights as "fundamental." *See* Youngberg v. Romeo, 457 U.S. 307, 315-25 (1982). Typically, the Court has been somewhat unwilling to characterize as fundamental the individual's right to safety. *Id.*; *see also Ingraham*, 430 U.S. at 673-74. The distinction between an important right and a fundamental right is significant. Where fundamental rights are concerned, the Court has held that the state may not limit those rights absent a compelling state interest. *See Roe*, 410 U.S. at 155. The state must make a less burdensome showing to curtail substantive due process rights not expressly deemed fundamental by the Supreme Court. *See, e.g.*, *Ingraham*, 430 U.S. at 676 (holding that there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of common-law privilege). *But see Taylor*, 818 F.2d at 794 (characterizing a foster child's right to physical safety as fundamental).

80. 489 U.S. 189 (1989).

81. *Id.* at 197.

82. *See* Brief for Petitioners at 8, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (No. 87-154) [hereinafter Petitioner's Brief] ("Joshua has lost nearly half the tissue in his brain, is permanently substantially paralyzed, and is profoundly and permanently retarded and brain damaged."). Joshua will be institutionalized for the rest of his life. *DeShaney*, 489 U.S. at 193.

83. Petitioner's Brief, *supra* note 82, at 7-8.

84. *DeShaney*, 489 U.S. at 192.

85. *Id.*

86. *Id.* At the time, the relevant state statute provided that a child may be withheld from parental custody if "[p]robable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others." WIS. STAT. ANN. § 48.205(1)(a) (West 1987).

counsel the family, but she provided little assistance to Joshua.[87] Although she visited the DeShaney home about once a month, the social worker often did not observe Joshua personally. She seemed entirely unaware of the boy's worsening condition despite mounting signs of rampant abuse.[88] Just months before the final, brutal beating, Joshua was again treated at the emergency room for "a cut forehead, a bloody nose, swollen ear, and bruises on both shoulders,"[89] prompting hospital officials to make another report of suspected child abuse. This time, the response of the local social services agency was to do nothing.

Through his guardian *ad litem* and his mother, Joshua brought suit under 42 U.S.C. § 1983[90] against the Department of Social Services and its employees. The plaintiffs claimed that the agency violated the child's substantive due process right to a safe environment by failing to protect Joshua from his father's foreseeable aggression.[91] The United States District Court for the Eastern District of Wisconsin dismissed the action, holding that the state's failure to render protective services to a child within its jurisdiction—but not within its custody—did not give rise to a constitutional grievance.[92] The United States Court of Appeals for the Seventh Circuit affirmed.[93]

In a six to three decision, the United States Supreme Court upheld the lower courts' dismissal of Joshua's claim.[94] The majority relied primarily on its view of the Constitution as an article of restraint against state interference

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87. *DeShaney*, 489 U.S. at 192-93.

88. *Id.* Joshua's numerous injuries included scrapes, bumps, bruises, an eye injury and an apparent cigarette burn. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 300 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

89. *DeShaney*, 812 F.2d at 300.

90. 42 U.S.C. § 1983 (1988) states in relevant part:

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

Id.

For a § 1983 action to arise where state officials are charged with failing to exercise an affirmative constitutional duty, two requirements must be met. First, the officials' failure to act must have been a substantial factor leading to the violation of a constitutionally protected liberty interest. Rizzo v. Goode, 423 U.S. 362 (1976). Second, depending on the context, the state actor must either exhibit deliberate indifference to his constitutional duty to act, Turpin v. Mailet, 619 F.2d 196 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980), or a failure to exercise professional judgment. Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

91. *DeShaney*, 489 U.S. at 193.

92. *Id.* (citing district court's opinion).

93. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

94. *DeShaney*, 489 U.S. at 194.

rather than as a guarantor of state assistance for individual rights.[95] Only in particularized contexts is the government obliged to advance and safeguard private liberty interests.[96] The Court determined that state "custody" is the setting in which the government becomes bound to abandon its neutrality and promote the liberties of individuals in state care.[97] Thus, whether or not a citizen resides in state custody became the test of a state's due process liability for failing to safeguard its citizens from violence.[98] On the question of the foster child's substantive due process right to a safe environment, the Court expressly reserved judgment:

> 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. Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents . . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.[99]

Prior to *DeShaney*, the Supreme Court had decided in *Estelle v. Gamble*[100] that prison officials could be held liable under § 1983 for failing to give medical treatment to a prisoner.[101] However, the majority based its holding on the Eighth Amendment's proscription against cruel and unusual punishment rather than the Due Process Clause.[102] Six years after *Estelle*, in *Youngberg v. Romeo*,[103] the Court cited the Fourteenth Amendment's Due Process Clause and extended the "right to treatment" from prison set-

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95. *Id.* at 195-96.

96. *Id.*, at 198.

97. *Id.* at 199-201.

98. *Id.* at 199-200. As the Court observed, only the state's "affirmative act of restraining the individual's freedom" prevents individuals from protecting themselves, therefore entitling them to government protection. *Id.* at 200.

99. *Id.* at 201 n.9. (emphasis added) (citations omitted). One federal district court observed that the Supreme Court "intimated its approval" of a substantive due process right to safe foster care. Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989). The United States Court of Appeals for the Third Circuit understood *DeShaney* to permit affirmative state duties to arise from noncustodial settings. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 723-24 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Both conclusions emanate from an imprecise reading of *DeShaney*'s footnote nine, wherein the Court expressly reserved judgment on the foster care question and did not even remotely suggest that a noncustodial relationship invites substantive due process rights and duties. *See DeShaney*, 489 U.S. at 201 n.9.

100. 429 U.S. 97 (1976).

101. *Id.* at 103-04.

102. *Id.* at 105.

103. 457 U.S. 307 (1982).

tings to state institutions for the mentally ill and retarded.[104] Considering for the first time the substantive rights of involuntarily committed persons, the Court recognized a sphere of affirmative state duties ensuring that residents are kept reasonably safe, free from needless restraint, and offered as much training as is necessary to effect their safety and freedom.[105]

In the wake of *Estelle* and *Youngberg*, *DeShaney* became the third chapter in the Court's evolving substantive due process jurisprudence concerning the rights of individuals in state care. The question following *DeShaney* is whether foster children reside in state custody for the purpose of asserting their substantive due process right to safe placements.[106] Most lower federal court decisions prior to *DeShaney* are not responsive to this question. Although at least four federal courts had determined that foster children

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104. *Id.* at 314-25.

105. *Id.* at 324. The government in *Youngberg* conceded its other duties to provide adequate food, shelter, clothing and medical attention, which the Court described as the "essentials of the care that the State must provide."

106. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989). ("When the state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.").

Arguably, *DeShaney* appears to rely more substantially on a "state creation of danger" test than a status custody test, but the text of the opinion reads as an unequivocal endorsement of custodial analysis. *Cf.* Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465 (3d Cir. 1990) (interpreting *DeShaney* to impose a status-based custody test for due process liberty interests); Eugene D. v. Karman, 889 F.2d 701, 709 (6th Cir. 1989) (stating that *DeShaney* "makes clear . . . that the Due Process Clause of the Fourteenth Amendment imposes affirmative duties on the State whenever it takes an individual into its custody"), *cert. denied*, 496 U.S. 931 (1990); Dwares v. New York, 1992 U.S. Dist. LEXIS 1412 at *5 (S.D.N.Y. Feb. 10, 1992) ("Because plaintiff was not in custody at the time of the alleged incident, *DeShaney* teaches that plaintiff's Due Process rights were not violated.").

