

# Systemic Foster Care Reform: An Essential Constitutional Remedy for Vulnerable Foster Youth

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## INTRODUCTION

Across the United States, there are currently over 630,000 children in the foster care system, with just over 216,000 entering foster care during fiscal year 2020.<sup>1</sup> Of the children who recently entered foster care, nearly fifty percent were children less than six years of age.<sup>2</sup> Both the age at which a child enters the child welfare system and the duration of their system-involvement are relevant factors in determining the lasting impact the system may have on that child.<sup>3</sup> Recent scholarship in the area of early childhood development suggests that children who experience toxic stress, or “excessive or prolonged activation of stress response systems in the body and brain,” may consequently face lifelong learning, behavioral, and health issues.<sup>4</sup> Children in the foster care system have been identified as being at an increased risk for toxic stress.<sup>5</sup>

Of the children placed in foster care in fiscal year 2020, approximately eighty-one percent were removed from their families following allegations of parental abuse or neglect.<sup>6</sup> Tragically, studies have continually shown that once children are in the foster care system, they may be even more vulnerable to similar maltreatment.<sup>7</sup> Given that children in

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<sup>1</sup> THE AFCARS REPORT, U.S. DEP’T HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS. 1 (Oct. 4, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE, THE PEW CHARITABLE TRS. (May 1, 2004), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content\\_level\\_pages/reports/0012pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf).

<sup>4</sup> *Toxic Stress*, CTR. ON DEVELOPING CHILD, HARV. UNIV., <https://developingchild.harvard.edu/science/key-concepts/toxic-stress/> (last visited Mar. 28, 2022).

<sup>5</sup> *Toxic Stress*, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/trauma-toolkit/toxic-stress> (last visited Mar. 28, 2022).

<sup>6</sup> THE AFCARS REPORT, *supra* note 1, at 2. The percentage of 81% was reached by combining the total percentages of children removed for neglect, physical abuse, and/or sexual abuse.

<sup>7</sup> Sarah A. Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 SOC. POL’Y REP. 1, 3 (2020).

foster care are in state custody,<sup>8</sup> one might assume that the State, as parents do,<sup>9</sup> has some duty to reasonably protect said foster youth from suffering maltreatment.<sup>10</sup> Unfortunately, more often than not, the State faces no liability for injuries endured by foster children in their care.<sup>11</sup>

Though they are profoundly disturbing, some specific examples of abuse that foster youth have endured must be provided for context. A particularly distressing story came to an end when, in 2018, Jennifer Hart, foster mother to six children, drove her car off the road, killing herself, her wife and all six of her foster children.<sup>12</sup> This incident occurred after over ten years of abuse allegations spanning Texas, Minnesota, and California went seemingly uninvestigated by state officials.<sup>13</sup> Another tragedy was uncovered in 2019, when Rick Hazel of Florida was arrested after fostering more than seventy children over seven years, at least one of which he filmed and raped repeatedly.<sup>14</sup>

It is also helpful to analyze this issue through a statistical lens. A study conducted by Johns Hopkins University found that, within their sample of Baltimore children in foster family placements, children in foster families were about seven times more likely to report physical abuse and four times more likely to report sexual abuse than their peers in non-foster families.<sup>15</sup> Not only are foster children at a greater risk of physical and sexual abuse in their foster placements,<sup>16</sup> they are also more vulnerable to child sex trafficking.<sup>17</sup> In the United States, it has been estimated that sixty percent of

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<sup>8</sup> THE PEW CHARITABLE TRS., *supra* note 3, at 34.

<sup>9</sup> 59 AM. JUR. 2D *Parent and Child* § 22 (2022).

<sup>10</sup> Andrea Koehler, *The Forgotten Children of the Foster Care System: Making A Case for the Professional Judgment Standard*, 44 GOLDEN GATE U. L. REV. 221, 222 (2014).

<sup>11</sup> *Id.* at 222.

<sup>12</sup> Joe Heim & Julie Tate, *Abuse, Neglect and a System that Failed: The Tragic Lives of the Hart Children*, WASH. POST (July 12, 2018), <https://www.washingtonpost.com/graphics/2018/national/hart-family-abuse-interstate-adoption/>.

<sup>13</sup> *Id.*

<sup>14</sup> Josh Salman et al., *Foster Kids Lived with Molesters. No One Told Their Parents.*, USA TODAY (Oct. 15, 2020, 10:09 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002/>.

<sup>15</sup> Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577, 581 (1994).

