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A Child's Right: What Should the State Be Required to Provide to Teenagers Aging Out of Foster Care

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A CHILD'S RIGHT: WHAT SHOULD THE STATE BE REQUIRED TO PROVIDE TO TEENAGERS AGING OUT OF FOSTER CARE?

Katherine M. Swift*

ABSTRACT

Teenagers aging out of foster care face harms that can be traced to their lack of preparation for adulthood. This Article argues that teenagers in foster care have a substantive due process right to services not only while they are in state custody but also after they age out of care. The lower federal courts have interpreted the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services* to mean that foster children—like prisoners and mentally retarded people held in state custody—have a substantive due process right to personal safety. What the courts have not considered is how these rights apply to foster teenagers. For teenagers, the primary risks of harm are associated with leaving care, not harm from within the system. Foster teens should have a recognized right to receive services to prepare them for adulthood, at least until age eighteen and potentially into adulthood. If they do not receive such services and then suffer harm as a result of the denial, they should be able to sue for a violation of their constitutional rights.

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We looked to the streets for meaning in our lives. We have to make a transition from that mind state. We have to understand our values and morals, or we're going to always do wrong. I try to get the young guys to visualize themselves in a leadership role after they get out.

—Jeffrey Williams¹

¹ MARTHA SHIRK & GARY STANGLER, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM 35 (2004) (quoting Jeffrey Williams, a former foster teen now serving a twelve- to twenty-five-year sentence for armed robbery).

INTRODUCTION

Jeffrey Williams ran away from foster care as a teenager. He was not prepared for adulthood at the facility where he had lived with his brothers. Before his eighteenth birthday, Jeffrey was incarcerated. One of his brothers was dead.²

Each year, between 18,500 and 25,000 children “age out” of foster care.³ Most states only provide such care until a child reaches age eighteen.⁴ An additional 5,200 or so children run away before they age out of care.⁵ These teenagers face harms unlike those facing other teens. These harms, like Jeffrey’s, can be traced to their lack of preparation for adulthood. At age seventeen, the average foster teen reads at the seventh grade level.⁶ More than half of them in one study reported having been arrested.⁷ Indeed, a few years after leaving foster care:

- Only slightly more than half of these young people have graduated from high school, compared with 85 percent of all youth eighteen to twenty-four years old.
- One-fourth have endured some period of homelessness.
- Almost two-thirds have not maintained employment for a year.
- Four out of ten have become parents.
- Not even one in five is completely self-supporting.
- One in four males and one in ten females have spent time in jail.⁸

Teenagers often leave the foster care system with no ties: no job, no money, no place to live, and no help. In addition to facing “high rates of homelessness, . . . poverty, and delinquent or criminal behavior[,] they are also frequently the target of crime and physical assaults.”⁹ The “worst” kids—those who, like Jeffrey, fight the

² *Id.* at 17–18.

³ *Id.* at 6.

⁴ *See id.*

⁵ *Id.*

⁶ *Id.* at 2 n.* (citing MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004)).

⁷ *Id.* (citing COURTNEY, *supra* note 6).

⁸ *Id.* at 3 (citing RONNA COOK, A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2 FINAL REPORT (1991); Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685 (2001)).

⁹ Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 101(a)(4), 113 Stat. 1822 (1999) (codified in part at 42 U.S.C. § 677 (2000)); *see also* CASEY FAMILY PROGRAMS, IT’S

system, run away, and get involved with drugs, crime, or both—are the ones who need help most, and they are the ones least likely to get it. This is not only because they resist the help they need but also because, increasingly, the system ties benefits to good behavior.¹⁰ Becoming an adult is difficult for the most privileged teenager. For those aging out of foster care, it can be nearly impossible to create a sustainable life.

This Article argues that teenagers in foster care have a substantive due process right to services preparing them for adulthood while they are in state custody—and, potentially, even after they age out of care. The lower federal courts generally have interpreted the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*¹¹ to mean that foster children have a substantive due process right to personal safety while they are in the custody of the state.¹² Doctrinally, this right

MY LIFE: A FRAMEWORK FOR YOUTH TRANSITIONING FROM FOSTER CARE TO SUCCESSFUL ADULTHOOD 7 (2002) [hereinafter *IT'S MY LIFE*], available at <http://www.casey.org/Resources/Publications/ItsMyLifeFramework.htm> (follow "It's My Life" download hyperlink) (citing studies on the ways former foster children are more at risk than other young adults, from increased risk of teen pregnancy to lower reading and math skills and lower high school graduation rates).

¹⁰ For example, although teenagers who run away from foster care before their eighteenth birthdays are still eligible for services and funding under the Foster Care Independence Act because they are still deemed "wards of the state," this changes at age eighteen. Therefore, a teenager who would have been eligible for services through age twenty-one if he had remained within the system, loses such services at eighteen if he runs away. NAT'L FOSTER CARE AWARENESS PROJECT, FREQUENTLY ASKED QUESTIONS II ABOUT THE FOSTER CARE INDEPENDENCE ACT OF 1999 AND THE JOHN H. CHAFEE FOSTER CARE INDEPENDENCE PROGRAM 12 (on file with author).

¹¹ 489 U.S. 189, 201 (1989) (holding that knowledge of danger to a child does not create an affirmative duty in the state to protect a child who is not in state custody but that an affirmative duty might attach where the child *is* in state custody).

¹² See *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) ("We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983."); *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) ("[T]he Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." (alteration in original) (quoting *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992))); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 891 (10th Cir. 1992) (finding that *DeShaney* gives children in foster care a substantive due process right to personal safety); *K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) ("Here, in contrast [to *DeShaney*], the 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 justification, 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 a jail or prison in which his health or safety would be endangered, without

in foster children is an extension of a similar right recognized in prisoners¹³ and mentally retarded people held in state custody.¹⁴ The Supreme Court has recognized a constitutional right to personal safety and minimal restrictions on liberty for those in state custody.¹⁵ Foster care is widely recognized as a form of state custody, and therefore there is potential liability for foster care workers who deny a foster child's right to safety and minimally restricted liberty if that child suffers harm as a result of the denial.

What the courts have not considered is how these rights apply to foster teenagers. For teenagers, the primary risks of harm are associated with leaving care, not harm from within the system.¹⁶ Foster teens should have a recognized right to receive services to prepare them for adulthood, at least until age eighteen and potentially into adulthood, such that if they do not receive such services and then suffer harm as a result of the denial, they can sue for a violation of their rights.

Moreover, although the circuits agree that foster children have a right to personal safety, they are split on what standard to use to determine whether a foster child's rights have been violated. The Second, Third, Fourth, Sixth, Eighth, and Eleventh circuits follow the Supreme Court's analysis in *Estelle v. Gamble*¹⁷ and apply a deliberate indifference standard to state actors accused of violating the rights of a child in their custody.¹⁸ Under this analysis, state actors cannot be held liable unless they are

violating his rights either under the cruel and unusual punishments clause of the Eighth Amendment"); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) ("We hold that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.").

Pre-*DeShaney* cases recognizing the same right include *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) ("[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a [patient] confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."), and *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) ("Defendants may be held liable under § 1983 if they . . . exhibited deliberate indifference to a known injury [or] a known risk . . . and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights . . .").

¹³ See generally *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that prisoners have an Eighth Amendment right to be free from the unnecessary and wanton infliction of pain).

¹⁴ See generally *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that mentally retarded people in state custody have a substantive due process right to "reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably [might] be required by these interests").

¹⁵ See *id.*

¹⁶ See SHIRK & STANGLER, *supra* note 1, at 3.

¹⁷ 429 U.S. 97.