However, the Supreme Court's opinion in *DeShaney* apparently leaves undisturbed a line of "police cases" which have found a state duty to act in noncustodial situations where the state contributed to the danger. *See, e.g.*, White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (holding that police officers who arrested the guardian of three children for drag racing and subsequently left the children alone in the abandoned car on a highway could be found liable under § 1983 for their failure to protect the children); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) (holding that police officers who witnessed the beating of a man by other officers could be found liable under § 1983 for failing to protect the citizen). Most recently, a federal district court refused to dismiss claims brought by a murder victim's family alleging that Milwaukee police officers neglected a duty to protect their son from a serial murderer. *See* Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343 (E.D. Wis. 1992). The victim, who did not speak English, had escaped from his would-be killer and located persons to help him. After neighbors contacted the police, local officers assumed control of the situation, and returned the boy to the killer's residence in the mistaken belief that the two were gay lovers engaged in a domestic disagreement. The court observed that "the *DeShaney* doctrine is not without some small cracks," *id.* at 1349, and held that "at the motion to dismiss stage, I cannot say that no special relationship existed between [the victim] and the three police officers." *Id.* at 1350.

have a constitutional right to safety,[107] only one opinion offered an express constitutional basis for enforcing the entitlement.[108] The opinion arrived four years prior to the Supreme Court's decision in *DeShaney*, when the United States District Court for the Northern District of Illinois took up the case of *Rubacha v. Coler*,[109] involving a mentally retarded foster child who was beaten by other juvenile residents at a state-run shelter in Illinois. The child filed suit against the state of Illinois alleging that her substantive due process right to safe custody had been violated. The court found that the child had indeed stated a cause of action based on her Fourteenth Amend-

107. *See* Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981); Rubacha v. Coler, 607 F. Supp. 477 (N.D. Ill. 1985); Santana v. Collazo, 533 F. Supp. 966 (D.P.R. 1982), *aff'd in part & vacated in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); Brooks v. Richardson, 478 F. Supp. 793 (S.D.N.Y. 1979). In Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976), a federal district court rejected the substantive due process claims of foster children to safe custody, holding that foster care is not a form of state custody to which such rights attach. *Id.* at 605. The reasoning in *Child* reflects the federal courts' minority view, and has been unequivocally rejected by most federal courts. *See, e.g.*, Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir.) (holding that a foster child has a liberty interest by virtue of his custodial relationship to the state), *cert. denied*, 498 U.S. 867 (1990); Taylor v. Ledbetter, 818 F.2d 791, 794-95 (11th Cir. 1987) (same), *cert. denied*, 489 U.S. 1065 (1989); B.H. v. Johnson, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (same).

108. In two of these decisions, *Doe* and *Brooks*, the courts acknowledged a foster child's liberty interest in safe and humane custodial care without exposition on the constitutional source of the right. *See Doe*, 649 F.2d at 141; *Brooks*, 478 F. Supp. at 795. In *Doe*, the United States Court of Appeals for the Second Circuit identified the foster child's liberty interest in a safe placement, but did not discuss its constitutional grounds for introducing this right. *Doe*, 649 F.2d at 141-46. However, on appeal after remand, the court acknowledged that it had originally applied an Eighth Amendment standard to the level of indifference the state must exhibit toward a child's unsafe conditions before liability attaches. Doe v. New York City Dep't of Social Servs., 709 F.2d 782, 790 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). The court still failed to discuss the source of the child's right to safety. *Id.* at 791-92. In *Brooks v. Richardson*, the court recognized the foster child's right to "humane custodial care," but did not specify from which constitutional provision this right derived. *Brooks*, 478 F. Supp. at 795-96. Similarly, in Santana v. Collazo, 533 F. Supp. 966 (D.P.R. 1982), *aff'd in part and vacated in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984), the district court's finding that foster children have a constitutional right to safe placements is nebulously based on either the Eighth or Fourteenth Amendments, with no clarification provided by the United States Court of Appeals for the First Circuit on appeal. *Santana*, 714 F.2d at 1172. These decisions do not necessarily establish the foster child's substantive due process right to safe custody. But in upholding even an ambiguous right to freedom from harm, each court observed a sufficient level of dependency in the foster care relationship to warrant a greater state duty to foster children than the government owes to its non-custodial citizens. The Supreme Court stated in *DeShaney* that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . ." *DeShaney*, 489 U.S. at 196; *see* Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that a state has no duty to provide citizens with publicly funded abortion services); Maher v. Roe, 432 U.S. 464 (1977) (holding that a state is not obligated to offer medical treatment to its citizens); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that government has no duty to provide adequate housing to citizens).

109. 607 F. Supp. 477 (N.D. Ill. 1985).

ment right to safety, and denied the state's summary dismissal motion.[110] The *Rubacha* court observed that the Second Circuit had earlier extended *Youngberg*'s right of safety to all persons who reside in state custody in *Society for Good Will to Retarded Children, Inc. v. Cuomo*.[111] By allowing the case to go forward, the *Rubacha* court implied that foster children live in state custody for the purposes of due process analysis.[112]

B. Defining "Custody": The Lehman *Hurdle*

In *Lehman v. Lycoming County Children's Service Agency*,[113] the Supreme Court announced that foster children are not in state custody for the purposes of obtaining the writ of habeas corpus.[114] In *Lehman*, a natural mother of three sons surrendered custody of her children to a county foster care agency.[115] After the agency initiated termination proceedings against the mother, a state court issued a final order terminating her parental rights. The mother subsequently sought a writ of habeas corpus in federal court to regain her children.[116] The Supreme Court ultimately decided against the mother's claim and denied her redress through a habeas petition.[117]

The *Lehman* majority observed that foster children "suffer no unusual restraints not imposed on other children."[118] In light of *DeShaney*,[119] the observation looms large. The *DeShaney* Court placed government restraint of personal liberty at the center of its formalistic distinction between negative and positive liberty interests.[120] If the *Lehman* Court anticipated the issue of foster care as state custody and intended its resolution, the decision would supply an answer to the unaddressed question of whether foster care children are in state custody for due process purposes.

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110. *Id.* at 479, 482.

111. 737 F.2d 1239, 1245-46 (2d Cir. 1984).

112. *Rubacha*, 607 F. Supp. at 479-80.

113. 458 U.S. 502 (1982).

114. A confined person may use the writ of habeas corpus to challenge either the conditions or duration of his incarceration. Preiser v. Rodriguez, 411 U.S. 475, 499 (1973). An applicant for the writ must first demonstrate that his relationship to the state constitutes "custody." *Lehman*, 458 U.S. at 502.

115. *Lehman*, 458 U.S. at 504.

116. *Id.* at 504-05. The mother sought a writ of habeas corpus under 28 U.S.C. § 2254(a), which requires a federal court to allow an application for the writ on behalf of a person incarcerated by a state court judgment.

117. *Id.* at 516.

118. *Id.* at 511.

119. 489 U.S. 189 (1989); *see supra* notes 80-99 and accompanying text.

120. For a criticism of the Supreme Court's reasoning in *Deshaney* as overly formalistic, see *Leading Cases*, 103 HARV. L. REV. 137, 167-77 (1989). *See generally* Curry First, *"Poor Joshua!": The State's Responsibility to Protect Children from Abuse*, 23 CLEARINGHOUSE REV. 525 (1989) (arguing that the result in *DeShaney* flies in the face of common sense).