<sup>16</sup> *Id.*

<sup>17</sup> HUMAN TRAFFICKING AND CHILD WELFARE: A GUIDE FOR CHILD WELFARE AGENCIES, CHILD WELFARE INFO. GATEWAY 4 (July 2017), [https://www.childwelfare.gov/pubpdfs/trafficking\\_agencies.pdf](https://www.childwelfare.gov/pubpdfs/trafficking_agencies.pdf). See, e.g., Reese Oxner, *State-Licensed Shelter Where Sex Trafficking Victims Were Reportedly Abused Ordered to Close*, TEX. TRIB. (Mar. 11, 2022, 5:00 PM), <https://www.texastribune.org/2022/03/11/texas-foster-care-shelter-abuse/>; Alexei Koseff, *Sex-Trafficking Sting Highlights Vulnerability of Foster Children*, L.A. TIMES (July 29, 2013, 12:00 AM), <https://www.latimes.com/nation/la-xpm-2013-jul-29-la-na-child-sex-20130730-story.html>.

child sex trafficking victims have a history of involvement with the child welfare system.<sup>18</sup>

Given these recent tragedies and the related statistical findings, it should come as no surprise that for the past several decades child advocates have been pushing for systemic reforms to the foster care systems across all fifty states.<sup>19</sup> Though frustration is warranted, given the foster care system's "remarkable immunity to reform,"<sup>20</sup> recent case law addressing alleged violations to the constitutional rights of foster youth does provide a sliver of hope for systemic reform.

This note seeks to: (1) provide a background on the substantive due process framework that has established the substantive due process rights of foster youth; (2) present and analyze recent cases that may support systemic reforms as a remedy to these constitutional violations; and (3) assert that said recent case law should act as a catalyst for systemic reform efforts moving forward.

## I. THE SUBSTANTIVE DUE PROCESS RIGHTS OF FOSTER YOUTH

In order to explore the connection between substantive due process rights and foster youth, this section will provide a brief history of substantive due process doctrine. To begin, the United States Constitution contains Due Process Clauses in both its Fifth and Fourteenth Amendments.<sup>21</sup> Of relevance to this article's analysis is the Due Process Clause of the Fourteenth Amendment, which seeks to regulate state, rather than federal, governmental action.<sup>22</sup> Thus, in order to bring a claim under the Fourteenth Amendment, said claim must satisfy the state action doctrine: where a plaintiff alleges to have suffered harm at the hands of the State and said harm deprived them of their "constitutionally protected interest in life, liberty, or property."<sup>23</sup>

Such claims may allege a violation of either a procedural or substantive due process right.<sup>24</sup> A procedural due process claim may allege that, under the circumstances, the proper procedures were not applied to concede the resulting deprivation of life, liberty, or property.<sup>25</sup> On the other hand, a substantive due process claim may allege that the State has violated

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<sup>18</sup> *Child Sex Trafficking*, CHILD'S RTS., <https://www.childrensrights.org/newsroom/factsheets/child-sex-trafficking/> (last visited May 5, 2022); *The Foster Care-Human Trafficking Nexus*, HUM. TRAFFICKING SEARCH (Jan. 16, 2018), <http://humantraffickingsearch.org/foster-care-and-human-trafficking-nexus/>.

<sup>19</sup> Font & Gershoff, *supra* note 7.

<sup>20</sup> 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, 212 (1988).

<sup>21</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV.

<sup>22</sup> U.S. CONST. amend. XIV.

<sup>23</sup> 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

<sup>24</sup> 16B AM. JUR. 2D *Constitutional Law* § 944 (2022).

<sup>25</sup> *Id.* § 945.

an unenumerated fundamental right – derived from the aforementioned protected interests, particularly liberty – and require a strict scrutiny analysis to ascertain whether the State had a compelling governmental interest and its actions were narrowly tailored to achieve that interest.<sup>26</sup>

Within that framework, a substantive due process claim may also be brought which more broadly alleges that the State’s conduct was so egregious it “shocks the conscience,” thus resulting in a deprivation of liberty for which relief is sought.<sup>27</sup> It is this type of claim, under 42 U.S.C. § 1983, that is most often brought on behalf of abused or neglected children in the child welfare system.<sup>28</sup> In these cases, “the State” typically refers to agents of the State, such as employees within a state’s Department of Human Services, and targets their alleged failure to monitor the safety and well-being of foster children in state custody.<sup>29</sup> To accurately analyze such a claim requires a foundational understanding of the application of three specific standards: (1) deliberate indifference; (2) special relationship; and (3) professional judgment. Given that the “deliberate indifference” and “special relationship” standards have frequently been evaluated in tandem, this article will discuss them together. Since the “professional judgment” standard is less commonly applied and approaches such claims in a distinct manner, this article will discuss it separately.

#### *a. The Deliberate Indifference & Special Relationship Standards*

The deliberate indifference standard is derived primarily from *Estelle v. Gamble*, where a state prisoner alleged that prison officials had failed to provide him with adequate medical care.<sup>30</sup> It was subsequently applied in the foster care context in *Doe v. N.Y.C. Dep’t Soc. Servs.*, where a foster child alleged that state officials had failed to protect her from being sexually abused by her foster father.<sup>31</sup> In *Doe*, the Second Circuit held that if a state official’s deliberate indifference is a “substantial factor” in the alleged Fourteenth Amendment violation, then the state officials responsible for the foster placement may be liable under § 1983.<sup>32</sup> The *Doe* Court further clarified that the standard required a showing that state officials “exhibited deliberate indifference to a known injury, a known risk, or a specific duty

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<sup>26</sup> *Id.* § 956.

<sup>27</sup> *Id.* § 960.

<sup>28</sup> Koehler, *supra* note 10, at 231.

