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Florida's Foster Care System Fails Its Children

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Florida's Foster Care System Fails Its Children

Timothy Arcaro*

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I. INTRODUCTION

Florida's child welfare system fails to protect children placed in the state's foster care system from neglect, physical abuse, sexual abuse, emotional abuse, and psychological harm.¹ Florida's systemic failure incorporates many

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1. Carol Marbin Miller, *Report: Child Services Worsen, DCF Official Calls Rating Premature*, MIAMI HERALD, Feb. 22, 2001, at 1B ("In virtually every category studied by state watchdogs . . . performance by . . . the Department of Children and Families, declined during

elements concomitant to what is described as “a national collapse in child welfare services.”² A particularly disturbing aspect of Florida’s dereliction of duty is illustrated by the state’s handling of child sexual abuse complaints involving foster children, and the lack of appropriate attention given to foster children with sexual behavioral problems.³ The breakdown of systemic protections within the foster care setting creates an environment that has enabled further victimization.⁴ Failing to properly identify children with sexual behavior problems and placing those children with appropriate foster care placements and services has led to an implosion of incidents involving inappropriate sexual conduct between foster children.⁵ Legislative, administrative, and social indifference to the plight of Florida’s foster children has contributed to the catastrophic damage they have suffered under the auspices of “state care.”⁶

This article will attempt to draw attention to the pervasive problem of child sexual abuse in foster care by identifying circumstances that contribute to sexual victimization. Hopefully the discussion will illuminate the plight of child victims of sexual abuse and generate discourse on a new paradigm of protection initiatives for foster children. Part I of the article will explain child protection proceedings and how children enter the foster care system. Part II will describe common characteristics of state foster care systems. Part III will discuss traditional notions of child sexual abuse and their illusory application in the context of sexual behaviors that occur solely between minor children. Part IV will discuss the prevalence of child sexual abuse in the foster care system and the factors that increase the likelihood of such incidents. Part V

the last two years while the amount of money spent doubled . . . [f]oster children continue to be abused at alarming rates”).

2. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1994/1995) (attributing the overall failure of the American foster care system to three determinative factors: an upsurge in the number of children in need of care; an overburdened system and agencies; an inadequate number of foster parents).

3. See Interim Report, Broward County Grand Jury, Spring Term 1998 [hereinafter Grand Jury Report] (noting the failure to report, investigate, or respond to allegations of child sexual abuse complaints from foster children exposed them to additional victimization).

4. *Id.* Accounting for the marked increase in child sexual abuse incidents the Report included the following: the failure to carefully plan foster care placements for children known to have sexual behavioral problems; the exposure of children to victimization through inappropriate placements; the failure to provide foster parents with necessary background information on children placed in their care which interferes with the parent’s ability to make informed decisions on supervision and care.

5. *Id.*

6. *Id.*

will examine Florida's acquiescence in the systemic abuse of foster children, the state's failure to take corrective action on the issue of child sexual abuse, and the resultant impact on foster children placed in its care. Part VI will examine judicial intervention and the right of foster children to be protected from harm while in foster care. Finally, Part VII will conclude the article by addressing the need for increased attention to the problem of child sexual abuse in the foster care system.

II. CHILD PROTECTION PROCEEDINGS

It is well established that parents have a fundamental liberty interest in the care, custody, and raising of their children.⁷ Although those rights are "essential, they are not absolute."⁸ The government may invade the sanctity of family when a compelling governmental interest can be demonstrated to justify intrusion.⁹ The governmental interest must be especially pronounced where it is necessary to protect children from parents themselves.¹⁰ Under the doctrine of parent's patriae,¹¹ the state clearly has the authority to pursue the overwhelming societal interest in protecting children from abuse.¹² This premise has led to an ever-increasing intervention of state action, which has displaced the role of private actors in providing children with basic necessities, such as teaching and nurturing.¹³ Once the state removes a child from his

7. See generally *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

8. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

9. *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

10. See *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205.

11. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381 (2000) (*parens patriae*, literally "parent of the county," is defined as the government's power and responsibility, beyond state police power, to protect, care for, and control citizens who cannot take care of themselves—traditionally infants, idiots, lunatics, and others who have no other protector).