¹⁸ *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. N.Y. City Dep't of Soc. Servs.*, 649

deliberately indifferent to known rights violations of a child in their care. The Tenth Circuit follows the Supreme Court's reasoning in *Youngberg v. Romeo*¹⁹ and applies a professional judgment standard to such state actors.²⁰ This analysis holds state actors liable if they fail to use professional judgment, based on accepted standards, in their decisions regarding a child who is injured in their care. The Seventh Circuit does not distinguish between the two standards, suggesting that in the foster care context, the deliberate indifference standard is similar, if not identical, to the professional judgment standard.²¹

Part I of this Article lays out the doctrinal framework as it exists today, starting with *Estelle* and *Youngberg* and proceeding to the foster care context via *DeShaney* and the appellate decisions.

Part II argues, first, that teenagers have a right to services preparing them for adulthood. Second, it argues that the professional judgment standard is more appropriate to the foster care context than the deliberate indifference standard. Third, it argues that the standards can be reconciled if "deliberate indifference" is defined simply as a failure to use professional standards. Likewise, deliberate indifference would be an acceptable standard if it were defined as a failure to act on an awareness of the generic risk to all teenagers leaving foster care.

Part II concludes by arguing that it is a short step from recognizing foster children's right of personal safety to recognizing that such children also have a right to preparedness for adulthood, which is a form of harm avoidance. This section addresses three possible approaches to finding liability for violation of a foster teen's rights, noting the difficulty in proving a causal connection between (1) failure to provide services and (2) harm suffered as a result of that failure. This difficulty is not insurmountable, however. The right to personal safety/protection from harm is explicit in *Youngberg*. That right should be expressed as a right to services—such as job training, mentoring, psychological support, preparation for college, and other resources geared toward transition to adulthood—so that teenagers are able to maintain their safety and liberty once they leave the foster care system.

Part III identifies the types of professional standards that currently exist for foster care workers and then explains that those standards often are not followed. Furthermore, the cases suggest that the state generally does not even claim to have followed such standards. Standards such as those in the Foster Care Independence Act of 1999 are well-publicized in the child welfare literature. If those standards—or any standards a state has developed on its own—were mandatory, teenagers aging out of foster care would have a better chance at success in the adult world.

F.2d 134, 145 (2d Cir. 1981).

¹⁹ 457 U.S. 307.

²⁰ *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 884 (10th Cir. 1992).

²¹ *K.H. v. Morgan*, 914 F.2d 846, 848–49 (7th Cir. 1990); see also *Yvonne L.*, 959 F.2d at 893–94 (discussing the Eighth Amendment standard and the *Youngberg* standard).

I. THE DOCTRINAL FRAMEWORK

A. *The Supreme Court's Framework*

The Supreme Court has not addressed the rights of children in foster care directly. However, the Court has recognized certain limited due process rights in prisoners and mentally retarded patients involuntarily committed to state hospitals. Furthermore, the Court has looked to the rights of prisoners and the mentally retarded to suggest what rights *might* exist in children in foster care.

1. Prisoners: *Estelle v. Gamble*

In 1976, the Court decided *Estelle v. Gamble*, which held that deliberate indifference to the serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain” proscribed by the Eighth Amendment.²² J.W. Gamble, an inmate of the Texas Department of Corrections, “was injured on November 9, 1973, when a bale of cotton fell on him while he was unloading a truck.”²³ During the months following the injury, he saw a doctor several times and was prescribed pain relievers and a muscle relaxant, but he was eventually sent back to work still complaining of pain.²⁴ When he refused to work, Gamble was sent before a disciplinary committee, which sent him to another doctor, who prescribed a new pain reliever and sent him to administrative segregation. This cycle continued until February 9, 1974, when, after being placed in solitary confinement for another refusal to work and then being hospitalized and placed on Quinidine for irregular cardiac rhythms, Gamble was allowed to see another doctor. The doctor ordered the Quinidine continued for three more days.²⁵ On February 11, Gamble sued the prison officials under 42 U.S.C. § 1983,²⁶ arguing that they “subjected him to cruel and unusual punishment in violation of the Eighth Amendment.”²⁷

Concluding that deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983, the Court explained that “[t]he [Eighth] Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards,

²² *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²³ *Id.* at 99.

²⁴ *Id.* at 99–100.

²⁵ *Id.* at 100–01.

²⁶ Section 1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress” 42 U.S.C. § 1983 (2000).

²⁷ *Estelle*, 429 U.S. at 101.

humanity, and decency' against which we must evaluate penal measures."²⁸ Thus, the Court continued, "we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'"²⁹ Furthermore, "'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'"³⁰

However, not every claim of inadequate medical treatment by a prisoner states a violation of the Eighth Amendment under *Estelle*. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment."³¹ The Court has held, for example, that "it was not unconstitutional to force a prisoner to undergo a second effort to electrocute him after a mechanical malfunction had thwarted the first attempt."³² And in *Estelle*, the Court concluded that Gamble's claim was not cognizable under § 1983 because he was seen by several doctors who prescribed a course of treatment.³³

2. Mentally Retarded Patients: *Youngberg v. Romeo*

The Supreme Court addressed a similar issue in *Youngberg v. Romeo*.³⁴ Nicholas Romeo was a profoundly retarded thirty-three-year-old. He was involuntarily committed to a state hospital by his mother after his father died and she could no longer care for him. Once he was in the hospital, he was injured on several occasions, and his injuries were both self-inflicted and caused by other residents. He was regularly physically restrained while in the infirmary. Romeo's mother filed a complaint under § 1983 for violation of his Fourteenth Amendment substantive due process rights.

Youngberg held that mentally retarded people in state custody have a substantive due process right to reasonably safe conditions and freedom from unreasonable bodily restraints.³⁵ "When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities."³⁶

²⁸ *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

²⁹ *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

³⁰ *Id.* at 104 (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)).

³¹ *Id.* at 106.

³² *Id.* at 105 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)).

³³ *Id.* at 97.

³⁴ 457 U.S. 307 (1982).

³⁵ *Id.* at 315–16.

³⁶ *Id.* at 317.

Youngberg also held that patients such as Romeo have a constitutional right to such minimally adequate training as reasonably might be required to maintain safe conditions and freedom from bodily restraints.³⁷ Because Romeo sought only this minimal training, however, the Court did not address the “difficult question” of “whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom.”³⁸ A footnote explained that Romeo had claimed a “sweeping *per se* right” at trial, but that he dropped this claim later in the litigation.³⁹

The circuit court in *Youngberg* decided that the Eighth Amendment was not an appropriate source for determining the rights of the involuntarily committed.⁴⁰ Instead, the court applied the Fourteenth Amendment, holding that the rights to freedom of movement and personal security are “fundamental liberties” that can be limited only by an “overriding, non-punitive” state interest.⁴¹

Youngberg also rejected the deliberate indifference standard used in *Estelle*. The Court held that a professional judgment standard struck a better balance between the state’s interests in running the hospital and Romeo’s interests in safety and freedom from restraint.⁴²

Persons 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. . . . At the same time, this standard is lower than the ‘compelling’ or ‘substantial’ necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety.⁴³

³⁷ *Id.* at 319.

³⁸ *Id.* at 318.

³⁹ *Id.* at 318 n.23 (“In the trial court, respondent asserted that ‘state officials at a state mental hospital have a duty to provide residents . . . with such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope *as effectively as their capacities permit*.’ . . . But . . . [i]n his brief to this Court, respondent does not repeat [this argument] and, at oral argument, respondent’s counsel explicitly disavowed any claim that respondent is constitutionally entitled to such treatment as would enable him ‘to achieve *his maximum potential*.’” (emphasis added) (internal citation omitted)). The *per se* right is likewise not addressed in the case’s other briefs to the Supreme Court. However, Justice Blackmun’s concurrence does address the right. “[I]t would be consistent with the Court’s reasoning today to include within the ‘minimally adequate training required by the Constitution’ such training as is reasonably necessary to prevent a person’s pre-existing self-care skills from *deteriorating* because of his commitment.” *Id.* at 327 (Blackmun, J., concurring) (internal citation omitted).