<sup>29</sup> See Eric M. Larsson & Jean A. Talbot, *Cause of Action for Negligent Placement in or Supervision of Foster Home*, 43 CAUSES ACTION 2D 1 (2022). This source was critical to understanding the basis for various claims brought on behalf of foster youth, what they have typically alleged, against whom liability is sought, and what remedies have been ordered under 42 U.S.C. § 1983.

<sup>30</sup> Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795–96 (11th Cir. 1987) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

<sup>31</sup> *Doe v. N.Y.C. Dep’t Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981).

<sup>32</sup> Taylor, 818 F.2d at 795–96 (citing *Doe*, 649 F.2d).

and their failure to perform the duty or act to ameliorate the risk of injury was a proximate cause of plaintiff's deprivation of rights under the Constitution."<sup>33</sup>

Shortly thereafter, the Eleventh Circuit, in *Taylor By & Through Walker v. Ledbetter*, was faced with whether to apply the Second Circuit's holding in *Doe* to a particularly gruesome fact pattern: a foster child was left in a coma after being "willfully struck, shaken, thrown down, beaten and otherwise severely abused by [her] foster mother."<sup>34</sup> The Eleventh Circuit determined that these facts were sufficiently analogous to *Doe* to hold that the county officials acted with deliberate indifference and that they could be held liable under § 1983.<sup>35</sup> Thinking ahead, the Eleventh Circuit wisely clarified that such a holding shall not impose liability where a foster child suffers "incidental" or "infrequent" abuse, but only where there is proof state officials acted with deliberate indifference as to the child's welfare.<sup>36</sup> Critically, the *Ledbetter* Court recognized that as our society progresses, the standards of decency may evolve and the application of the Fourteenth Amendment must evolve with them.<sup>37</sup>

In addition, though neither the *Doe* nor *Ledbetter* Courts did, some courts may frame their deliberate indifference analysis within the contours of the Supreme Court's "shocks the conscience" test, which holds that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'"<sup>38</sup> For example, in *Tamas v. Dep't Soc. & Health Servs.*, the Ninth Circuit faced a claim that the Department of Social and Health Services for the State of Washington had deprived three foster children, who had been sexually molested by their foster father, of their liberty interest in a safe foster care placement.<sup>39</sup> In addressing this claim, the Ninth Circuit understood "deliberate indifference" to mean "conduct which shocks the conscience" and remanded back to the District Court as to properly apply their interpretation of the deliberate indifference standard.<sup>40</sup>

Though analysis under the "deliberate indifference" standard typically encompasses the bulk of a court's reasoning in these cases, most courts also address whether the child(ren) and the state official(s) had a sufficiently "special relationship" from which an affirmative duty would

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<sup>33</sup> *Doe*, 649 F.2d at 145.

<sup>34</sup> *Taylor*, 818 F.2d at 792–93.

<sup>35</sup> *Id.* at 797.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Though this is but a brief side note in the *Ledbetter* Court's reasoning, this acknowledgment from the Court that our society's standards can and should shift over time is critical to not just reforming foster care but many other institutions within American society.

<sup>38</sup> *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also Palko v. State Conn.*, 302 U.S. 319, 325–26 (1937)).

<sup>39</sup> *Tamas v. Dep't Soc. & Health Servs.*, 630 F.3d 833, 837 (9th Cir. 2010).

<sup>40</sup> *Id.* at 844–47.

arise to render the State's alleged "deliberate indifference" relevant.<sup>41</sup> Accordingly, in *Bowers v. DeVito*, the Seventh Circuit clarified this special relationship standard when it held that, where a special or custodial relationship exists, the State retains an affirmative duty to protect private citizens.<sup>42</sup> This has also been referred to as the "special relationship exception," whereas generally no affirmative duty exists for the State to protect the rights of private citizens, a special relationship may take exception to that rule.<sup>43</sup>

While the Seventh Circuit's holding in *Bowers* considered the relationship between doctors employed by a state facility and their mentally ill patients, the Eleventh Circuit, in *Jones v. Phyfer*, applied its reasoning to the special relationship between a foster child and their case worker.<sup>44</sup> The *Jones* Court explained that "the case workers were hired specifically to protect the children and . . . it would therefore be unreasonable to characterize the child's death as too remote a consequence of the case workers' failure to perform their duties."<sup>45</sup> Thus, case workers and foster children have been found to have a special relationship which suggests that case workers may be found liable under § 1983 claims where foster youth have been harmed while in state custody.<sup>46</sup>

The somewhat amorphous question of "state custody" was addressed within the Supreme Court's special relationship analysis of likely the most controversial case in this area of law: *DeShaney v. Winnebago County Department of Social Services*.<sup>47</sup> The *DeShaney* Court faced a particularly grim set of facts: a four-year-old, Joshua DeShaney, had been beaten by his father to the point of permanent brain damage.<sup>48</sup> Following this tragic incident, Joshua's mother alleged that the Department of Social Services ("DSS") had violated Joshua's substantive due process rights under the Fourteenth Amendment, since DSS had failed to remove him into state custody despite having been notified of repeated allegations of physical abuse and having made numerous visits to the DeShaney home during which

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<sup>41</sup> Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)). It is critical to the protection of the substantive due process rights of foster youth that this duty be framed in an affirmative context. Since the duty is "affirmative," that requires the State to take action to fulfill said duty and allows for inaction to be framed as a constitutional violation. See *DeShaney v. Winnebago Cnty. Dep't Soc. Servs.*, 489 U.S. 189, 204–12 (1989) (Brennan, J., dissenting).