12. See *Prince*, 321 U.S. at 165–67; *Myers*, 810 F.2d at 1437 (holding that qualified immunity may apply where state officials take proper action to investigate abuse complaints when founded upon reasonable suspicion); see also Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745 (1987) (noting that deference should be given to the social consensus that the family should raise the child rather than the state, and that traditional family law clearly points to harm of the child as a requisite for state action).

13. See generally LAURENCE D. HOULGATE, *FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW* (1998); Theodore Caplow, *The Loco Parent: Federal Policy and Family Life*, 1976 BYU L. REV. 709 (1976).

parent, the state assumes the role of primary caregiver and the fundamental obligation of safekeeping.¹⁴

In Florida, the competing interests of protecting children from abuse and neglect while respecting a parent's fundamental right of family integrity often collide in state dependency proceedings. Child protection proceedings, known as dependency proceedings in Florida,¹⁵ authorize state intervention in suspected cases of child abandonment,¹⁶ abuse,¹⁷ or neglect.¹⁸ The legislative intent behind Florida's child protection laws is: "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state's care."¹⁹ Florida's child protection laws closely resemble those enacted in numerous

14. *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997) (finding liability under 42 U.S.C. Section 1983 where a child was killed after county officials placed the child in a foster home and negligently supervised that home); *see also LaShawn v. Dixon*, 762 F. Supp. 959 (D.D.C. Cir. 1991) (holding that a section 1983 claim provided a federal remedy for violations of the federal Adoption Assistance Act; by virtue of official policy or custom, deprived children of rights conferred by the Act; and district officials deprived children in district's foster care of their constitutionally protected liberty interests); *Norfleet v. Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993) (holding that children in foster care have constitutionally protected due process rights).

15. *See generally* FLA. STAT. § 39.01(14)(a) (2000) (defining a dependent as "a child who . . . is found by [the court] to have been abandoned, abused, or neglected by the child's parent[s] or legal custodian . . .").

16. § 39.01(1) of the *Florida Statutes* defines abandonment as:

A situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations.

Id.

17. § 39.01(2) (defining abuse as "any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental or emotional health to be significantly impaired"); *see also* § 827.03(1)(b) (defining the crimes of child abuse as "an intentional act that could reasonably be expected to result in physical or mental injury to a child").

18. § 39.01(45) (defining neglect as "when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment, or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental [condition] . . . to be significantly impaired").

19. § 39.001(1)(a).

jurisdictions in what some suggest is the “federalization of child protection legislation.”²⁰

A child protective investigation is often initiated after child maltreatment allegations are reported to the Florida State Department of Children and Family Services (“DCF”).²¹ Allegations are then investigated by DCF or its agent to determine their merit.²² If a child’s safety with the custodial parent cannot reasonably be assured, the child may be physically removed and placed temporarily in shelter status.²³ Due process entitles the parent to notice, a hearing, and proof of unfitness when the state endeavors to remove the child from the parent.²⁴ In Florida, a hearing is scheduled within twenty-four hours of the child’s removal, as state law requires a detention or shelter hearing to determine probable cause of dependency and assess the need for continued shelter placement.²⁵ In general, only a small portion of all substantiated cases are ultimately brought before the court for judicial intervention.²⁶ These cases commonly require court intervention to involuntarily remove children from the care of their parents.²⁷

When DCF believes the conditions of maltreatment cannot be remedied by a voluntary agreement with the parents, a petition for dependency may be filed.²⁸ If the parent consents or admits to the allegations to the dependency petition, or if the allegations in the petition are established by a preponderance

20. Levesque, *supra* note 2 (describing the influence of CAPTA, AACWA, and ASFA in shaping state law to comport with federal requirements in order to obtain much needed federal reimbursement for child protection and child welfare proceedings); *see also* Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. & CONCILIATION CTS. REV. 25 (2001). By July 1999, every state passed the requisite enabling legislation which mirrored the federal language.