On the surface, *Lehman* may appear to quash hopes for a custody-based construction of foster care. In fact and in law, however, the decision is inapposite for due process considerations. As a federal habeas case, *Lehman*'s analysis of state restraint of individuals is fundamentally inappropriate for due process considerations. The restraint that triggers individual substantive due process rights under a *DeShaney*[121] or *Youngberg*[122] analysis can be characterized not necessarily by physical confinement, though that may be a part of it, but more generally by social blockades to private resources and methods. Because the individual's access is barred by the government, the state must substitute its own substantive services by right of the Due Process Clause. To the contrary, the restraint and custody which are necessary to accommodate the writ of habeas corpus have historically been associated with "[s]ubstantial restraints not shared by the public generally."[123]

DeShaney should be understood to define custody as occurring once the state exercises affirmative control over the individual, thereby eliminating access to treatment, care and services. The Court's opinion in *Youngberg* supports this view by characterizing persons who are constitutionally due care and services as "wholly dependent on the [s]tate."[124] On the other hand, *Lehman* demands more than dependence and government dominion to satisfy custody in the habeas context. It requires virtual incarceration. Since foster children are not "confined" in the conventional sense, it follows that the Supreme Court was hesitant to designate their circumstances custodial for the purposes of habeas relief.

The *DeShaney* Court must have considered the *Lehman* decision when it articulated in footnote nine the possibility of a substantive due process right to safety for foster children.[125] And still, the majority chose not to cite *Lehman*. This omission hints to what is apparent from a careful reading of *Lehman*: the Court did not intend *Lehman* to stand for the broad proposition that foster children are not in any form of state custody, but for the narrower proposition that foster children are not in the type of custody associated with the writ of habeas corpus.

This distinction is advanced in two sections of the opinion. First, the Court stated that "[t]he 'custody' of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through fed-

121. *See supra* notes 97-99 and accompanying text.

122. *See supra* notes 104-05 and accompanying text.

123. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 510 (1982).

124. Youngberg v. Romeo, 457 U.S. 307, 317 (1982). Indeed, in the due process context, "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-22.

125. *See supra* note 99 and accompanying text.

eral habeas."[126] This observation comports with the Court's preference to remain disengaged from family matters which are typically reserved to the states.[127] In a revealing portion of the majority decision in *Lehman*, the Court observed that "Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in [regaining] her own parental rights."[128] The bottom line in *Lehman* may result more from the Court's disinterest in entertaining family custody claims than from any single precept of its constitutional jurisprudence.[129]

Second, the Court framed its holding in language which limited the applicability of the noncustodial determination to federal habeas cases, stating that "although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the 'custody' of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus."[130] Thus, as written, the holding in *Lehman* applies only to habeas corpus cases and does not foreclose the possibility that foster children may be in state custody for the purpose of asserting other constitutional rights. Moreover, since the Supreme Court has not

126. *Lehman*, 458 U.S. at 511.

127. The Supreme Court has typically avoided involvement in many family law issues, preferring they remain within the jurisdiction of the individual states. In Santosky v. Kramer, 455 U.S. 745 (1982), then Justice Rehnquist explained:

> State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.
>
> Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."

Id. at 771 (Rehnquist, J., dissenting) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)); *see also* Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (upholding domestic relations exception to diversity jurisdiction).

128. *Lehman*, 458 U.S. at 511. It is significant that the Court acknowledged in its opinion that the writ in this particular case was being used not to further the interests of the foster children, but rather as a tool of the non-custodial parent to relitigate her loss of custody and parental rights. In contrast, substantive due process claims raised by children in foster care are aimed at creating a better life for the children and almost certainly do not involve questions about whose interests are being promoted.

129. The *Lehman* Court explained that:

> The considerations in a child-custody case are quite different from those present in any prior case in which this Court has sustained federal-court jurisdiction under § 2254. The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.

Id. at 515-16.

130. *Id.* at 510.

made pervasive physical confinement an essential element of the substantive due process right to safety,[131] *Lehman*'s description of foster youth as relatively physically unrestrained is not dispositive.

Not surprisingly, none of the federal courts have cited *Lehman* as imposing a barrier to the recognition of foster care as a custodial relationship. In a portion of a decision which survived a recent reversal by the Supreme Court, the Northern District Court of Illinois, in *Artist M. v. Johnson*,[132] spoke plainly of *Lehman*'s irrelevance to substantive due process considerations. The lower court concluded that "[*Lehman*] was a habeas case that addressed a set of concerns . . . very different from those relevant" to due process analysis.[133] The *Artist M.* court acknowledged that foster children have substantive due process rights to basic necessities. It dismissed the plaintiff-children's constitutional claims to particular services, such as timely case review, only because state officials had not exhibited "complete indifference to a known significant risk to [the] physical and emotional safety" of such children.[134] The court held that AACWA gave foster children an enforceable private right of action to sue states for services described in, and required by, the Act. These services generally involved state efforts to reunite separated families, and specifically included a case plan system plus a follow-up program of case review. The district court's affirmative holding on the constitutional rights of foster children was not raised on appeal. Instead, its decision regarding the implied private enforceability of AACWA became the central issue on which appellate review[135] focused and, specifically, the narrow basis on which the Supreme Court granted certiorari.[136]

In *Suter v. Artist M.*,[137] the Supreme Court reversed the lower court on the private enforceability of an AACWA provision that directed states to undertake reasonable efforts to prevent a child's removal and hasten reunion with biological families. The Court maintained that Congress had not made sufficiently plain its intent to grant foster children a private right of action under the Act.[138] The Court's analysis, consisting mainly of statutory con-

131. *See infra* notes 148-49 and accompanying text; *see also DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting). "Thus, the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the state was obligated to replace." *Id.*

132. 726 F. Supp. 690 (N.D. Ill. 1989), *aff'd*, 917 F.2d 980 (7th Cir. 1990), *rev'd sub nom.*, Suter v. Artist M., 112 S. Ct. 1360 (1992).

133. *Id.* at 699.

134. *Id.* at 700; *see supra* note 90, (discussing requisite behavior of state officials necessary to maintain § 1983 actions).

135. *Suter*, 112 S. Ct. at 1370.

136. *Id.* at 2008.

137. 112 S. Ct. 1360 (1992).

138. *Id.* at 1370. Prior to the Court's decision in *Suter*, the lower federal courts had split on the private enforceability of AACWA provisions under § 1983 of the Civil Rights Act of

struction, reflected no intention to consider a foster child's constitutional entitlement to services. *Suter*, therefore, is not instructive on the issue of the foster child's substantive due process rights, and leaves undisturbed the *Artist M.* court's affirmative holding favoring the existence of such rights.

There is a growing consensus among the lower federal courts that a substantive due process right to safe custody attaches to foster children involuntarily placed in state-run foster care programs.[139] Most recently, in *K.H. ex. rel. Murphy v. Morgan*,[140] the United States Court of Appeals for the Seventh Circuit held that a child removed from her parents' custody by the state had a constitutional right to be free from harm while in foster care.[141] The decision echoed an earlier Eleventh Circuit opinion, *Taylor v. Ledbetter*,[142] which held that an involuntarily placed foster child could assert a constitutional right to reasonably safe living conditions. The Sixth Circuit likewise concluded, in *Meador v. Cabinet for Human Resources*,[143] that "the right to be free from the infliction of unnecessary harm [attaches] to children in state-regulated foster homes."[144] Subsequent to the Supreme Court decision

1871. *Compare* L.J. *ex. rel.* Dorr. v. Massinga, 838 F.2d 118, 122-23 (4th Cir. 1988) (case plan requirements of AACWA are privately enforceable), *cert. denied*, 488 U.S. 1018 (1989) *and* Lynch v. Dukakis, 719 F.2d 504, 512 (1st Cir. 1983) (same); *with* B.H. v. Johnson, 715 F. Supp. 1387, 1401 (N.D. Ill. 1989) ("reasonable efforts" clause not enforceable under § 1983).