<sup>42</sup> Taylor, 818 F.2d at 797 (citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

<sup>43</sup> Henry A. v. Willden, 678 F.3d 991, 998 (9th Cir. 2012). Notably, this framework of exceptionality has also been used with regard to the aforementioned deliberate indifference standard; specifically, deliberate indifference has alternatively been referred to as the "state-created danger exception." See 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

<sup>44</sup> Taylor, 818 F.2d at 798 (citing *Jones v. Phyfer*, 761 F.2d 642, 644–45 (11th Cir. 1985)).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> *DeShaney v. Winnebago Cnty. Dep't Soc. Servs.*, 489 U.S. 189 (1989).

<sup>48</sup> *Id.* at 193.

evidence of abuse mounted.<sup>49</sup> Since Joshua had never actually been removed into state custody, the Court held that no “special relationship” existed.<sup>50</sup> Consequently, though the *DeShaney* Court briefly cited to the “shocks the conscience test,” it saw no need to apply it or to determine whether DSS had in fact been “deliberately indifferent” to Joshua’s safety.<sup>51</sup> Rather, the *DeShaney* Court held that no constitutional protection is owed to children still in the custody of their parents, even where abuse has been reported.<sup>52</sup> In this case, the Supreme Court’s formalism limited their application of both the special relationship and deliberate indifference standards and failed to conceive a just outcome for Joshua.<sup>53</sup>

*b. The Professional Judgment Standard*

When faced with claims on behalf of foster youth alleging a violation of their substantive due process rights under the Fourteenth Amendment, many courts have also applied the “professional judgment” standard. The basis for the professional judgment standard is derived from *Youngberg v. Romeo*, where a mother filed suit on behalf of her intellectually disabled son to contest the allegedly unsafe conditions of the Pennsylvania state institution to which her son had been involuntarily committed.<sup>54</sup> In *Youngberg*, the Supreme Court held that to determine whether a state official has adequately protected the liberty interests of those in their care, a court must ascertain if that state official exercised professional judgment.<sup>55</sup> The *Youngberg* Court further reasoned that, while decisions made by professionals are presumed valid, “liability may be imposed . . . 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.”<sup>56</sup> In the foster care context, this standard asserts that state officials, such as employees of a state’s Department of Human Services, may violate a foster child’s substantive due process rights under the Fourteenth Amendment by

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<sup>49</sup> *Id.* at 191–93.

<sup>50</sup> *Id.* at 189–90.

<sup>51</sup> *Id.* at 197–200.

<sup>52</sup> *DeShaney*, 489 U.S. at 197–200.

<sup>53</sup> *Id.* at 212 (Blackmun, J., dissenting). Though his dissent is quite brief, Justice Blackmun is articulating an ever-persistent conflict between formalism and functionalism. When the Court constricts itself with formalistic rules, it simply cannot be dynamic when faced with a more nuanced fact pattern, as was tragically illustrated in *DeShaney*. See also Benjamin Zipursky, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1101 (1990).

<sup>54</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>55</sup> *Id.* at 323.

<sup>56</sup> *Id.*

failing to base their decisions surrounding that child's care on their professional judgment.<sup>57</sup>

In revisiting *DeShaney*, in his dissent, Justice Brennan expressed concern that applying the professional judgment standard in these types of cases could result in the poor decisions of state officials with regard to foster children being excused as merely "professional judgment."<sup>58</sup> On the contrary, many advocates for the protection of foster youth disagree with Justice Brennan and view the application of the professional judgment standard as the most supportive of the substantive due process rights of foster youth.<sup>59</sup> Advocates have argued that it may be easier to prove that a state official, like a caseworker who repeatedly fails to conduct mandated visits to a foster placement, has failed to meet a professional judgment standard, rather than applying the more amorphous deliberate indifference standard.<sup>60</sup> Whereas under the deliberate indifference standard it can highly subjective what conduct a court may find a state official liable for, the professional judgment standard reasons that a state official is meant to conform to specific "judgment, practice, or standards" and that they face liability when their conduct falls outside of those prescribed bounds.<sup>61</sup>

While the professional judgment standard may seem favorable to foster youth for the aforementioned reasons, some courts have also argued that the "deliberate indifference" and "professional judgment" standards are essentially the same.<sup>62</sup> Though that ambiguity may seem frustrating, it could actually swing in favor of protecting foster children. As long as courts recognize that foster children have a substantive due process right to be free from a substantial risk of harm while in state custody, courts can and should find liability and order a remedy to address said harm regardless of the standard applied.

## II. OVERVIEW & ANALYSIS OF RECENT BREAKTHROUGH CASES

Though it is critical to have a foundational understanding of the standards courts have applied in cases addressing alleged violations of a foster child's substantive due process rights under the Fourteenth Amendment, what has become even more urgent is conceiving a suitable remedy for these harms. Though the Supreme Court has yet to take up a case

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<sup>57</sup> See *Yvonne L., ex rel. Lewis v. New Mexico Dep't Hum. Servs.*, 959 F.2d 883 (10th Cir. 1992) (holding that the state officials' liability should be determined by their failure to exercise professional judgment).