21. §§ 39.201–.206 (reporting child abuse); *see also* Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 188 (1998) (summarizing various state reporting obligations concomitant with federal regulations and implications and the implications of potential claims to immunity for reporting).

22. §§ 39.201–.206.

23. § 39.402. It should be noted that at the shelter hearing and anytime thereafter, the court does have the authority to place the child with a related adult or any other person as a temporary physical placement. Such decisions usually vest legal custody with the state agency and temporary physical custody with a temporary custodian. Additionally, under Florida law, any person has the right to file a petition for dependency—also known as a private petition.

24. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

25. § 39.402; *see also* FLA. R. JUV. P. 8.305.

26. Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 20 (2000).

27. *Id.*

28. § 39.501.

of the evidence, an order of adjudication of dependency is entered.²⁹ The case is then set for a disposition hearing where the court addresses placement issues and parenting defects through a case plan.³⁰ When the child cannot be returned to the parent and no other adult is available to care for the child, the child is placed in the temporary legal custody of DCF and placed in foster care.³¹

III. FOSTER CARE

Established as early as 1832, foster care in America was rooted in social concerns for orphaned, poor, and needy children.³² Until the end of the nineteenth century, this system of care was based on "child rescue philosophy."³³ In theory, modern foster care systems envision a temporary home like setting for the protection and nurturing of children unable to live in a parental home due to abuse, neglect, or abandonment.³⁴ In reality, many states have failed to provide even the most rudimentary protections to foster children.³⁵ For too many children, foster care is a dangerous place.³⁶ Research

29. § 39.507.

30. Garrison, *supra* note 12 (specifying that judicial supervision of the case plan determining where the child will be placed, the steps that will be undertaken to return the child home, and the actions that will be undertaken to maintain parent-child ties is warranted in light of consistent reports of agency failure to plan and implement treatment programs carefully).

31. § 39.623. Foster care is but one placement alternative, for purposes of this article only foster care placements are considered as dispositional alternatives.

32. See Gendell, *supra* note 20.

33. Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL'Y & L. 177, 182-83 (1993) (explaining the historical overview of foster care and the philosophical development of rehabilitating parents as being superior to removal and permanent placement of children outside the home).

34. Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353, 356 (1991).

35. See generally 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 (1988); see also Sally Kestin, *Failures of Foster Care; Saving Money Comes First*, SUN-SENTINEL (Ft. Lauderdale), Nov. 23, 1998, at 1A (detailing how children were consistently left in dangerous foster homes by child welfare officials because it takes time and money to move them; caseworkers were admonished for seeking to protect too many children); Shana Gruskin, *DCF Slapped with Federal Suit*, SUN-SENTINEL (Ft. Lauderdale), June 15, 2000, at 1B (state class action filed on behalf of over 14,000 children in the Florida child welfare system alleging sexual abuse, beatings, malnutrition, torture, and neglect).

36. Emily Buss, *Parent's Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 439 (1996) (stating that the child welfare system plays out abysmally for children often exposing them to neglect, physical, and or sexual abuse); see also Mandelbaum, *supra* note 26 (citing to

suggests that once a child is removed from abusive parents, and placed in foster care, the child may not be safer from harm, which “undermines the belief that foster care placements are less dangerous and detrimental to children than remaining with their biological parents who have abused or neglected them.”³⁷ In fact, evidence to the contrary suggests that rates of abuse and neglect of children in foster care may be greater than those in the general population.³⁸ The failure of foster care systems to follow minimum standards of care that may otherwise ensure care and protection of children, has led to increased rates of foster care abuse and neglect.³⁹ The latest national data on child abuse fatalities suggest that a child is nearly three times more likely to die of abuse in foster care than in the general population.⁴⁰ Children may also be at greater risk of abuse in nontraditional family structures, although few studies have actually tested the premise.⁴¹ With the national foster care population around 500,000 children,⁴² there is tremendous exposure to harm.