⁴⁰ *Id.* at 312 (majority opinion) (discussing the lower court’s opinion).

⁴¹ *Id.* at 312–13 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 157–58 (3d Cir. 1980), *vacated*, 457 U.S. 307 (1982)).

⁴² *See id.* at 321.

⁴³ *Id.* at 321–22 (internal citations omitted).

Furthermore, the Court found that the Constitution requires only that professional judgment be exercised, not that courts determine what that professional judgment should be.⁴⁴

3. Children *Not* in State Custody: *DeShaney*

Joshua DeShaney was beaten by his father from the time he was one year old until he was four, when he was beaten “so severely that he fell into a life-threatening coma” and suffered such extensive brain damage that he was expected to spend the rest of his life [in] an institution for the [mentally] retarded.”⁴⁵ The Department of Social Services was notified of the early abuse and assigned a caseworker who observed signs that someone was hurting Joshua, but the caseworker never did more than note her suspicions in Joshua’s file. The state never attempted to remove Joshua from the home.⁴⁶

*DeShaney v. Winnebago County Department of Social Services*⁴⁷ held that the state has no affirmative duty to protect a child from danger by a private individual, even if it is aware of that danger.⁴⁸ *DeShaney* suggested, however, that the state may have a duty to protect children who are in state custody.⁴⁹ *DeShaney* emphasized that nothing in the Due Process Clause requires the state to protect individuals from private harm.⁵⁰ Then, citing *Youngberg*, the Court distinguished “private harm” from harm that occurs in state custody. “[W]hen 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.”⁵¹ Finally, the Court addressed harm to children in foster care.

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.⁵²

⁴⁴ See *id.* at 321 (quoting *Romeo*, 644 F.2d at 178 (Seitz, C.J., concurring)).

⁴⁵ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 192–93 (1989).

⁴⁶ *Id.*

⁴⁷ *Id.* at 189.

⁴⁸ *Id.* at 197–98.

⁴⁹ *Id.* at 201–02.

⁵⁰ *Id.* at 202–03.

⁵¹ *Id.* at 199–200 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

⁵² *Id.* at 201 n.9.

Following *DeShaney*, several circuit courts have used this analogy to hold that the state may be liable for failing to protect children in foster care.⁵³

The link between prisoners, mentally retarded patients, and children in foster care is that all are involuntarily in state custody. The Court focuses much attention on this connection, leading some lower courts to ignore the obvious distinctions between the three groups. But without the fact of involuntary state custody, none of these groups would receive the benefit of these rights at all. The Seventh Circuit explained the difference between a case like *DeShaney* and a case before it involving a child in foster care:

This is not a 'positive liberties' case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents⁵⁴

That makes the state "a doer of harm rather than merely an inept rescuer."⁵⁵ The Seventh Circuit then took the distinction one step further and emphasized "the state's lack of responsibility for a child's *voluntary* placement by the natural parents in an abusing private foster home."⁵⁶

⁵³ See *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) ("We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983."); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (same); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (same); *K.H. v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990) (same); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) ("We hold that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.").

Before *DeShaney*, two other circuit courts drew the analogy from *Youngberg* and *Estelle* to the foster care context. See *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) ("[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a [patient] confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."); *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) ("Defendants may be held liable under § 1983 if they . . . exhibited deliberate indifference to a known injury [or] a known risk . . . and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights . . .").

⁵⁴ *K.H.*, 914 F.2d at 848-49.

⁵⁵ *Id.* at 849.

⁵⁶ *Id.*

Thus, according to the Seventh Circuit, the crucial point is that the state must forcibly take an individual into its custody before the substantive due process right attaches. The state cannot be found liable for abuse of a child, even if that child is in state custody, if the child is there “voluntarily,” inasmuch as the parents placed him there of their own volition.

B. Two Standards for Protecting Young Children in State Custody

1. The Deliberate Indifference Standard

Estelle v. Gamble established the deliberate indifference standard for state actors charged with the medical care of prisoners.⁵⁷ The Court held that deliberate indifference to the serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain.”⁵⁸ The Court explained that “deliberate indifference” covered not just how prison doctors respond to the prisoner’s needs, but also prison guards “intentionally denying or delaying access to medical care, or intentionally interfering with treatment.”⁵⁹ “Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”⁶⁰

The Court later relied on *Estelle* when it held that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official *knows of and disregards* an excessive risk to the prisoner’s health or safety.⁶¹ “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”⁶² This sets a relatively low bar for prison officials charged with the care and safety of prisoners.

Most of the circuit courts that have addressed this issue in the foster care context have followed *Estelle*, setting the same low bar for state officials charged with the care of children in the foster care system.⁶³ But the bar is not too low for a finding of liability. If, for instance, the risks facing teens aging out of foster care are well known generally, any foster care worker who “knows of and disregards” that generic risk could be found deliberately indifferent.⁶⁴

⁵⁷ 429 U.S. 97 (1976).

⁵⁸ *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

⁵⁹ *Id.* at 104–05.

⁶⁰ *Id.* at 105.

⁶¹ *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁶² *Id.* at 837.

⁶³ *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *K.H. v. Morgan*, 914 F.3d 846, 848–49 (7th Cir. 1990); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981).

⁶⁴ For a more detailed discussion, see *infra* Part II.C.2.

In *Nicini v. Morra*,⁶⁵ the Third Circuit explained why deliberate indifference was the appropriate standard in the foster care context. "Mere negligence is never sufficient for substantive due process liability. . . . [S]ubstantive due process liability attaches only to executive action that is 'so ill-conceived or malicious that it "shocks the conscience."'"⁶⁶ The "shocks the conscience" standard is problematic for a finding of liability, because it sets such a low bar for defendants. But the *Nicini* court further explained that the "exact degree of wrongfulness necessary depends upon the circumstances of [the] case," and that the deliberate indifference standard should be employed only when "actual deliberation is practical."⁶⁷ *Nicini* stated that "in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory," and that the state's responsibility for the medical care of its prisoners "does not ordinarily clash with other . . . governmental responsibilities."⁶⁸ The *Nicini* court then distinguished the prison context from that of a social worker separating parent from child, noting that although the social worker "does not usually act in the hyperpressurized environment of a prison riot . . .," he "rarely will have the luxury of proceeding in a deliberate fashion."⁶⁹

As for the foster care context of the case at hand, however, the *Nicini* court found that the defendant caseworker *had* had the time "to make unhurried judgments" in his investigation of the family where he placed fifteen-year-old Anthony Nicini.⁷⁰ This language seems to set a higher standard for defendants in the foster care context. Instead of conduct that shocks the conscience, it seems to require only that the plaintiff prove that the foster care worker had the opportunity to deliberate and failed to do so. In *Nicini*, the foster father had abused the child sexually and given him drugs and alcohol. A later investigation revealed that the foster father had a conviction for corrupting the morals of a minor and distributing controlled substances to minors,⁷¹ which would have been discovered if the foster care worker had conducted a national check of the father's record. In those circumstances, the court deemed the deliberate indifference standard had been met.

Nicini also pointed out that other circuit courts applying the deliberate indifference standard to foster care workers have defined the standard in different ways.⁷² For example, *White v. Chambliss*⁷³ found liability where the defendant was "plainly placed on notice of a danger and chose to ignore the danger."⁷⁴ *Taylor v. Ledbetter*⁷⁵ ruled

⁶⁵ 212 F.3d 798.

⁶⁶ *Id.* at 810 (internal citation omitted).

⁶⁷ *Id.* (citations omitted).