<sup>58</sup> *DeShaney v. Winnebago Cnty. Dep't Soc. Servs.*, 489 U.S. 189, 211 (1989) (Brennan, J., dissenting).

<sup>59</sup> *Id.*; Koehler, *supra* note 10, at 221–25.

<sup>60</sup> Koehler, *supra* note 10, at 221–25.

<sup>61</sup> *Id.* at 237 (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

<sup>62</sup> *Id.* at 242–43. See *Yvonne L.*, 959 F.2d at 893–94; *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 328 (Ariz. 2003). Both cases suggest that there is little difference in the application of the "deliberate indifference" and "professional judgment" standards.



that addresses this issue directly,<sup>63</sup> that does not mean that lessons cannot be gleaned from the decisions of lower courts across the country. Several recent cases have taken a more radical approach to remedying these alleged constitutional violations. The following three recent cases could provide the spark necessary to support systemic foster care reform: (1) *M.D. ex rel. Stukenberg v. Abbott*;<sup>64</sup> (2) *Wyatt B. by McAllister v. Brown*;<sup>65</sup> and (3) *Ashley W. ex rel. Durnell v. Holcomb*.<sup>66</sup>

a. *Overview of Recent Case Law*

1. *M.D. ex rel. Stukenberg v. Abbott*

*M.D. ex rel. Stukenberg v. Abbott* is a class action suit brought on behalf of minor children in the custody of the Texas Department of Family Protective Services (“DFPS”).<sup>67</sup> The plaintiffs filed a cause of action under 42 U.S.C. § 1983 seeking injunctive relief and alleging that DFPS had violated the substantive due process rights under the Fourteenth Amendment of minors in DFPS custody by failing to protect them from the unreasonable risk of harm caused by the State.<sup>68</sup> Specifically, the plaintiffs challenged DFPS’s excessive caseloads, poor abuse and neglect investigations, insufficient placement arrays, and failures to ensure the safety of children in foster group homes.<sup>69</sup> The plaintiffs sought to prove that said failures had led to actual harm, like a facility remaining operational for seventeen years despite three teenage girls dying of asphyxiation from being hog-tied, developmentally disabled children failing to receive proper nutrition, and multiple children reporting sexual abuse.<sup>70</sup>

Though the defendants immediately appealed, it is worth first reflecting on the reasoning of the District Court before considering the Fifth Circuit’s subsequent analysis. Relying on *DeShaney*, the District Court found that “custody . . . creates a ‘special relationship’ between the State and

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<sup>63</sup> See, e.g., *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. N.Y.C. Dep’t Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, *Cath. Home Bureau v. Doe*, 464 U.S. 864 (1983). See also *DeShaney ex rel. DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.* 489 U.S. 189 (1989) (holding that, given the child was no longer in the custody of the State and had been returned to his father’s custody, the State could not be held liable under any prior duty they may have had to protect the child from abuse).

<sup>64</sup> *M.D. ex rel. Stukenberg v. Abbott*, 152 F. Supp. 3d 684 (S.D. Tex. 2015), *aff’d in part, rev’d in part & remanded sub nom. M. D. ex rel Stukenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018).

<sup>65</sup> *Wyatt B. ex rel. McAllister v. Brown*, No. 6:19-CV-00556-AA, 2021 WL 4434011 (D. Or. Sept. 27, 2021).

<sup>66</sup> *Ashley W. ex rel. Durnell v. Holcomb*, 467 F. Supp.3d 644 (S.D. Ind. 2020), *motion to certify appeal granted sub nom. Ashley W. v. Holcomb*, No. 319CV00129RLYMPB, 2021 WL 5121146 (S.D. Ind. Sept. 29, 2021).

<sup>67</sup> *M. D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 243 (5th Cir. 2018).

<sup>68</sup> *Stukenberg*, 152 F. Supp. 3d.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 803.

that person, which triggers a constitutional duty to provide basic needs.”<sup>71</sup> The District Court recognized that the Fifth Circuit had, in the context of foster care, previously established that the State’s duty extended to providing foster children with “personal security and reasonably safe living conditions.”<sup>72</sup> Most significantly, the District Court articulated that these affirmative duties fall under the exercise of a foster child’s “right to be free from an unreasonable risk of harm.”<sup>73</sup> Given the existence of a “special relationship” between DPFS and the minor children in their custody, the District Court then turned to a determination of liability by applying both the “deliberate indifference” and “substantial departure from professional judgment” standards.<sup>74</sup> In so doing, the District Court examined the conditions that foster children in DPFS had been subjected to and found that, “judged by either standard, Texas’s conduct shock[ed] the conscience.”<sup>75</sup>