Foster care placements, although intended as a temporary respite on the service continuum, often become a final stopping ground for too many children.⁴³ The average stay in foster care has risen over the past fifteen years with many children spending more than two years in care on a national level and over three years in Florida.⁴⁴ The term “foster care drift” was adopted to describe the experience for too many foster children—protracted

S. Rep. No. 104-117, at 3 (1995), *reprinted in* 1996 U.S.C.C.A.N. 3490, 3492 testimony of Professor Richard Wexler at Senate Committee hearing, “foster care is not a haven. Often it is not even safe. Most people assume that removing children from their parents means removing them from danger and placing them in safety. Often it is the other way around.”).

37. Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 107 (1999).

38. Levesque, *supra* note 2; Skoler, *supra* note 34.

39. Mandelbaum, *supra* note 26, at 199.

40. NATIONAL COALITION FOR CHILD PROTECTION REFORM [hereinafter NCCPR], *Foster Care vs. Family Preservation: The Track Record on Safety*, Issue Paper #1, (citing U.S. Dep’t of Health & Human Services, Administration on Children, Youth & Families, Child Maltreatment 1998: Reports from the States to the National Child Abuse and Neglect Data System, (Washington, D.C.: U.S. Gov’t Printing Office, Ch. 7, Sec. 4 (2000)).

41. *See generally*, Adam M. Tomison, *Child Maltreatment and Family Structure*, NAT’L CHILD. PROTECTION CLEARINGHOUSE (1996), available at <http://www.arfs.au/external/nch/discussings.html>.

42. Gendell, *supra* note 20; Levesque, *supra* note 2, at 14–15; *see also* Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

43. Gordon, *supra* note 42, at 643.

44. *Id.* at 648.

stays in foster care which frequently involve numerous placements.⁴⁵ The phenomenon is not new and has attenuated modern foster care systems since the late 1970s.⁴⁶ Multiple placements have become a reality for most children in foster care.⁴⁷ Research has firmly established that these placements have “a variety of negative consequences for children and adolescents.”⁴⁸

IV. FEDERAL INFLUENCE ON STATE FOSTER CARE SYSTEMS

Systemic deficiencies associated with the child welfare system have evaded governmental eradication efforts over past thirty years. The federal government entered the child protection movement with the promulgation of the Child Abuse Prevention Treatment Act of 1974 (“CAPTA”).⁴⁹ CAPTA was the first in a series of comprehensive federal legislation designed to combat child maltreatment and neglect.⁵⁰ Primarily a funding act, CAPTA was designed to provide support for and improve operating standards of local and state child protective services.⁵¹ Of major significance, the act required states to pass reporting laws for known cases of child abuse,⁵² provide for prompt investigation of child abuse complaints,⁵³ and also provide for the appointment

45. Madelyn Freundlich, *Expediting Termination of Parental Rights Procedures: Solving a Problem or Sewing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 97; (1999); see also Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 254–55 (1989–1990) (discussing the implications for leaving the term “reasonable efforts” for state interpretation under the Child Welfare Act); see also Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care: An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995) (comparing adoption rates in Michigan and New York after implementation of the Child Welfare Act).

46. Gordon, *supra* note 42, at 643; see also LELA B. SOSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA*, 82, 97–99 (1996) (citing studies from the late 70s and early 80s showing that seventy percent of children in foster care had been there for longer than one year, that thirty-four percent had been there for longer than four years or more, and that fifty-three percent experienced multiple placements).

47. Gordon, *supra* note 42, at 643.

48. *Id.* at 655 (quoting Robert George et al., *A Foster Care Research Agenda for the 90s*, 73 CHILD WELFARE 525, 537 (1994)).

49. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974). [hereinafter CAPTA].

50. *Id.*

51. MICHAEL J. DALE ET AL., *REPRESENTING THE CHILD CLIENT*, ¶ 4.04(4) (Matthew Bender 2000) (summarizing state reporting obligations in exchange for receipt of federal grants to combat child abuse); see also 42 U.S.C. §§ 5101–5106a (2000).

52. 42 U.S.C. § 5106a(b)(2)(A)(i) (2000).