⁶⁸ *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998)).

⁶⁹ *Id.* at 811 (quoting *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999)).

⁷⁰ *Id.*

⁷¹ *Id.* at 804.

⁷² *Id.* at 810.

⁷³ 112 F.3d 731 (4th Cir. 1997).

⁷⁴ *Id.* at 737.

⁷⁵ 818 F.2d 791 (11th Cir. 1987).

that the foster child must show “actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home.”⁷⁶ *Doe v. New York City Department of Social Services*⁷⁷ found that deliberate indifference “cannot exist absent some knowledge triggering an affirmative duty to act. . . . Defendants may be held liable [for] . . . deliberate indifference to a known injury, a known risk, or a specific duty”⁷⁸ Other circuit courts applying the deliberate indifference standard generally have followed *Taylor and Doe*.⁷⁹

2. The Professional Judgment Standard

Youngberg v. Romeo established a professional judgment standard for state actors charged with the care of mentally retarded patients involuntarily committed to state hospitals.⁸⁰ In distinguishing these patients from the prisoners in *Estelle*, the *Youngberg* Court stated that “[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.”⁸¹ Yet the Court was careful to point out that the Constitution only requires that professional judgment be exercised. “It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.”⁸² Furthermore, the Court stated:

In determining what is “reasonable”—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.⁸³

⁷⁶ *Id.* at 796.

⁷⁷ 649 F.2d 134 (2d Cir. 1981).

⁷⁸ *Id.* at 145.

⁷⁹ See *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (finding that deliberate indifference to the serious medical needs of a child in state custody violates the Due Process Clause); *K.H. v. Morgan*, 914 F.2d 846, 851, 853 (7th Cir. 1990) (finding a constitutional “right not to be placed with a foster parent who the state’s caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child”); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (“[D]eliberate indifference by state officials to child abuse within a foster home was actionable under section 1983 as a violation of the substantive due process right to be free from unnecessary harm.”).

⁸⁰ See *Youngberg v. Romeo*, 457 U.S. 307, 321–23 (1982).

⁸¹ *Id.* at 321–22.

⁸² *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980), *vacated*, 457 U.S. 307).

⁸³ *Id.* at 322.

This language seems to foreclose the prospect of judges determining what standards foster care workers should follow. But it does not suggest across-the-board deference to the state in how it treats the children in its custody. Rather, it suggests a middle ground. *Youngberg* allows a judge to find that an individual foster care worker has not followed established state standards, while deferring to the state to establish those standards. Perhaps more controversially, *Youngberg* allows a judge to find a violation of “professional” standards—for instance, those promulgated by national organizations devoted to foster care advocacy but not necessarily mandated by the state. Showing “deference to the judgment exercised by a qualified professional”⁸⁴ does not mean that professional’s standards must be mandated by the state. In many cases “state standards” and “professional standards” would be the same. But that does not appear to be required by *Youngberg*’s language.

Only the Tenth Circuit has explicitly followed *Youngberg*’s professional judgment standard in the foster care context, rejecting *Estelle*’s deliberate indifference standard.⁸⁵ *Yvonne L. v. New Mexico Department of Human Services* held that “[i]f defendants knew of the asserted danger to plaintiffs or failed to exercise professional judgment with respect thereto, . . . and if an affirmative link to the injuries plaintiffs suffered can be shown, then under the analysis set forth hereafter defendants violated plaintiffs’ constitutional rights.”⁸⁶ However, *Yvonne L.* qualified its holding by adding that “[e]ven if defendants did violate plaintiffs’ constitutional rights, as government officials performing discretionary duties they are immune from civil liability if their conduct did not violate an established statutory or constitutional right of which a reasonable person would have known.”⁸⁷

Yvonne L. asserted that the Seventh Circuit also followed the professional judgment standard in its decision in *K.H. v. Morgan*, but the language in *K.H.* is ambiguous on this point. On one hand, the *K.H.* court stated that “K.H. must demonstrate that the conduct of the state agents resulted from their failure to exercise reasonable professional judgment in their placement and supervision decisions”⁸⁸ And, “[o]nly if without justification based either on financial constraints or on considerations of professional judgment [state foster care workers] place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.”⁸⁹ But on the other hand, the *K.H.* court quoted *Taylor v. Ledbetter*, a deliberate indifference case, in a footnote explaining the standard for determining liability:

⁸⁴ *Id.*

⁸⁵ *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893–94 (10th Cir. 1992).

⁸⁶ *Id.* at 890.

⁸⁷ *Id.*

⁸⁸ *K.H. v. Morgan*, 914 F.2d 846, 865 (7th Cir. 1990) (referring to the standard set by *Youngberg*).

⁸⁹ *Id.* at 854.

Although the contacts between actors in the foster home situation are not as close as in the penal institution, the situations are close enough to be held analogous. The lack of proximity [between the foster care worker and the child] in the foster home situation simply suggests that deliberate indifference is not as easily inferred or shown from a failure to act.⁹⁰

K.H.'s interpretation of the deliberate indifference standard therefore actually lowers the bar for foster care workers. *K.H.* reasoned that, unlike prison guards, foster care workers are not regularly in the presence of the foster children in their care and therefore cannot be expected to keep a close watch on them. The *K.H.* court explained:

It would be unrealistic to expect the state to carry out the in-depth type of surveillance and supervision in a foster home that it carries out in the ever-controlled institutional setting; indeed, this type of oversight would defeat the very purpose of foster care by impairing and intruding upon the family-like setting which the state hopes will aid the child's proper development.⁹¹

This reasoning favors foster care workers and foster parents, potentially to the detriment of foster children.⁹²

K.H. also recognized, however, that some courts do not distinguish sharply between the professional judgment and deliberate indifference standards. For example, *Yvonne L.* also found that the two standards were similar. "As applied to a foster care setting we doubt there is much difference in the two standards," the *Yvonne L.* court stated. "Failure to exercise professional judgment' does not mean mere negligence as we understand *Youngberg*; while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements."⁹³ Thus it seems that *Yvonne L.* and *K.H.* both interpret *Youngberg* as setting something like a recklessness standard for state foster care workers. These courts require more than negligence but less than knowledge or purpose to find foster care workers guilty of violating their standard of care.

Yet *Yvonne L.* concludes this way:

⁹⁰ *Id.* at 860 n.5 (quoting *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987)).

⁹¹ *Id.* at 860.

⁹² Although states should not be required to engage in day-to-day monitoring of foster homes, they should be required to be aware of generic risks to the teenagers in their care and be held accountable for failing to mitigate those risks. *See infra* Part II.C.2.

⁹³ *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992).

To the extent there is a difference in the standards, we agree with the Seventh Circuit that the *Youngberg* standard applies. The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients, are “entitled to more considerate treatment and conditions” than criminals. These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in place of the parents.⁹⁴

Thus, *Yvonne L.* seems to conclude that, because foster children bear no blame for being in foster care, it would be unfair and legally inconsistent to hold foster care workers to a lesser standard than that of prison guards, who supervise convicts who are in their care as punishment. Indeed, *Yvonne L.* ultimately suggests that foster care workers should be held to an even higher standard than prison guards.⁹⁵

II. A TEENAGER'S RIGHT TO PERSONAL FREEDOM AND SAFETY

This Part first identifies the liberty interest at stake in teenagers leaving foster care and, second, addresses the reasons why *Youngberg*'s professional judgment standard is the more appropriate standard to determine whether that liberty interest has been violated. Third, it addresses ways in which the deliberate indifference standard could be made to mirror the professional judgment standard. Finally, this Part addresses three possible approaches to establishing liability for violation of a foster teen's rights, and it discusses the relative difficulty in making the causal connection between violation and harm for each approach.