In this groundbreaking decision, the District Court held that DPFS had: (1) been deliberately indifferent to its excessive caseloads; (2) substantially departed from professional judgment with respect its excessive caseloads; (3) been deliberately indifferent to its faulty abuse and neglect investigations; (4) been deliberately indifferent in its insufficient placement array; (5) substantially departed from professional judgment with respect to its placement array; and (6) been deliberately indifferent to the safety of children placed in foster group homes.<sup>76</sup> Given that plaintiffs sought injunctive relief, the District Court appointed a Special Master to implement the policies and procedures necessary to protect Texas’s foster children from unreasonable risk of harm.<sup>77</sup> In so doing, the District Court effectively gave the green light for a complete overhaul and restructuring of the Texas foster care system.<sup>78</sup> The District Court was willing to be bold and recognize that *systemic* failures are worthy of *systemic* solutions.<sup>79</sup>

Unfortunately, the Fifth Circuit was not willing to be quite as radical as the District Court. They reversed the District Court’s holdings with regard to allegedly insufficient placement arrays and the safety of foster children in group homes, and held that the permanent injunction was overbroad.<sup>80</sup> Critically, two primary holdings were affirmed: (1) DFPS was deliberately indifferent given the risks posed by their caseload management; and (2) DFPS was deliberately indifferent given the risk posed by their practices and

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<sup>71</sup> *Id.* at 695 (citing *DeShaney ex rel. DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.*, 489 U.S. 189, 200 (1989)).

<sup>72</sup> *Id.* at 697 (quoting *Hernandez v. Tex. Dep’t Protective & Regul. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004)).

<sup>73</sup> *M. D. ex rel. Stukenberg v. Abbott*, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015).

<sup>74</sup> *Id.* at 697.

<sup>75</sup> *Id.* at 700.

<sup>76</sup> *Id.* at 820–21.

<sup>77</sup> *Id.* at 823.

<sup>78</sup> *Id.* at 828.

<sup>79</sup> *M. D. ex rel. Stukenberg v. Abbott*, 152 F. Supp. 3d 684, 799, 820–21 (S.D. Tex. 2015).

<sup>80</sup> *M. D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018).

policies of monitoring and oversight.<sup>81</sup> The Fifth Circuit remanded back to the District Court so that the injunctive relief sought could be modified to reflect their decision.<sup>82</sup>

Per the Fifth Circuit's decision, the District Court revisited the issue of what should constitute appropriate injunctive relief.<sup>83</sup> The Defendant then appealed again and the injunction was reviewed for the final time by the Fifth Circuit.<sup>84</sup> While the Fifth Circuit, once again, did not agree with all of the provisions of the injunction, the District Court was partially affirmed, partially vacated and ordered to begin implementing the modified injunction without further changes.<sup>85</sup> Crucially, the modified injunction still contains several provisions which target systemic issues within the Texas foster care system, including a 24-hour supervision requirement for all licensed foster care placements, and an order for DFPS to complete "workload studies" on their caseworkers to determine the appropriate caseload that would not impose an unreasonable risk to the safety of foster children.<sup>86</sup>

## 2. *Wyatt B. by McAllister v. Brown*

The next case of note, *Wyatt B. by McAllister v. Brown*, is a class action suit brought on behalf of all youth in the custody of Oregon Department of Human Services ("DHS"), either housed in foster homes or facilities contracted by DHS.<sup>87</sup> The plaintiffs allege "that Oregon's child welfare and foster care systems are dysfunctional and plagued by *systemic* deficiencies."<sup>88</sup>

Some of the specifically identified deficiencies include failures to: (1) employ a sufficient number of caseworkers; (2) provide adequate training and support to caseworkers; (3) provide adequate training and support to foster parents; (4) evaluate the needs of each child in state custody; (5) protect children from abuse and neglect in foster placements; (6) support children with disabilities with placements in least restrictive environments; and (7) prepare children for when they age out of the foster care system.<sup>89</sup> The plaintiffs allege that, through these omissions, the DHS had violated their substantive due process rights under the Fourteenth Amendment, as well as their rights under the Adoption Assistance and Child Welfare Act of 1980, the Americans with Disabilities Act, and the

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> M. D. *ex rel.* Stukenberg v. Abbott, 418 F. Supp. 3d 169 (S.D. Tex. 2019).

<sup>84</sup> M. D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272 (5th Cir. 2019).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 278.

<sup>87</sup> *Wyatt B. ex rel. McAllister v. Brown*, No. 6:19-CV-00556-AA, 2021 WL 4434011 \*1 (D. Or. Sept. 27, 2021).

<sup>88</sup> *Id.* at \*2 (emphasis added).