139. *See, e.g.*, K.H. *ex. rel.* Murphy v. Morgan, 914 F.2d 846, 894 (7th Cir. 1990); Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990); Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); LaShawn A. v. Dixon, 762 F. Supp. 959, 992 (D.D.C. 1991); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989); Rubacha v. Coler, 607 F. Supp. 477, 479-80 (N.D. Ill. 1985); *see also* Gibson v. Merced County Dep't of Human Resources, 799 F.2d 582, 589-90 (9th Cir. 1986) (assuming, without expressly holding, the validity of the analogy between the circumstances of children whom the state removes from free society and places in foster homes operated by its agents and the circumstances of those who, by virtue of incarceration or institutionalization, have substantive due process rights to safe custody).

140. 914 F.2d 846 (7th Cir. 1990).

141. The Court explained that:

> [T]he state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without protection, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in jail or prison in which his health or safety would be endangered, without violating his rights either under the cruel and unusual punishments clause of the Eighth Amendment . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial. In either case the state would be a doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to lions.

Id. at 849 (citations omitted).

142. 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989).

143. 902 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990).

144. *Meador*, 902 F.2d at 476.

in *DeShaney*,[145] at least three federal district courts had reached the same conclusion.[146] The emerging view of the federal bench is that foster children enjoy a substantive due process right to safe living conditions. Since *DeShaney* holds this right to exist only in the custodial context,[147] each of these courts has expressly or implicitly recognized that foster children are in state custody for due process purposes. These decisions contribute to an apparently growing federal rule recognizing foster care as a custodial relationship under *DeShaney*'s status-based custody test.

The Supreme Court has not had an opportunity to address the lower courts' view of foster care as a form of state custody. In fact, the Court has provided few clues in its due process analyses to what it considers essential in the nature of custody. For example, *DeShaney* mentions the state's "affirmative control" over the individual and stresses the individual's resulting inability to care for himself.[148] *Youngberg* emphasizes the individual's dependency on the state for care and protection.[149] There is nothing apparent in either formulation to suggest that foster care is not essentially custodial. Lower courts describe foster children as "defenseless,"[150] "helpless, isolated,"[151] and at "risk of harm."[152] Many of these children inhabit foster care's "bleak and Dickensian"[153] world for too long, shepherded from placement to placement at the will of the agency. There could hardly be a circumstance where the variables of dependency and control were more obviously engaged.[154]

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145. *See supra* notes 80-99 and accompanying text.

146. LaShawn A. v. Dixon, 762 F. Supp 959, 992 (D.D.C. 1991) ("It is indisputable that plaintiffs [foster children] have a liberty interest in safe conditions while in state custody."); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989) (holding that foster children "have a substantive due process right under the Fourteenth Amendment" to safe custody); B.H. v. Johnson, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) ("In sum, plaintiffs [foster children] have stated a substantive due process claim to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being, while directly or indirectly in state custody . . . .").

147. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199 (1989).

148. *Id.*

149. Youngberg v. Romeo, 457 U.S. 307, 317 (1982).

150. Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

151. Aristotle P. v. Johnson, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989) (citing *Taylor*, 818 F.2d at 797).

152. *Taylor*, 818 F.2d at 797.

153. B.H. v. Johnson, 715 F. Supp. 1387, 1389 (N.D. Ill. 1989).

154. *See* Garrison, *supra* note 45, at 1755-56 (discussing state's unfettered discretion over the lives of foster children to the exclusion of natural parents).

III. BEYOND CUSTODY: SHUTTING OUT THE CHILDREN OF CONSENT VOLUNTARY VS. INVOLUNTARY FOSTER CARE

The federal circuit courts have been reluctant to recognize a substantive due process right to safety for a large subset of foster youth who are "voluntarily" placed by their parents or guardians into substitute care.[155] Shortly after *DeShaney*, the United States Court of Appeals for the Fourth Circuit, in *Milburn v. Anne Arundel County Department of Social Services*,[156] decided that a child enrolled in a state-run foster care program by his parents was not subject to state restraint. The case arose when a four-year-old boy, Charles Milburn, was beaten repeatedly by his foster parents while in substitute care.[157] The Fourth Circuit maintained that *DeShaney* determined the outcome in *Milburn*.[158] The court distinguished the *DeShaney* Court's express reservation of judgment on the foster care question,[159] and held that the state had not affirmatively exercised any control over the boy because his parents had voluntarily placed him in substitute care.[160] The court did not state why a voluntary placement made the boy's foster care experiences, of restraint or otherwise, less like those of the institutionalized plaintiff in

155. *See, e.g.*, Milburn v. Anne Arundel County Dep't of Social Servs. 871 F.2d 474, 476 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989) (holding that voluntarily placed foster child does not have substantive due process right to safety); *Aristotle P.*, 721 F. Supp. at 1009 (same). The establishment of a voluntary/involuntary dichotomy in substantive due process analysis has infiltrated settings beyond foster care. *See, e.g.*, Fialkowski v. Greenwich Home For Children, 921 F.2d 459, 466 (3d Cir. 1990) (holding that mentally retarded adults living through a Community Rehabilitation Residential Service possess no substantive due process right to safety); Jordan v. Tennessee, 738 F. Supp. 258 (M.D. Tenn. 1990) (holding that voluntary resident at state facility for severely retarded individuals had no due process right to safety).

A 1983 report estimated that one quarter of the foster care population was voluntarily placed in substitute care. Research Institute for Human Services, Comparison of Voluntary and Court-Ordered Foster Care: Decisions, Service and Partial Choice, 3 (Portland State University 1983). Dr. Tatara, estimates that voluntary placements now comprise less that 5% of the national total foster care population, but he indicates that the incidence varies widely based on existing state laws and policies. Telephone Interview with Dr. Toshio Tatara (March 31, 1992).

156. 871 F.2d 474 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989).

157. *Id.* at 474-76. When he was almost two years old, Charles Milburn's natural parents placed him in a state foster care program. *Id.* at 474. The ensuing two years were filled with terror and violence. The child's hands were permanently disfigured by suspicious burns and his leg was broken. He suffered a deep gauge above his eye and numerous bruises over his body. *Id.* at 474. Despite repeated hospital calls to the local social service agency reporting the boy as a victim of child abuse, Charles was time and again returned to his abusive foster parents. *Id.* at 474-76. Not until he suffered a painful broken tibia did the state remove him to a safer environment. *Id.* at 474-75.

158. *Id.* at 476. In effect, Charles Milburn's foster parents were not recognized by the Court as state actors, despite the County Department of Social Services' involvement in placing Charles with them. *Id.* at 476-77.

159. *See supra* note 99 and accompanying text.

160. *Milburn*, 871 F.2d at 476.