A. A Right to Services in Preparation for Adulthood

1. *Youngberg* Sets the Standard

Youngberg v. Romeo established the substantive due process right of mentally retarded patients in state custody to personal safety and freedom from unnecessary restraints.⁹⁶ This right could be extended to teenagers leaving foster care.⁹⁷ In *Youngberg*, the Court stated that the mentally retarded have a right to training that is necessary to reasonably preserve their freedom and safety.⁹⁸ In *Youngberg*, that meant

⁹⁴ *Id.* (citation omitted).

⁹⁵ *Id.*

⁹⁶ 457 U.S. 307 (1982).

⁹⁷ *Id.* at 319 n.25 (explaining the analysis required to determine the type of training needed for a mentally retarded patient in state custody).

⁹⁸ *Id.* at 319.

Romeo had a right to training to prevent him from injuring himself and others, so that he could be free from bodily restraints.⁹⁹ The same rule, in principle, should apply to teenagers leaving foster care. Their personal safety and freedom as adults requires preparation for adulthood while they are teenagers and, possibly, continuing into early adulthood. Only with such preparation can they reliably avoid such harms as becoming homeless, suicidal, or criminal. Becoming a criminal, for instance, often entails the “bodily restraint” of prison, which could be counted as a harm teenagers could avoid with proper preparation for adulthood.

Indeed, the parallels between Romeo’s plight and that of the foster teen are closer than they need to be. The Supreme Court has stated:

It is not feasible . . . to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case.¹⁰⁰

In the case of a teenager leaving foster care, the liberty interest at stake is the teenager’s personal freedom and safety, just as it is in *Youngberg*,¹⁰¹ and just as it is in the lower federal courts applying *Youngberg* and *Estelle v. Gamble* to young children in foster care.¹⁰² The only difference with regard to teenagers may be that it will be more difficult to make the causal connection between the failure to provide adequate training and the harm suffered as a result of that failure.¹⁰³

At least one district court has expanded the right recognized in *Youngberg* beyond what is called for in this Article. That court recognized not only the right of foster children to be free from physical harm but also their right to be free from psychological harm and the right to services protecting a child’s association with her biological parents.¹⁰⁴ Emotional well-being is vague and difficult to evaluate. It may be even

⁹⁹ *Id.* at 322–23 (holding that the respondent was entitled to minimally adequate, reasonable training as judged by a professional).

¹⁰⁰ *Id.* at 319 n.25.

¹⁰¹ *Id.* at 319.

¹⁰² *See Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 891 (10th Cir.1992) (“Thus, in 1982 it was established that ‘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.’ *Youngberg* arguably reaches the constitutional right plaintiffs assert to be clearly established.” (citation omitted)).

¹⁰³ *See infra* Part II.D.

¹⁰⁴ *Marisol A. v. Giuliani*, 929 F.Supp. 662, 675 (S.D.N.Y. 1996), *aff’d*, *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (extending to a class of abused foster children the substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being, and finding that they stated a substantive due process claim arising from

more difficult to determine what constitutes an unnecessary intrusion on a *child's* emotional well-being. Different children may respond differently to different "intrusions." Thus, this right seems stricter, and more difficult to enforce, than a right to services preparing teens for adulthood. But this case demonstrates that some courts are willing to establish such rights where they are needed.

2. Normative Reasons to Extend the Right to Teenagers

a. Teens need as much or more help than children do

Teenagers may be better equipped than younger children to avoid physical harm while they are in foster care. But that may not be the case after they leave the foster care system.¹⁰⁵ Once they are on their own, teenagers face "high rates of homelessness, . . . poverty, and delinquent or criminal behavior."¹⁰⁶ They are "frequently the target of crime and physical assaults."¹⁰⁷ These dangers are at least as serious as the dangers facing small children in care, and probably much more serious, both in degree and frequency.¹⁰⁸

Furthermore, if teenagers do run into trouble after leaving care, there is often no one within the system for them to go back to for help. They are unlikely to find a mentor outside of the system, because being within the system often cuts them off from opportunities to develop mentoring relationships, either with a family member, a teacher, or an employer. It is important for teens to have mentors. Barring that, they should at least be taught to look after themselves.

the defendants' alleged failure to provide reasonable services and placements that protected the plaintiffs' right of association with their biological family members).

¹⁰⁵ Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 101, 113 Stat. 1822, 1823 (1999) (codified in scattered sections of 42 U.S.C.) (discussing difficulties teens face in transitioning to adulthood).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 101(a)(4).

¹⁰⁸ Statistics on what happens to teenagers after they leave foster care are spotty at best, but a study by the Chapin Hall Center for Children revealed that, of 92,210 children in substitute care at age 16 between 1990 and 1998, 6% (4,709) were discharged to relatives, 12% (8,634) reached majority or "aged out," 19% ran away (13,743), and 21% (15,654) exited care via "other means," which often means they were incarcerated, either in a juvenile or adult corrections facility, or they were placed in a mental health institution. FRED WULCZYN & KRISTEN BRUNNER HISLOP, CHILDREN IN SUBSTITUTE CARE AT AGE 16: SELECTED FINDINGS FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE tbl. 4 (2001) (unpublished report, on file with the University of Chicago Chapin Hall Center for Children). The largest group, 41% (30,696), was reunified with family. *Id.* But more than half were not reunited. *Id.* And a significant percentage ended up incarcerated or institutionalized. *Id.*

b. Preparing teens for adulthood is the last chance to make a difference in their lives

Once teenagers leave foster care—particularly if they run away but also if they age out formally—the state often loses track of them permanently. An informal e-mail survey of twelve foster care workers around the country¹⁰⁹ revealed that several states do not track the circumstances of children leaving state care before the age of majority, nor do they keep track of what happens to them later on.¹¹⁰ Additionally, some states close a teenager's case if he has been on runaway status for a lengthy period or if he is incarcerated.¹¹¹

Admittedly, tracking youths beyond their time in care would be a daunting, if not impossible, task for budget-strapped foster care agencies. But that is all the more reason to train teenagers at least minimally before they leave care. Once they are gone, they are usually gone for good.

¹⁰⁹ The author e-mailed fifty independent living coordinators—one in each state—listed on the Web site of the National Child Welfare Resource Center (<http://nrcys.ou.edu/nrcyd/ilcoord.htm>) in December 2004; twelve of them responded with substantive comments.

¹¹⁰ Several Independent Living Coordinators said they could not provide data on children leaving care before age eighteen or why they leave. *See, e.g.*, Interview with Paula Brown, Wis. Indep. Living Coordinator (Dec. 21, 2004) (on file with author); Interview with Mark Mitchell, Neb. Indep. Living Coordinator (Dec. 21, 2004) (on file with author); E-mail from P. Carrington-Jones, South Carolina Indep. Living Coordinator, to author (Dec. 28, 2004, 07:36 CST) (on file with author); E-mail from Joan McAllister, N.C. Indep. Living Coordinator, to author (Dec. 21, 2004, 08:52 CST) (on file with author); E-mail from Jane Wilson, Mont. Indep. Living Coordinator, to author (Dec. 27, 2004, 09:12 CST) (on file with author).