<sup>89</sup> *Id.*

Rehabilitation Act.<sup>90</sup> Given the extensive list of issues plaintiffs have taken with DHS, rather than targeting one or two specifically identified deficiencies, the relief they are seeking is *systemic*.<sup>91</sup>

In *Wyatt B.*, the District Court asserted that, while the Due Process Clause of the Fourteenth Amendment does not generally “confer any affirmative right to governmental aid and typically does not impose a duty on the State to protect individuals from third parties,” there are two exceptions: (1) the special relationship exception; and (2) the state-created danger exception.<sup>92</sup> If either applies, state officials may face liability under § 1983.<sup>93</sup> The District Court affirmed that both of these exceptions apply in the context of foster youth in state custody.<sup>94</sup>

As such, the *Wyatt B.* Court noted that the State owes children in their custody “reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child”<sup>95</sup> and that such a duty shall extend “to the right to be free from ‘the infliction of unnecessary harm,’ and to ‘adequate medical care, protection, and supervision.’”<sup>96</sup> The *Wyatt B.* Court additionally relied on the Fifth Circuit’s reasoning in *Abbott*, where it was determined that a court may consider challenged policies as they interact with one another systemically, rather than being forced to examine each policy individually.<sup>97</sup> At present, the plaintiffs’ claims, with the exception of those calling for placements in least restrictive environments and support for children aging out of foster care, have survived the defendant’s motion to dismiss and advocates are optimistic as they await the continued litigation of the surviving claims.<sup>98</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*4–5 (citing *O’Shea v. Littleton*, 414 U.S. 488 (1974)).

<sup>92</sup> *Id.* at \*6 (citing *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012)). While the “deliberate indifference” standard and “state-created danger exception” elicits virtually the same analysis, this language of exceptionality does more forcefully imply that, through their inaction, the State has deliberately placed the foster child in a dangerous situation for which they should bear some responsibility. *See* 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

<sup>93</sup> *Wyatt B. ex rel. McAllister v. Brown*, No. 6:19-CV-00556-AA, 2021 WL 4434011 at \*6 (D. Or. Sept. 27, 2021).

<sup>94</sup> *Id.* at \*6–7.

<sup>95</sup> *Id.* at \*7 (quoting *Lipscomb ex rel. DeFehr v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992)).

<sup>96</sup> *Id.* (quoting *Tamas v. Dep’t Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010)).

<sup>97</sup> *Id.* (quoting *M. D. ex rel. v. Abbott*, 907 F.3d 237, 255 (5th Cir. 2018)).

<sup>98</sup> *Id.* at \*7–9. *See also* Hillary Borrud, *Federal Judge Keeps Alive Potential Class Action Lawsuit Alleging Oregon Foster Care Failures, Saying State Can’t Bat Away Charges it Mistreats Children*, THE OREGONIAN (Oct. 7, 2021, 9:57 AM), <https://www.oregonlive.com/politics/2021/10/federal-judge-keeps-alive-lawsuit-alleging-oregon-foster-care-failures-saying-state-cant-bat-away-charges-it-mistreats-children.html>; *Wyatt B. v. Governor Brown*, A BETTER CHILDHOOD, <https://www.abetterchildhood.org/oregon> (last visited May 11, 2022); *Lawsuit: Foster Care*, DISABILITY RTS. OR., <https://www.droregon.org/litigation-resources/wyatt-b-v-brown?eType=EmailBlastContent&eId=46fe47b8-2d7c-4d7e-be8a-4bfced77d024> (last visited Aug. 6, 2022). This class action lawsuit was brought by Disability Rights Oregon and A Better Childhood and is currently stalled following a mostly successful outcome for

### 3. *Ashley W. v. Holcomb*

The final recent case of interest is *Ashley W. v. Holcomb*.<sup>99</sup> *Ashley W.* is yet another class action suit, this one brought on behalf of all children in the custody of the Indiana Department of Child Services (“DCS”), alleging that DCS violated the substantive due process rights of foster children to be free from harm under the Fourteenth Amendment.<sup>100</sup> In response to Defendants’ initial motion to dismiss, the District Court for the Southern District of Indiana was faced with a particularly disturbing set of facts: two of the named plaintiffs, four and five-year-old sisters Ashley W. and Betty W., were placed into fourteen different foster homes over two years, then, despite allegations of abuse, placed with their biological father for two months, during which time they contracted lice, ringworm, and had unexplained bruising, and eventually were separated into different foster placements.<sup>101</sup>

Though the Seventh Circuit did recently dismiss this case under the *Younger* abstention doctrine,<sup>102</sup> the initial complaint and remedies sought remain relevant. Thankfully, given the severity of the harm suffered and the “special relationship” that had been established between this class of children and DCS, Defendants were initially unsuccessful in their motion to dismiss Plaintiffs’ substantive due process claim.<sup>103</sup> Had this case been argued on the merits, Plaintiffs were seeking declaratory and injunctive relief to address the *systemic* deficiencies currently plaguing Indiana’s foster care system and have directed “that necessary and appropriate relief be granted so that Indiana’s children are no longer irreparably harmed by the system that has failed its mandate to protect them. Plaintiffs ask this Court to protect their right to a safe and nurturing childhood.”<sup>104</sup> Though Plaintiffs

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plaintiffs to Defendant’s motion to dismiss. Defendants have also filed a motion for interlocutory appeal, which plaintiffs’ attorneys have responded to. Settlement negotiations allegedly continue as well. See also *Wyatt B. et al v. Brown et al*, JUSTIA, <https://dockets.justia.com/docket/oregon/ordce/6:2019cv00556/144652> (last visited Aug. 6, 2022).

<sup>99</sup> *Ashley W. ex rel. Durnell v. Holcomb*, 467 F. Supp. 3d 644 (S.D. Ind. 2020), *motion to certify appeal granted sub nom. Ashley W. v. Holcomb*, No. 3:19-CV-00129RLYMPB, 2021 WL 5121146 (S.D. Ind. Sept. 29, 2021).