53. § 5106a(b)(2)(A)(ii).

of a guardian ad litem to represent the best interest of child victims of abuse and neglect.⁵⁴

Based on child development theory, many policy makers of the 1970s became convinced that lengthy foster care placements resulted in significant harm to children.⁵⁵ Foster children were being harmed in many other ways. Foster care placements were often utilized as a substitute for providing much needed reunification services to families.⁵⁶ Children were not only remaining in foster care for extended periods of time, they were often experiencing multiple placements.⁵⁷ Financial incentives were wrongly placed on keeping children with special needs in foster care instead of promoting their placement in pre-adoptive homes⁵⁸ and reliable data was not being adequately collected on the number of children actually using foster care services⁵⁹—making it difficult, if not impossible, to evaluate program services.

The high cost of foster care maintenance and the increasing evidence that foster care was being misused⁶⁰ prompted the federal government to revisit child welfare through the passage of the Adoption Assistance and Child Welfare Act (“AACWA”) of 1980.⁶¹ The AACWA had three major goals: 1) to provide families with sufficient pre-placement, remedial, and support services to keep families together and prevent removal of the child; 2) to provide appropriate care and services to children in foster care; and 3) to reunify families where possible or expedite permanency by locating permanent adoptive homes for children that could not be reunited with their parents.⁶²

54. § 5106a(b)(2)(A)(ix).

55. David J. Herring, *The Adoption and Safe Families Act—Hope and its Subversion*, 34 FAM. L.Q. 329, 332 (2000); see also JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625 (1976).

56. Levesque, *supra* note 2, at 14.

57. *Id.*

58. *Id.*

59. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 290 (1991). The Commission found that children are removed from their families prematurely or unnecessarily because federal reimbursement provides a strong financial incentive to do so.

60. Levesque, *supra* note 2, at 14.

61. 42 U.S.C. § 620 (1994) Adoption Assistance Welfare Act of 1980, *repealed by* Pub. L. No. 103-432, 108 Stat. 4398, Oct. 31, 1994.

62. Gordon, *supra* note 42, at 638; Levesque, *supra* note 2, at 14–15.

Although the AACWA did not expressly address child safety,⁶³ it made considerable progress to ensure that states would move forward with a comprehensive approach to meet basic human needs of children placed in foster care⁶⁴ and required that states do a better job documenting their efforts.⁶⁵

States were able to demonstrate a procedural conformity with the AACWA but this superficial compliance subverted the substantive value of the act.⁶⁶ AACWA anticipated that states would report to Congress on compliance, but it was the duty of the states to police themselves.⁶⁷ This "called for [state] officials to make major, painful changes, and if they did not effect these changes, to report themselves so that the federal government could cut off their funding."⁶⁸ As states came to rely on federal funds, they reported compliance with the AACWA and funding for a failing system continued to flow.⁶⁹ Despite the high hopes of foster care reform, the AACWA failed to realize its objectives.⁷⁰

Due to the system of federal reimbursement for foster care services, the AACWA had the "unfortunate effect of contributing to the unprecedented rise in the number of children placed in foster care."⁷¹ The AACWA's financial incentive scheme provided for "partial reimbursement to state and local agencies for the cost of keeping children in foster homes."⁷² Conversely, it failed to provide reimbursement for other social services designed to rehabilitate the child/parent relationship within the home setting.⁷³ Other than the threat of lost funding, the AACWA did not allow for appropriate remedies

63. Herring, *supra* note 55, at 33 (describing how noncompliance with the dictates and intent of ASFA will minimize the overall impact of the act).

64. Levesque, *supra* note 2, at 14.

65. 42 U.S.C. § 675(1)(A), (B) (1992).

66. Pursuant to the AACWA, case planning, review hearings, and judicial scrutiny were all designed to give the Act meaning. The result was different. Child welfare agencies developed cookie-cutter forms for case plans, review hearings were cursory at best with the court spending less than ten minutes to review cases, and judicial scrutiny gave way to system pressures. Herring, *supra* note 55, at 335.

67. *Id.*

68. *Id.* at 336.

69. *Id.*

70. *Id.* (explaining the realities behind a flawed funding system for AACWA).