¹¹¹ *See, e.g.*, E-mail from Beverlee Kroll, Ariz. Indep. Living Coordinator, to author (Dec. 21, 2004, 09:57 CST) (“There have also been occasions where a judge will dismiss a dependency when a youth has been on runaway status for an extended period of time (i.e. 9 months–1 year or longer) or they are committed to the adult or juvenile department of corrections until age 18.”) (on file with author); E-mail from Rod Rodler, N.H. Indep. Living Coordinator, to author (Dec. 21, 2004, 10:30 CST) (“Teens who are in the Juvenile Justice system and have been adjudicated as delinquents usually have their case closed at 17 and leave the JJ system at that point.”) (on file with author). *But see, e.g.*, E-mail from Judy Gallo, N.Y. Indep. Living Coordinator, to author (Dec. 22, 2004, 04:26 CST) (providing detailed statistics on the age at which children leave care and where they go) (on file with author); E-mail from Hugh Sipowicz, Me. Indep. Living Coordinator, to author (Dec. 21, 2004, 07:26 CST) (“We do have a few youth who ‘de facto emancipate’ themselves by running away and refusing to accept a safe living arrangement. Hardly any of these youth actually ‘disappear.’ We know where they are and who they are living with. Many of these self made placements are not necessarily unsafe, but may not be the best for the youth long term. Many of these youth are not in school and are not encouraged to attend by the people they are living with. Some of these youth actually come around and cooperate with their caseworker at some point. A number of our youth are on probation and some are in juvenile correctional facilities at different points in time. We treat them the same as any teen in care and offer them the same opportunities as anyone would have.”) (on file with author).

c. Preparing teens for adulthood benefits society

Teens who leave foster care without services preparing them for adulthood are that much more likely to end up homeless, in jail, or otherwise institutionalized.¹¹² Providing them with minimal training would be a benefit, not just to them, but also to society. First, training for adulthood could prevent them from being a drain on society, either by receiving welfare benefits or by being committed to other tax-subsidized services such as prisons or state hospitals. Second, training teenagers for adulthood should help them become productive members of society. It should help them find a job, go to college, or both. Instead of draining resources, the prepared teenager should contribute resources to his community.

B. Why the Professional Judgment Standard Is Most Appropriate

1. Children Are Unlike Prisoners

Perhaps the most striking difference between *Estelle v. Gamble* and *Youngberg v. Romeo* is the status of the plaintiffs. Gamble was a prisoner sentenced to a state correctional facility;¹¹³ Romeo was a profoundly retarded thirty-three-year-old whose mother could no longer care for him.¹¹⁴ In one sense, both men were involuntarily committed to state custody—Gamble surely did not *want* to be in prison—but in a larger sense, Gamble was the master of his fate in a way that Romeo could not be. The act that landed Gamble in prison was at least in some sense, if not primarily, a voluntary one. The state judged him responsible for that act and sentenced him to prison.¹¹⁵ Romeo, however, had no control over his actions, much less the ability to take responsibility for them.¹¹⁶ He had the “mental capacity of an 18-month-old child.”¹¹⁷

Most minor children—at least those older than eighteen months—fall somewhere in between Romeo and Gamble on the spectrum of accountability for their actions, in terms of cognitive capacity and self-control. But as minors, children have an additional barrier between themselves and voluntary action: their parents. Even the most responsible ten-year-old cannot be expected to prevent a drug-addicted parent from losing parental rights and subjecting him to foster care. Likewise, a troubled sixteen-year-old cannot do much to prevent his parents from voluntarily committing him to the state's custody. In neither case can the child be held responsible for winding up in foster care. Nor can that child necessarily act independently to remedy the

¹¹² See *supra* notes 7–10 and accompanying text.

¹¹³ *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

¹¹⁴ *Youngberg v. Romeo*, 457 U.S. 307, 309 (1981).

¹¹⁵ *Estelle*, 429 U.S. at 98.

¹¹⁶ *Youngberg*, 457 U.S. at 309.

¹¹⁷ *Id.*

situation, by finding a new home or a job, for instance. Children are more or less required to remain in someone's custody, and therefore their liberty is to some extent deprived. Children receive more protection, but less freedom, under the Constitution.¹¹⁸ Children are simply different from adults.¹¹⁹

The children in these scenarios are therefore innocent on multiple levels. First, the child's actions generally are not responsible for the child's committal to foster care—the parents' actions are. Second, even if a child is committed to foster care by his parents because he is a troublemaker, he is innocent inasmuch as he is a child. Juvenile status confers innocence upon him. We do not hold our children responsible for their actions in the same way we do adults. This is why juvenile offenders are treated differently from adults in the criminal justice system.¹²⁰ Thus, all minor children seem to be squarely in the *Youngberg* portion of the spectrum, and the standard for judging their state care providers should reflect that. Foster care workers should be held to the higher, professional judgment standard of care called for in *Youngberg*.

2. Foster Care Workers Should Be Held to a Higher Standard than Prison Guards

Deliberate indifference is akin to recklessness, or a conscious disregard of a substantial risk.¹²¹ We should expect more than the absence of recklessness from those looking after our children.

The language of *Yvonne L. v. New Mexico Department of Human Services* is ambiguous as to the level of culpability required of state actors before liability will attach under the professional judgment standard. It seems to set the bar somewhere between recklessness and negligence. The court states that it will find liability “[i]f defendants knew of the asserted danger to plaintiffs,”¹²² which sounds like recklessness, “or failed to exercise professional judgment with respect thereto,”¹²³ which sounds more like negligence. The *Yvonne L.* standard, although somewhat ambiguous, is more appropriate than the deliberate indifference standard in the foster care context. This is because even *ordinary* indifference would be problematic in the foster care context. That indifference should not have to be *deliberate* before liability attaches.

¹¹⁸ See *Bellotti v. Baird*, 443 U.S. 622, 634–41 (1979) (discussing protections allowed by the Constitution for children, not adults, and corresponding limits on children's freedoms).

¹¹⁹ See *id.* at 634 (“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.”).

¹²⁰ See *In re Gault*, 387 U.S. 1, 14–16 (1966) (discussing motives behind development of the juvenile justice system).

¹²¹ See *infra* Part II.C.2 for an argument that conscious disregard of a generic risk may qualify as deliberate indifference.

¹²² *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 890 (10th Cir. 1992).

¹²³ *Id.* (emphasis added).

Of course, as another circuit court has emphasized, “[m]ere negligence is never sufficient for substantive due process liability.”¹²⁴ Requiring transparent professional standards to be followed by state foster care workers would help solve the problem of the precise level of culpability required. Without having to delve into the specific mental state of the foster care worker, a judge could determine objectively whether established professional standards had been followed.

C. Fixing the Deliberate Indifference Standard

1. Reconciling the Standards

One way to reconcile the professional judgment standard with the deliberate indifference standard is to define “deliberate indifference” simply as a failure to follow professional standards. This would collapse the two standards together. It would require states to have professional standards and to follow them, and would call it “deliberate indifference” if they did not. In this way, the deliberate indifference standard would mirror the professional judgment standard.

2. Generic Risk

The deliberate indifference standard would also be more appropriate in the foster care context if it were defined as a failure to act on an awareness of the generic risk to all teenagers leaving foster care by providing services to prepare them for adulthood (and therefore mitigating those risks). This version of the deliberate indifference standard sounds more controversial than it is. Deliberate indifference has been found in the foster care context where the defendant was “plainly placed on notice of a danger and chose to ignore the danger.”¹²⁵ Liability is also available where there is “some knowledge” of a “known risk.”¹²⁶

As discussed at the outset of this Article, there are numerous well-known risks to foster teens leaving care, particularly when they do not have preparation for adulthood.¹²⁷ These risks, from homelessness and joblessness to incarceration, victimization, pregnancy, and early mortality, affect teenagers whether they run away or age out of care formally. They are generic risks that affect foster teens as a group, as opposed to risks to an individual teen from being placed in a dangerous foster home, for example, one headed by a known sex offender. But they are still “known risks.” Failing to respond to these known risks by providing services to prepare teens to be

¹²⁴ *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir. 2000).

¹²⁵ *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (noting this would be required to find deliberate indifference).

¹²⁶ *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981).

¹²⁷ See *supra* text accompanying notes 7–10.

capable adults (i.e., adults with jobs, homes, and perhaps higher education), should be recognized as deliberate indifference.