<sup>100</sup> *Holcomb*, 467 F. Supp. 3d at 644.

<sup>101</sup> *Id.* at 653–54.

<sup>102</sup> *Ashley W. v. Holcomb*, 34 F.4th 588, 594 (7th Cir. 2022), *reh’g denied*, No. 21-3028, 2022 WL 2165486 (7th Cir. June 15, 2022).

<sup>103</sup> *Holcomb*, 467 F. Supp. 3d at 653–54.

<sup>104</sup> Am. Compl. at 4–5, *Holcomb*, 467 F. Supp. 3d 644 (No. 3:19-cv-129-RLY-MPB) (“DCS lacks sufficient foster placements for youth alleged to be Children in Need of Services (‘CHINS’), leaving children for extended periods of time in emergency shelter care or forcing children to sleep in DCS offices; fails to engage in appropriate placement matching, subjecting children to multiple and inappropriate foster care placements; regularly separates sibling groups; and fails to provide children with disabilities with adequate support services to meet their medical, psychological, or developmental needs in the most appropriate, least restrictive environment.”). These are the systemic deficiencies listed in the amended complaint.

were denied the opportunity to seek said remedies before a federal court,<sup>105</sup> advocates should take some comfort that the District Court initially ruled in favor of Plaintiffs and a ruling on the merits has yet to be made.<sup>106</sup>

*b. Analysis & The Case for Tackling Systemic Foster Care Reforms*

In each of the aforementioned cases, courts have acknowledged a substantive due process right of foster children to be free from the substantial risk of harm while in state custody.<sup>107</sup> This finding remained true whether the Court applied the deliberate indifference standard, special relationship standard, professional judgment standard, multiple standards together or hardly any at all.<sup>108</sup> This rather arbitrary application was particularly evident in *Abbott*, which found that any difference in the Court's application of the deliberate indifference and professional judgment standards, like an "actual knowledge" requirement under deliberate indifference, was "dulled" when "the risk of harm is obvious."<sup>109</sup> As previously acknowledged in Part IB, a fluid and varied application of these standards should benefit foster children seeking systemic relief, as it will not constrain judges based on their preferred method of analysis or the specific precedent within their circuit.

The tempered conclusion of the *Abbott* case, the delay in adjudicating the *Wyatt B.* case, and the halted adjudication of the *Ashley W.* case are all admittedly frustrating. However, all hope should not be lost since: (1) there is still the distinct possibility that *Wyatt B.* will result in sweeping injunctive relief aimed at systemically reforming Oregon's foster care system; and (2) all the aforementioned cases are still useful as a roadmap for activists, both inside and outside of their respective states, to make more strategic advocacy decisions moving forward. If more courts follow Justice Blackmun's suggested "sympathetic reading" of the Fourteenth Amendment, then there is no reason why systemic reform cannot be a remedy consistently granted when viable substantive due process claims are made on behalf of foster children.<sup>110</sup>

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<sup>105</sup> *Holcomb*, 34 F.4th at 594, *reh'g denied*, No. 21-3028, 2022 WL 2165486 (7th Cir. June 15, 2022).

<sup>106</sup> *Holcomb*, 467 F. Supp. 3d at 653–54.

<sup>107</sup> *M.D. ex rel. Stukenberg v. Abbott*, 152 F. Supp. 3d 684, 694 (S.D. Tex. 2015); *Wyatt ex rel. McAllister v. Brown*, No. 6:19-CV-00556-AA, 2021 WL 4434011, at \*7 (D. Or. Sept. 27, 2021); *Holcomb*, 467 F. Supp. 3d at 648.

<sup>108</sup> *Abbott*, 152 F. Supp. 3d at 697, 700; *Brown*, 2021 WL 4434011, at \*6–7; *Holcomb*, 467 F. Supp. 3d at 653–54.

<sup>109</sup> *Abbott*, 152 F. Supp. 3d at 700.

<sup>110</sup> *DeShaney v. Winnebago Cnty. Dep't Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) ("our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.").

### III. CONCLUSION

As referenced throughout this note, the conditions that foster children face are not unique to one state or even one area of the country; the suffering of hundreds of thousands of children is ubiquitous.<sup>111</sup> Given this reality, advocates for systemic foster care reform and courts can waste no more time dodging this issue because it is too difficult or the conception of constitutional remedies is too rigid. The cases reviewed and analyzed in Part II should compel advocates to consider filing similar class action lawsuits to build on their momentum.

Answering Justice Blackmun's call to exhibit "moral ambition,"<sup>112</sup> particularly on behalf of vulnerable foster children, may at times feel futile, but those who are committed to the protection of foster youth can no longer throw their hands up and proceed as if the system is inevitably doomed. The aforementioned cases have proven that systemic reform can and should be a viable constitutional remedy, so all that is left to do is seek it.

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<sup>111</sup> THE AFCARS REPORT NO. 28, *supra* note 1.

<sup>112</sup> *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting) ("We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort.") (quoting ALAN A. STONE, *LAW, PSYCHIATRY, AND MORALITY* 262 (1984)).