Youngberg and more like those of Joshua DeShaney.[161] Instead, the court created an unprotected class of foster children whose natural parents had consented to their placements, effectively allowing states to evade constitutional duties owed to foster children, even where the custodial ingredients of social control and juvenile dependence are in evidence. The decision effectively abandons thousands of children left vulnerable to the shadowy underbelly of a system ripe with abuse and neglect.

The plaintiff in *Milburn* raised claims similar to the those upheld two years earlier by the United States Court of Appeals for the Eleventh Circuit in *Taylor v. Ledbetter*.[162] The principal distinction between the cases was the nature of each child's placement, which in *Taylor* was not voluntary. The Eleventh Circuit, sitting en banc, ruled that when "the state *involuntarily* place[s] the person in a custodial environment, and . . . the person is unable to seek alternative living arrangements," the state must ensure that the individual receives "reasonably safe living conditions."[163] The Seventh Circuit recently cited *Milburn*, with apparent approval, as "emphasiz[ing] the state's lack of responsibility for a child's *voluntary* placement by the nat-

161. As additional grounds for its decision, the court cited the "private actor" status of the foster parents, based on a tenuous state-foster parent relationship. *Id.* at 476-79. *DeShaney* makes plain that the harm caused by private actors does not implicate government liability. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989); *see also* Weller v. Dep't of Social Servs., 901 F.2d 387, 392 (4th Cir. 1990) ("[H]arm suffered by a child in the custody of a parent or grandparent is not harm inflicted by the State."); Arroyo v. Pla, 748 F. Supp. 56, 60 (D.P.R. 1990). "Although young children are required by law to attend school and it may be said that these children are under the custody of the state while they attend classes, the determining factor in this case is that the death of [the child] was caused solely by a private individual [who was another student]." *Id.* at 60. The Fourth Circuit was incorrect to hold that some foster parents are not agents of the government based on the lax regulatory policies of the state child protective agency. As the Seventh Circuit recently observed: "It should have been obvious from the day *Youngberg* was decided that a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons." K.H. *ex. rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990). The state plays a pivotal role in foster care: the nexus between child and parent. Absent the state's intervention and intermediary action, a foster child would have no occasion to be in the care of the foster parents and, therefore, no abuse by the so-called "private actor" foster parents would fall upon the child. Because of this causal relationship and, more importantly, because all foster parents serve both in an official capacity pursuant to state child welfare programs and policies and at the pleasure of the state, foster parents are state actors. *See also*, Laura Oren, Deshaney*'s Unfinished Business: The Foster Child's Due Process Right To Safety*, 69 N.C. L. REV. 113 (1990). Ms. Oren stated that:

> In the foster care situation, moreover, it is much clearer that the state's actions have thrown the child into the "snake pit" and that it cannot be said, as the Court said about Joshua DeShaney, that the state "played no part" in the creation of the dangers that the child faced in the "free world" outside of state custody, nor did anything "to render him any more vulnerable to them."

Id. at 154.

162. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

163. *Id.* at 795.

ural parents in an abusing private foster home."[164] Drawing a distinction between voluntarily and involuntarily placed foster children is particularly dangerous because children voluntarily placed by their parents into foster care comprise a sizeable fraction of the substitute care population.[165] Movement away from a due process right to safe custody for foster children whose natural parents place them with the state, threatens to reverse the increased judicial enforcement of foster children's entitlement to safe living conditions by leaving a large subset out in the cold.

Application of a "voluntariness" standard to deny foster children the right to safe custody is misplaced in modern substantive due process analysis. The only meaningful way to reconcile a voluntary/involuntary dichotomy with the facts of *Youngberg*[166] is to rely heavily on an age distinction that demands little justice for children. The importance of this point is underscored by the prominence of *Youngberg* as the primary, precedent-setting authority from which the substantive due process right to safe custody is derived. *Youngberg* concerned a mentally retarded man whose confinement at Pennhurst State School and Hospital resulted from his mother's application for a commitment order.[167] Despite the new emphasis on voluntariness, Nicholas Romeo, the plaintiff in *Youngberg*, had no more control over his institutionalization than Charles Milburn had over his entry into foster care.

The primary difference between the two plaintiffs was their age. While Charles Milburn was a child when he was placed in foster care, Nicholas Romeo was already an adult when his mother arranged for his commitment. Courts define "voluntary" in a different manner for children than for adults, and there is no question that Romeo's placement was technically "involuntary." As an adult, Romeo was not legally susceptible to parental authority, which made his mother's consent irrelevant to the voluntariness of his institutionalization. Conversely, Charles Milburn's minority status made him fully responsive to adult discretion.

164. *K.H.*, 914 F.2d at 849; *see also* Hanson v. Clarke County, 867 F.2d 1115, 1120 (8th Cir. 1989) (reserving judgment on the applicability of "the *Youngberg* holding . . . to a case such as this where the plaintiff has been voluntarily institutionalized"). *But see* Wilder v. City of New York, 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983) (holding that the foster child's liberty interest in personal safety is not diluted merely because he has been involuntarily placed in substitute care) (citing Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 485 (D.N.D. 1982), *aff'd in part and remanded in part*, 713 F.2d 1384 (8th Cir. 1983)).

165. *See supra* note 155.

166. *See supra* notes 103-05 and accompanying text.

167. Romeo v. Youngberg, 644 F.2d 147, 155 (3d Cir. 1980), *vacated*, 457 U.S. 307 (1982).

These are lawfully valid distinctions, time-honored by the federal courts.[168] For example, in *Parham v. J.R.*,[169] the Supreme Court recognized parents' right to make decisions for their child even if the child disagreed with the parent or the choice included some risk.[170] Age, however, is not the talisman of liberty. The Supreme Court made clear in *Planned Parenthood v. Danforth*[171] that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[172]

Age need not be viewed as a determining factor in assessing foster children's constitutional rights. The decision in *Parham* addressed a procedural due process claim, and not the substantive due process issues examined by this article.[173]

The Supreme Court has indicated that involuntariness is a relevant consideration in determining what procedures are constitutionally required for the admission of a patient to a state mental health facility.[174] This does not mean, however, that involuntariness is a similarly important concept in assessing what conditions of confinement are constitutionally mandated. The Court has never suggested that voluntary commitment negates an individual's right to safe living conditions in state custody. And even if voluntariness was a worthwhile consideration, its application to the foster care context would mean that a child like Charles Milburn could be brought to foster care against his will, but still be considered voluntarily placed in the eyes of the law.[175] This result undermines the meaningfulness of voluntary

168. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) (invalidating a Massachusetts statute prohibiting an unmarried minor from obtaining an abortion without parental consent or a court order). "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *Id.* at 634.

169. 442 U.S. 584 (1979).

170. *Id.* at 603-04 (stating that a child's disagreement with her parent's decision "does not automatically transfer the power to make that decision to the state").

171. 428 U.S. 52 (1976) (striking down a state law that gave parents absolute veto power over minor's decision to undergo an abortion).

172. *Id.* at 74. *See generally* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (challenging the traditional understanding that personal rights vest with maturity).

173. *See supra* note 78.

174. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 133-34 (1990) (discussing the constitutional implications of involuntarily confining the mentally ill).

175. The age of the plaintiffs in *Milburn* and *Youngberg* is not as meaningful a distinction as *Parham* may indicate. At least one federal appeals court concluded that *Youngberg* established that "[a] child confined to a state mental facility has a fourteenth amendment substantive due process liberty interest in reasonably safe living conditions." Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (citing Youngberg v. Romeo, 457 U.S. 307, 320, (1982)), *cert. denied*, 489 U.S. 1065 (1989). *Youngberg* did not, however, actually involve a child plaintiff,

commitment in the foster care context. Unlike its application to due process considerations involving adults, the voluntary/involuntary distinction does not convey that the child who must endure the conditions of state residency has consented to the arrangement.