But no court has recognized this argument. Indeed, one court has stated specifically that the foster child must show “actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home.”¹²⁸ If this language does not foreclose the argument proposed here, it at least makes it difficult to extrapolate from actual knowledge of harm within a specific home to constructive knowledge of harm generically occurring to teens leaving foster care.

D. The Causal Connection Between Violation and Harm

Another difficult aspect of the foster teenager’s claim is making the causal connection between (1) a failure to provide services preparing the teen for adulthood and (2) harm suffered as a result of that failure. This difficulty is not insurmountable, however. The right to personal safety/protection from harm is explicit in *Youngberg v. Romeo*.¹²⁹ That right should be expressed as a right to services—such as job training, mentoring, psychological support, preparation for college, and other resources geared toward transition to adulthood—that will protect teenagers from harm by teaching them how to maintain their own safety and liberty once they leave the foster care system.

The causal connection between the violation of the right and the harm suffered is harder to make depending on which of three potential approaches to liability is taken.

1. Lack of Services and Harm Suffered Before Age Eighteen

The causal connection is easiest to make where the teenager has been denied services *and* suffered harm as a result of that denial before reaching age eighteen. This is because the teenager is generally required to remain in custody until age eighteen,¹³⁰ and the state is responsible for protecting the teenager from harm while he is in state custody.

This umbrella of responsibility makes it easier for the teenager to make a case against the state for any harm suffered while he is in state custody. The example most relevant to this Article, however, is that of the teenager who runs away or is arrested while out of the system—and is therefore no longer physically in state custody—before turning eighteen. The runaway might have a cognizable claim if he ended up homeless, the victim of a crime, unable to find a job, or otherwise “harmed” by a lack of preparatory services. The delinquent might also have a claim for being incarcerated,

¹²⁸ Taylor v. Ledbetter, 818 F.2d 791, 796 (11th Cir. 1987).

¹²⁹ Youngberg v. Romeo, 457 U.S. 307, 319 (1981).

¹³⁰ In some states the age is nineteen and in a few it is seventeen. Eighteen is used generically as the age of majority.

the argument being that if he had been adequately prepared for adulthood, he would not have resorted to criminal activity and therefore would not have ended up in jail. This would be an impossible argument to make for the "average" juvenile delinquent from a broken home. *DeShaney v. Winnebago County Department of Social Services* forecloses it, but for the teenager confined involuntarily to state custody, it should have teeth.

2. Lack of Services Before Age Eighteen and Harm Suffered into Adulthood

The connection between violation and harm is more difficult to make, as a matter of degree, where the harm is suffered after the teenager has left the foster care system as an adult. After a teenager has aged out of foster care, *DeShaney* suggests that he is on his own. Private harms that a teenager suffers are not the state's responsibility. But serious harms are most likely to befall such teenagers after they age out of care, making this the most important of the three approaches to liability. It does few teenagers much good if they only have a claim for harm suffered before age eighteen. Most teenagers will not suffer that harm until later—only a fraction of teens leaving care do so before age eighteen.

Furthermore, it is arbitrary to cut off liability at eighteen if the cause of the harm suffered is the same. Why should a seventeen-year-old foster teen have a claim and an eighteen-year-old teen not have one, if both teens failed to receive training for adulthood when they were in state custody? Such plaintiffs should be allowed to make § 1983 claims and prove the connection between lack of services and harm outside of care. The argument would be that the foster care system made an improper decision to discharge the teenager, subjecting him to risks he would not have faced if he had been discharged following preparation for adulthood. Allowing liability in such circumstances would not necessarily open the door to a flood of litigation by progressively older former foster children, because, for one thing, the older the plaintiff, the more difficult it would be to prove a causal connection between the violation of the right and the harm suffered.

3. Lack of Services After Age Eighteen and Harm Suffered After Age Eighteen

The hardest case to make is one in which the teenager has not received services continuing into adulthood and he suffers the harm as an adult. The Foster Care Independence Act authorizes independent-living services through age twenty-one, but such services are not required to be provided by states.¹³¹ The Chafee Act's guidelines do suggest professional standards related to discharge.¹³² Therefore, the

¹³¹ Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 101, 113 Stat. 1822 (1999) (codified in part at 42 U.S.C. § 677 (2000)).

¹³² For a discussion of the Chafee Act, see *infra* Part III.B.1.

case can at least be made for liability where a state discharges at age eighteen without continuing services.¹³³ But where both the violation of the right and the harm suffered occur outside the foster system, there is a strong argument that *DeShaney* forecloses liability. Indeed, the barrier between what happens in state custody before age eighteen and what happens outside and after eighteen may be difficult to permeate.

III. PROFESSIONAL STANDARDS FOR TEENAGERS IN FOSTER CARE

This Part describes the professional standards that exist in the foster care arena and explains how they may be helpful to a judge determining whether a former foster teen's rights have been violated. It concludes by showing that despite the existence of standards in this area, state foster care workers do not always follow those standards, and, in the case law, do not even claim to follow them.

A. How Professional Standards Shape the Claim

Foster care advocates and legislators have promoted professional standards for training teenagers for adulthood for years,¹³⁴ though they may not have called such guidelines "professional standards." These standards should be helpful to courts trying to determine whether state actors sued under § 1983 have violated a teenager's substantive due process right to minimally adequate training for adulthood.

It is well-established that children in foster care have a substantive due process right to personal safety.¹³⁵ If that right is extended to include a right to be free from harm suffered because of a lack of preparation for adulthood, as has been argued here, then a state actor who violates that right should not receive qualified immunity under § 1983. Furthermore, if a court determines that the foster care worker defendant did not follow standards (either established by the state or by a professional organization) and that failure led to the violation of the teenager's right to personal safety, then it follows that the foster care worker should be found liable.

¹³³ See *Doe v. Gaughan*, 808 F.2d 871, 882 (1st Cir. 1986) (noting that, even where a constitutional right does not exist, "certain other rights are statutorily guaranteed [including a right to] 'the highest practicable professional standards for the reception, examination, treatment, restraint, transfer and discharge of mentally ill [persons]'" (emphasis added) (second alteration in original) (quoting MASS. GEN. LAWS ch. 123, § 2 (1986))).

¹³⁴ See *infra* Part III.B–C.

¹³⁵ See generally *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 891 (10th Cir. 1992) ("[W]hen 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." (quoting *DeShaney v. Winnebago County Dep't Soc. Servs.*, 489 U.S. 189, 199–200 (1989))); *supra* Part I.A.3.

B. Existing Standards

1. The Chafee Act

In 1986, Congress passed the Title IV-E Independent Living Initiatives, which were designed to provide teens aging out of foster care with the skills and experience needed to survive as adults.¹³⁶ As a result, all states began providing independent-living services to foster care teens between the ages of sixteen and eighteen. These services include life skills classes, supervised-living arrangements, mentoring, and employment readiness and training.

In 1999, Congress enacted the Foster Care Independence Act (the Chafee Act),¹³⁷ which created the John H. Chafee Foster Care Independence Program. The Chafee Act increased federal funding for states to create independent living programs for teenagers aging out of foster care.¹³⁸ The Chafee Act does not mandate such programs, and it leaves great flexibility with states to create their own programs. But the Act does provide guidelines for what such programs should include.

The Chafee Act specifies that state plans should be designed:

- (1) to identify children who are likely to remain in foster care until 18 years of age and to help these children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities (including smoking avoidance, nutrition education, and pregnancy prevention);
- (2) to help children who are likely to remain in foster care until 18 years of age receive the education, training, and services necessary to obtain employment;
- (3) to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;
- (4) to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults;

¹³⁶ Pub. L. No. 99-272, §12,307, 100 Stat. 82, 294 (1986) (codified as amended in scattered sections of 42 U.S.C.).

¹³⁷ 42 U.S.C. § 677 (2004).

¹³⁸ *Id.* § 677(a).

(5) to provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood; and

(6) to make available vouchers for education and training, including postsecondary training and education, to youths who have aged out of foster care.¹³⁹

2. Other Foster Care Standards

Organizations and advocates devoted to helping teens transition from foster care to adulthood have developed a body of literature on the subject. Some generally agreed-upon standards have emerged in the form of goals for the teenager and the foster care agency.¹⁴⁰ These standards overlap significantly with the guidelines in the Chafee Act. First is the importance of providing mentoring by a supportive adult who will stick with the teenager through his last years in care and into his first years as an adult. Second is the development of an external support system, so that the teenager will view himself as part of a community and as a contributing member of that community. Third, advocates call for involving teenagers in their own transition plans. The teenager should have a say in the training and services he receives, instead of just following the directions of a caseworker. It is important to create a “consumer-centered model which allows youth to identify their vision of success and to direct their own futures.”¹⁴¹ Other important standards include finding housing for teenagers after they leave care¹⁴² and creating education plans.

¹³⁹ *Id.* § 677(a)(1)–(6).

¹⁴⁰ *See, e.g.*, IT’S MY LIFE, *supra* note 9, at 9, 14, 27, 47.

¹⁴¹ *Id.* at 17.

¹⁴² *See* ROBIN NIXON & MARIA GARIN JONES, CHILD WELFARE LEAGUE OF AM., IMPROVING TRANSITIONS TO ADULTHOOD FOR YOUTH SERVED BY THE FOSTER CARE SYSTEM: A REPORT ON THE STRENGTHS AND NEEDS OF EXISTING AFTERCARE SERVICES 3 (2000) (“The most important needs identified . . . are those related to housing.”). Nixon and Jones point out that “[t]he Transitional Housing Program for Homeless Youth, funded by the U.S. Department of Health and Human Services, provides up to 18 months of housing and . . . services to homeless [children] ages 16–21.” *Id.* The authors argue that such living programs should be more widely available to fill the gap in housing for former foster teens. *See id.*; *see also* INST. FOR CHILD & FAMILY POLICY AT THE UNIV. OF S. ME., IMPROVING ECONOMIC OPPORTUNITIES FOR YOUNG PEOPLE SERVED BY THE FOSTER CARE SYSTEM: THREE VIEWS OF THE PATH TO INDEPENDENT LIVING 14 (1998) (recommending guaranteed housing as one of three major programmatic changes to the foster care system as it serves youth leaving care).

3. A Sample State Plan: Alaska

Alaska offers an example of what states have done to implement professional standards like the ones outlined above.¹⁴³ Alaska's strategic plan for transitioning foster youth to adulthood focuses on eight components that overlap with the standards discussed in the preceding two sections.¹⁴⁴ Those components are character building; youth-driven planning; job readiness and accessibility; independent living skills, including child care and parenting; accessible education; safe housing options; community involvement; and supportive services, including legal advocacy, mental health and medical care through age twenty-five, transportation, and mentoring.¹⁴⁵

4. Parental Standards

A final measure of appropriate professional standards for foster care workers preparing teenagers for adulthood is the standards courts apply to parents rearing their own children. Philosophically, there is no reason why foster workers should not be held to the same standards as parents. Foster children deserve the same treatment as other children. The only reasons the foster care system might be held to a lower standard than parents are practical (states may not have the resources to invest in their wards that parents have) and cynical (foster care workers are unlikely to care as much about their wards as parents do). This last reason may even be biological, but that does not excuse the state from preparing its teens for adulthood any more than parents are excused.

In terms of parental standards, the Supreme Court has held that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁴⁶ Furthermore, the Court has found that "[t]he duty to prepare the child for "additional obligations" . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."¹⁴⁷ The Court continued, "[t]his affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens."¹⁴⁸ When the state nurtures a child and directs his destiny, the state shares the high duty to "prepare him for additional obligations," to teach, guide, and inspire by precept and example. Foster teens should have the same right to such guidance as every teen reared by a parent. Indeed,

¹⁴³ See DIV. OF FAMILY & YOUTH SERVS., STATE OF ALASKA, INDEPENDENT LIVING STRATEGIC PLAN 2 (2000), available at <http://www.hss.state.ak.us/ocs/IndependentLiving/Docs/RS%20Independent%20Living%20Strategic%20Plan.pdf> [hereinafter ALASKA STRATEGIC PLAN].

¹⁴⁴ *Id.* at 4–7.

¹⁴⁵ *Id.*

¹⁴⁶ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

¹⁴⁷ *Bellotti v. Baird*, 443 U.S. 622, 637–38 (1979) (omission in original) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)).

¹⁴⁸ *Id.* at 638.

DeShaney v. Winnebago County Department of Social Services actually suggests that foster care workers should be held to a higher standard than parents are—a child does not have a due process right to be free from private harm inflicted by a parent, but he does have a right to be free from harm inflicted by the state.

C. Are Professional Standards Followed?

Despite the existence of professional standards for foster care workers, promoted at the state and federal level and by private organizations, it is unclear that such standards are regularly followed. In the case law, state actors have not claimed to follow standards; on the contrary, they have argued that children do not have a clearly established constitutional right to the kinds of services recommended by those standards.¹⁴⁹

Furthermore, Alaska's strategic plan for youth transitioning to adulthood points out reasons the state fails to follow its own standards: lack of funding, insufficient training of staff workers, and burdensome caseloads, to name just a few.¹⁵⁰ Finally, foster care advocates point to other gaps between standards and practice. For instance, the Chafee Act allows states to provide Medicaid to former foster youth until they are twenty-one years old, but not all states do so.¹⁵¹ The Chafee Act also mandates culturally appropriate services for young people—and for Native American youth specifically¹⁵²—but it is unclear that these teenagers are receiving such services. Other gaps in services include adequate transportation and child care, formal training for foster parents, collaboration and shared funding across organizations, and the need to educate “policy makers, the judiciary, and teachers about the needs” of foster teens leaving care.¹⁵³ In one study of teens leaving foster care, only a minority of teens “indicated that they had received the concrete assistance [needed] to develop [necessary] life skills.”¹⁵⁴

CONCLUSION

Jeffrey Williams¹⁵⁵ is a testament to foster teens' need for services as they become adults.¹⁵⁶ A caring mentor may have been able to prevent him from running away

¹⁴⁹ See, e.g., *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 885 (10th Cir. 1992) (discussing the defendants' qualified immunity defense).

¹⁵⁰ See ALASKA STRATEGIC PLAN, *supra* note 143, at 10, 11.

¹⁵¹ IT'S MY LIFE, *supra* note 9, at 21.

¹⁵² *Id.*

¹⁵³ *Id.* at 21–22.

¹⁵⁴ *Id.* at 39.

¹⁵⁵ See *supra* note 2 and accompanying text.

¹⁵⁶ See NIXON & JONES, *supra* note 142, at 2 (“Young and older adults who have been in foster care identify relationships with mentors, foster parents, foster care program and group home staff and other caring adults as invaluable supports after leaving care.”); *Aging Out: Daniella's Story* (PBS television broadcast May 26, 2005).

from foster care or from ending up in prison. That mentor could have worked with Jeffrey to find a job that paid enough to pay the bills, to budget his finances, and perhaps even to go back to school. Particularly if that mentor—or anyone else involved in services for teens aging out of care—had stuck with Jeffrey after he left the system, his chances at success would have been greatly improved.

Jeffrey is typical. He did not suffer *physical* harm due to his lack of preparedness for adulthood, but his harm is tangible nonetheless. It could potentially be traced to the violation of his constitutional right to personal safety, expressed as a right to be prepared for adulthood. That right should be enforceable against the foster care workers charged with his care under § 1983.