Courts should also consider the integrity of a voluntariness determination. Indeed, as the term is understood in the law, voluntariness does not necessarily indicate volitional conduct. Doubts about such a characterization have been circulating for some time. The Supreme Court questioned the distinction between the "involuntary" and "voluntary" foster care classifications in its 1977 *Smith v. Organization of Foster Families for Equality and Reform* [176] decision, noting that "[t]he poor have little choice but to submit to state-supervised child care when family crises strike."[177] Parental action might therefore be deemed volitional when in fact it was the product of coercion by the state or compulsion produced by a lack of meaningful alternatives. Foster care is not truly voluntary when parents are compelled to transfer their parental rights because of external forces which leave them without a choice. Although perchance convenient, these "voluntary" and "involuntary" labels are misnomers. The dichotomy, a simplistic and jejune exercise, respects a technical divide that is often empty and always illogical. Several courts appear to have recognized the problem with these labels, and

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but rather an adult plaintiff whose mother arranged for his commitment. *Youngberg*, 457 U.S. at 309. Because the plaintiff did not personally consent to his institutionalization, the placement was considered involuntary despite his mother's participation. *Id.* at 310. While the Eleventh Circuit in *Taylor* applied the *Youngberg* holding to children, *Youngberg's* underlying facts remain unchanged. Those facts included a placement which, under *Parham*, would have been considered voluntary if a child was actually involved, due to parental participation and consent. Therefore, the Eleventh Circuit suggests that an individual whose parent arranges for his placement into state care (*Youngberg*) may be afforded a substantive due process right to safety, even if that individual is a child. *Taylor*, 818 F.2d at 795 (restating the applicability of the *Youngberg* holding to children). Thus, a coherent reading of *Taylor* suggests that voluntariness should not be a consideration in the foster care context. It is uncertain, then, why the Eleventh Circuit took pains to limit its holding in *Taylor* to involuntarily placed foster children. *See id.* at 796-97.

176. 431 U.S. 816 (1977).

177. *Id.* at 834.

> The extent to which supposedly "voluntary" placements are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many "voluntary" placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent. Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child. This accounts, it has been said, for the hostility of agencies to the efforts of natural parents to obtain the return of their children.

Id.

have adopted a broad interpretation of volitional action in cases concerning the allegedly voluntary institutionalization of mentally retarded individuals.[178] Some of these courts have applied a "meaningful options" analysis to assess whether mentally retarded persons and their families enjoyed alternatives to institutionalization. For instance, one federal district court asked whether "pressures from family and the high cost and unavailability of alternative care" has caused retarded patients to enter state care facilities "voluntarily."[179] Probative, thorough inquiries of natural parents would doubtlessly show that some of them felt compelled by the threat of state action, family calamity, or severe poverty, to place their children in foster care.

At least one federal appellate court seems to have rejected a voluntariness test of a foster child's substantive due process interest in safety. In *Meador*, the Sixth Circuit noted at the outset of its opinion that three children sexually abused in substitute care had been surrendered to the state by their natural grandfather after their custodial parent abandoned them.[180] Without discussing the voluntariness of their placement, the court still held that the children had a substantive due process "right to be free from the infliction of unnecessary harm . . . in state-regulated foster homes."[181] *Meador* is sound

178. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215 (E.D. Pa. 1992), *aff'd without opinion*, 977 F.2d 568 (3d Cir. 1992); Kolpak v. Bell, 619 F. Supp. 359, 377-78 (N.D. Ill. 1985); Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 484 (D.N.D. 1982), *aff'd in part*, 713 F.2d 1384 (8th Cir. 1983).

179. *Olson*, 561 F. Supp. at 484. Another court found that residents of a state institution have "no practical alternative [to institutionalization] at the time of their admission and [that] they [had] no place else to go." Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1978), *aff'd in part & rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc).

180. Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990). The Court found that:

> David Meador ("Meador"), father of the three children, and his wife, Jana Meador, were divorced . . . Meador was to relinquish custody of his three daughters . . . [but] [w]hen Jana could not be located, Meador gave the children to their grandparents to take care of them. On December 11, 1985, Gordon Meador, the natural grandfather of the children, took them to Bowling Green Police Department. The police then delivered the children to [the country child welfare agency].

Id.

181. *Id.* at 476. The court did not believe that the Supreme Court's *DeShaney* decision required dismissal of the children's action against the state. *Id.* A recent unpublished opinion from the Sixth Circuit, however, draws into question the court's apparent repudiation of the voluntariness threshold to custody. In Higgs v. Latham, No. 91-5273, 1991 U.S. App. LEXIS 25549 (6th Cir. Oct. 24, 1991) (per curium), the court rejected a substantive due process claim brought by a patient in a state mental health facility. Relying on *Youngberg*, the plaintiff alleged that she had been raped and that her substantive due process right to safe custody had been violated. Although the woman arrived at the state hospital under court order, the facility was unaware of her involuntary admission status because the judge's order was lost in transit to the state institution. The court stated that "[a]n unexpected and unknown court order does not accomplish an actual restraint." *Id.* at *9. It also rejected the plaintiff's claim because of

because it applies the same standard of care to foster care parents as society should normally expect from biological parents, thereby seeking to provide a safe custodial environment for both voluntarily and involuntarily placed foster youth.[182] Several federal courts have adopted this view in the context of state housing for the mentally retarded.[183] These courts have looked with suspicion upon claims that mentally retarded persons, by virtue of their voluntary admissions to state institutions, have a lesser right to safe living conditions than involuntarily placed residents.[184] Although there may be relevant distinctions between mentally retarded persons and foster children,[185] one federal court has already espoused this view in the context of foster care.[186] As a matter of justice, the extension is welcome. Whatever the differences between children and mentally retarded adults, neither class should have its liberty interests weakened because of a formalistic disinterest in the context of alleged consent.

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what the court deemed to be her voluntary admission status. *Id.* Arguably, *Higgs* can be distinguished from *Meador* because it did not involve foster children, but the court's reliance on an involuntariness requirement for substantive due process analysis is unmistakeable. The fact that the Sixth Circuit elected not to publish *Higgs* may indicate the court is not prepared to endorse the precedential value of an involuntariness requirement.

182. *See* Wilder v. City of New York, 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983) (stressing a foster child's reliance on the city to protect his rights in the absence of parents or guardians protecting those rights).

183. *See, e.g.*, Kolpak v. Bell, 619 F. Supp. 359, 377-78 (N.D. Ill. 1985); Society for Good Will to Retarded Children v. Carey, 572 F. Supp. 1298, 1343 (E.D.N.Y. 1983), *vacated*, 737 F.2d 1239 (2d Cir. 1984); N.Y. SOC. SERV. LAW § 383 (McKinney 1992) (regulating foster care); CAL. WELF. & INST. CODE §§ 396-99 (Deering 1988) (same).

184. *See Kolpak*, 619 F. Supp. at 378. In *Kolpak*, the court cited Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974), in finding that a resident of a state mental facility has a right to a safe living environment regardless of the voluntary or involuntary status of his admission.

185. In Penry v. Lynaugh, 492 U.S. 302 (1989), the Supreme Court declined to endorse a blanket proscription against the execution of mentally retarded capital defendants. Justice O'Connor's opinion asserted that mental retardation characterizes a broad spectrum of individuals who possess diverse skill levels and abilities. *Id.* at 338; *see also id.* at 344 (Brennan, J., concurring in part and dissenting in part) ("For many purposes, legal and otherwise, to treat the mentally retarded as a homogenous group is inappropriate, bringing the risk of false stereotyping and unwarranted discrimination.") Although all mentally retarded persons "have a reduced ability to cope with and function in the everyday world," City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985), they do not submit as easily to classification as children. For example, the mental age of a child may be accompanied by a set of expectations typical for children of similar physical age. In contrast, the mental age of a mentally retarded adult may be undercut by social maturity and ameliorative therapy. *See Penry*, 492 U.S. at 338-39.

186. *Wilder*, 568 F. Supp. at 1137 (stating that "certainly, '[an] individual's liberty is not less worthy of protection merely became he has consented to be placed in a situation of confinement' " (quoting Association for Retarded Citizen's v. Olson, 561 F. Supp. 473, 485 (D.N.D. 1982), *aff'd in part*, 713 F.2d 1384 (8th Cir. 1983)).

Because the state regulates the foster care experience,[187] the notion that voluntariness entails parental autonomy in decisions affecting the child is illusory.[188] Regardless of how or why the child enters substitute care, "the parent [is] required to cede legal custody—the right to decide where the child lives and the kind of care he will receive—to the state's foster care agency."[189] The state takes the place of the natural parent, replacing parental authority with unfettered government discretion.[190]

The extent of government autonomy apparent in contemporary foster care has venerable origins. State parenting is in large part an exercise of the government's sovereign *parens patriae* power which arises from the state's traditional ability to confine people who are in need of care or treatment.[191] Vested in the earliest traditions of the English common law, the interventionist authority conferred by the *parens patriae* doctrine is largely responsible for the power assumed by state agents running local foster care projects. Yet tradition never excuses or mitigates the misuse of power, nor can it convey immunity from society's evolved standards.

Certain conditions which have led courts to adopt an involuntariness requirement in other settings are altogether lacking in foster care. For example, in *Fialkowski v. Greenwich Home for Children*,[192] the Third Circuit observed that the parents of a mentally retarded man whom they had voluntarily placed in a state facility were "free to remove their son."[193] That is usually not the case in foster care. Natural parents typically may not remove their voluntarily placed children without the approval of the court or a

187. *See, e.g.*, N.Y. SOC. SERV. LAW § 323 (McKinney 1992) (regulating foster care); CAL. WELF. & INST. CODE §§ 396-399 (Deering 1988) (same).

188. *See* Oren, *supra* note 161, at 123 (recognizing that "the usurpation of the parental role [by the state] continues today"). *But see* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 828 n.20 (1977) (noting the continued responsibility and rights of natural parents in their children's foster care).

189. Garrison, *supra* note 45, at 1755-56.

190. One Massachusetts study reported that 31% of natural parents never had contact with their child's case worker once the child was placed in foster care. Fifty-seven percent had no contact for at least six months. Alan Gruber, *Foster Home Care in Massachusetts: A Study of Foster Children, Their Biological and Foster Parents*, 51 (1973).

191. *See, e.g.*, Clark v. Cohen, 794 F.2d 79, 94-95 (3d Cir.) (Becker, J., concurring), *cert. denied*, 479 U.S. 962 (1986) *see also* Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195 (1978) (discussing the power of the state to substitute for parental authority); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH L. REV. 463, 507 n. 192 (1983) ("In foster care, the *state* as *parens patriae* is acting as parent for a child whose family ties have been . . . disrupted. In that role, the state has created and defined the nature of the foster parents' interest . . . . ").

192. 921 F.2d 459 (3d Cir. 1990).

193. *Id.* at 465.

supervising agency.[194] In *Jordan v. Tennessee*,[195] a federal district court acknowledged that extensive parental interaction with an institutionalized, mentally retarded boy effectively undercut state restraint of the child and revealed the voluntary nature of the child's confinement.[196] In foster care, however, biological parents are rarely afforded opportunities for extensive interaction[197] because they are presumably unwilling or unable to care for their children. Biological parents may therefore be viewed as frequently lacking the capacity or opportunity for significant involvement in foster care, in contrast to the circumstances in *Fialkowski* and *Jordan*.

States restrict a foster child's liberty interests by acting as parents: for example, by establishing curfews and bedtimes, setting house rules, and assigning chores or moving a child among homes. Restraint is not limited to those occasions when the state removes children from parental custody. The "restraint" described in *DeShaney* and *Youngberg* is a condition of personal confinement and regulation experienced over time. It should not be understood to describe a singular moment, as did *Milburn*'s involuntary admissions test.[198] Certainly government control is apparent at an earlier stage of the foster care process in cases like *Taylor*, where the state affirmatively takes the child away from his parents,[199] than in cases like *Milburn*, where the child's parents surrender him to social care.[200] But there should not be a single defining moment of state restraint, and certainly not one that occurs so early in the foster care experience. Children cannot lawfully leave foster care without parental, agency, or court permission. Parental consent to this restraint, even in light of *Parham*, does not effect the conditions of the substitute care experience. In fact, there still lurks a multiplicity of unfit placements, neglectful case management, and a lack of permanency planning. If biological parents who placed their child with the state could regulate the child's quality of care, an involuntariness requirement might make sense. But this is not the case. As long as foster care remains state-moderated, a child's right to safety cannot justly remain conditioned upon the consent of parents whose continued care of their child has ceased being in the child's best interest.

194. Garrison, *supra* note 45, at 1756 (citing Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977); *In re* Sanivini K., 391 N.E.2d 1316 (N.Y. 1979).

195. 738 F. Supp. 258 (M.D. Tenn. 1990).

196. *Id.* at 260.

197. *See* Martha J. Cox & Roger D. Cox, FOSTER CARE: CURRENT ISSUES, POLICIES, AND PRACTICES, *supra* note 39, at xv; Garrison, *supra* note 45, at 1755.

198. Milburn v. Anne Arundel County Dep't of Social Servs., 871 F.2d 474, 474 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989).

199. Taylor v. Ledbetter, 818 F.2d 743, 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

200. *Milburn*, 871 F.2d at 474.

IV. Defining the Scope of Due Process Protection: Runaway Prevention Services

Recognition of the foster child's right to safe custody invites further consideration of the child's liberty interest in receiving runaway prevention services as a means of guaranteeing safety. The Supreme Court in *Youngberg* limited the type of services the state must offer for this purpose:

> As we have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint, training may be necessary to avoid unconstitutional infringement of those rights. . . . [R]espondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.[201]

The Fourteenth Amendment does not mandate an optimal level of state care and treatment.[202] But the enrollment of foster children in a therapeutic prevention program can be accomplished without extending their constitutional entitlement beyond "minimally adequate" levels. For example, in *LaShawn A. v. Dixon*,[203] the federal district court recognized the constitutional right of foster children to appropriate placements and case planning to the extent those services "are essential to preventing harm to the children."[204] According to the court, these services are a constitutional entitlement by virtue of the child's liberty interest in safe living conditions, and the state's duty to minimize emotional and psychological harm to the foster child.[205]

Preemptive screening and counseling programs are necessary to prevent foster children from tackling their foster care problems by running away and submitting to lives of delinquency, poverty and hopelessness. Children who run away from foster care often encounter a milieu of daunting realities that makes their street life a bruising and traumatic endurance test.[206] Given the

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201. Youngberg v. Romeo, 457 U.S. 307, 318-19 (1982) (citations omitted).

202. *See, e.g.*, Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 n.7 (1989) (citing *Youngberg*, 457 U.S. at 317); Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1250 (2d Cir. 1984); Hanson v. Clarke County, 867 F.2d 1115, 1120 (8th Cir. 1989); B.H. v. Johnson, 715 F. Supp. 1387, 1397 (N.D. Ill. 1989).

203. 762 F. Supp. 959 (D.D.C. 1991); *see also supra* notes 1-6 and accompanying text.

204. *Id.* at 993.

205. *Id.* (citing Carey v. Piphus, 435 U.S. 247 (1978) ("mental and emotional distress is a cognizable injury under § 1983")).

206. *See* Mary R. McGeady, *Disconnected Kids: An American Tragedy*, 164 AMERICA 639 (1991). Sister Mary Rose McGeady is the President of Covenant House, one of the nation's largest nonprofit agencies for runaway and homeless adolescents. She addressed the issue during a lecture at Fordham University:

> Homeless youth have, in most instances, lived through multiple placements with relatives, in foster homes or institutions. A 1991 study indicates that at Covenant House about 50 percent of our kids have lived in foster care. Many *disconnected*

high incidence of HIV among runaways,[207] all efforts to prevent running behavior become essential to the safety and survival of America's foster children.[208]

The Office of Juvenile Justice and Delinquency Prevention believes "the runaway incident [is] part of a pattern of victimization and an index of family difficulties."[209] Running from foster care can result from these experiences of family conflict, or from deficiencies inherent in the foster care system. Whatever the cause, the runaway phenomenon is all too evident today. Controlling it requires a comprehensive remedy that anticipates the child's behavior and creates appropriate programs. In many instances, remedial action may target situational rehabilitation instead of private rehabilitation. Children who run from misery should not be returned to it. The foster child's placement, the case worker, or the parents may ultimately require the attention of foster care agents obliged to ensure the child's safe and stable home life.

Guaranteeing a foster child the right to safe custody involves counseling services that deter running behavior. Runaways, including children like Janet D.,[210] are typically placed under the jurisdiction of the juvenile justice system once their need for rehabilitation is identified.[211] Since foster children are constitutionally entitled to "minimally adequate or reasonable training to ensure safety and freedom from restraint,"[212] a punitive response

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> youth over 16 years of age who leave or who are discharged from their foster care placements are poorly equipped to deal with life independently. Many also harbor negative feelings about their many out-of-home placements. They end up in adult emergency shelters or on the street, and life on the streets is a dead end. Many are depressed or attempt suicide. They meet their basic needs by begging, stealing, selling drugs or becoming prostitutes.

Id. at 644.

207. *See supra* note 29.

208. CHILDREN'S DEFENSE FUND, *supra* note 26, at 48. As the Children's Defense Fund has observed:

> About 1.5 million children and adolescents run away from home each year. Many others run away from foster care placements or other residential care settings that fail to meet their needs. Although most of these youngsters return to their families within a short time, as many as one-third do not. Because many children who return home go back to the same problems that drove them away, they frequently run away again. Too many runaways eventually end up on the streets, where their poverty, fear, anger, depression, and hopelessness make them especially vulnerable to crime, drug abuse, prostitution, and now AIDS.

Id.

209. Office of Juvenile Justice & Delinquency, U.S. Dep't of Justice, *Proyecto Esperanza: Community-Based Help for At-Risk Hispanic Youth*, JUVENILE JUSTICE BULLETIN, Sept. 1988, at 3.

210. *See supra* notes 7-16 and accompanying text.

211. *See* CHILDREN'S DEFENSE FUND, *supra* note 26, at 49.

212. Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

from the juvenile justice system seems wholly inconsistent with the notion of "freedom from restraint." This is especially true if an earlier, proactive response from foster care could have prevented the behavior altogether.

Constitutionally, states may not act with indifference to the abuse of a foster child.[213] Child protective agencies cannot passively confront the likelihood of abuse by failing to act. In the same way, foster care agents should be required to act preventively when they perceive a danger of running behavior. The disproportionate number of foster children who infuse the ranks of runaways nationwide necessarily alerts agencies to the likelihood of potential runaways in their midst.[214] In the same way that an agency should screen foster parents for admission to its program, the agency should screen foster children for mental health problems and signs of contemplated running behavior. Based on these screening results and any subsequent indications of planned runaway behavior, states must offer appropriate services to help children remain safely in state custody.

There are no assurances that there will not be foster children who refuse help, or whose indications are missed and then unexpectedly run away. But it is just as certain that there will be thousands of children whose plans for running are identified in advance of their flight and in time to be provided with an alternative to homelessness. The duty of the state to offer these services to children in its care is fully supported by the Supreme Court's vision of minimally adequate training in *Youngberg*. The Court there observed that the plaintiff's own aggressive behavior posed a threat to his safety and required the state to address his behavior therapeutically.[215] For the same reason, a foster child's running behavior must be enjoined therapeutically.

Unfortunately, it may be difficult for the federal courts to enforce the foster child's liberty interest in a runaway prevention program. When determining the minimal level of care and treatment required by the Fourteenth Amendment, the Supreme Court has applied a standard of reasonableness determined by prevailing professional judgment, practice, or standards.[216]

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213. *See, e.g.*, Taylor v. Ledbetter, 818 F.2d 741, 795-97 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

214. *See supra* note 25 and accompanying text.

215. *See Youngberg*, 457 U.S. at 324 (finding that the state had a duty to provide a retarded plaintiff with reasonable training to ensure his safety, where such training was prescribed by a qualified professional).

216. The Court in *Youngberg* explained that:

> [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323 (citations omitted).

Because therapeutic runaway prevention services are often lacking in contemporary child welfare agencies, courts may find insufficient evidence of professional practices to impose liability on an agency that fails to screen and counsel its foster children. A cycle of self-interested inertia could easily stall enforcement of the foster child's substantive due process right to such services. Many overextended and underbudgeted agencies are reluctant to create runaway prevention programs unless pressed to do so by the courts. In turn, the courts may not press agencies to establish such programs until many more foster care agencies start to view them as professionally normative. Inevitably, the real losers are the foster children. For whomever this paralysis stymies, it is certain to mobilize foster children right out the door. Many will continue to run away, irretrievable to a system whose professional practices, judgment, and standards often lag behind the best interests of children, however adeptly keeping pace with the purse strings.

V. CONCLUSION

The Supreme Court reserved judgment in *DeShaney* on the substantive due process right of foster children to safety and protective services. That question should be resolved affirmatively, as several recent decisions from the federal courts have indicated.[217] Foster care is an exercise of state control over the private lives of helpless children whose families cannot or will not care for them. Foster care is the type of state custody, like civil confinement, that activates constitutional rights and duties under the Due Process Clause of the Fourteenth Amendment. By virtue of this right to safe custody, all foster children, regardless of parental consent to placement, are similarly entitled to runaway prevention services. The poor health, lack of shelter, violence and desperation that pervade street life make running away a harmful experience. It is incumbent upon the state to attempt to prevent that harm by enrolling foster children in mandatory mental health screening and counseling services designed to dissuade running behavior and rehabilitate troubled youth.

217. *See supra* note 77 and accompanying text.