71. Levesque, *supra* note 2, at 19.

72. Stacy Robinson, Comment, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 398-99 (1993).

73. *Id.*

for enforcement.⁷⁴ Although the legislature's efforts to incorporate child development theories and permanency planning concepts into the AACWA were laudable, they simply had no chance for success of survival in the resource poor trenches of the child public welfare system.⁷⁵

In an effort to address many of the identified deficiencies in the nation's foster care system, former President Clinton signed the Adoption and Safe Families Act ("ASFA") into law on November 19, 1997.⁷⁶ The ASFA has two primary objectives: "to prevent children from being returned to unsafe homes and [to] diminish the "foster care drift" by finding safe, loving, and permanent homes for children who cannot be reunited with their families."⁷⁷ Again, foster care legislation clashes with systemic realities as the ASFA failed to address the most frequently identified problems which plague every foster care system: insufficient funding for services;⁷⁸ lack of training for social workers, supervisors, attorneys, and judges; overwhelming case-loads;⁷⁹ foster and adoptive parent recruitment;⁸⁰ and funding for post-adoption services.⁸¹ The ASFA's nonsensical financial system of reimbursement between federal and state government continues to reward states for leaving children in foster care, thus undermining state incentives.⁸² In the end, the legislative scheme of the ASFA is essentially the same as the AACWA—state court enforcement through the review of individual cases, combined with rather lax periodic file audits conducted by the federal Department of Health and Human Services.⁸³ Historically, the system of enforcement has produced unimpressive results.

74. Barbara L. Atwell, "A Lost Generation:" *The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593, 596 (1992); see also 42 U.S.C. § 671(b) (1994).

75. Herring, *supra* note 55, at 333.

76. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in various sections of Title 42 of the United States Code).

77. 126 CONG. REC. H2012, at 2017.

78. See generally Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1 (2001).

79. *Id.*

80. *Id.*

81. Gendell, *supra* note 20, at 31.

82. Gordon, *supra* note 42, at 639 (detailing the inconsistent logic behind the ASFA that would jeopardize state funding for services if in fact states were more effective in reducing foster care populations).

83. Herring, *supra* note 55, at 340.

V. DEFINING CHILD SEXUAL ABUSE

The term "child sexual abuse" can be employed to conceptualize a variety of sexually oriented behaviors involving a minor child. Stereotypical notions of child sexual abuse portray children being victimized exclusively at the hands of adult perpetrators.⁸⁴ A growing body of literature pertaining to child sexual abuse indicates that principal actors in many abusive incidents are sexually aggressive minor children with sexual behavior problems.⁸⁵ It is important to note that research of this subject is still in its infancy stages and must be considered preliminary.⁸⁶ However, the fact remains that we have only recently begun to conceptualize child sexual abuse as a phenomenon occurring within the context of child sexual behavioral problems.⁸⁷

Given this relatively new perspective, existing definitions of child sexual abuse need to be examined and retooled to fit our expanding knowledge and comprehension of the subject. The American Academy of Child and Adolescent Psychiatry defines child sexual abuse as "sexual behavior between a child and an adult or between two children when one of them is significantly older or uses coercion"⁸⁸ CAPTA defines sexual abuse as "the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct"⁸⁹ Another authority defines sexual abuse in terms of

84. *Id.*

85. See generally Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 286-87 (1998).

86. SUE RIGHTHARD & CARLANN WELCH, U.S. DEP'T OF JUSTICE, JUVENILES WHO HAVE SEXUALLY OFFENDED 19-21 (2001) (explaining that many of the conclusions reached are based upon clinical observations and empirical data, and that longitudinal studies must be conducted to confirm the findings).

87. See generally *id.* (detailing an up-to-date review of the literature and discussing the pragmatics of professional work with juveniles who have committed sex offenses).

88. See American Academy of Pediatrics, Committee on Child Abuse and Neglect, *Guidelines for Evaluation of Sexual Abuse of Children*, 87 PEDIATRICS 254 (1991). The perpetrator and the victim may be of the same sex or the opposite sex. *Id.* The sexual behaviors include touching breasts, buttocks, and genitals, whether the victim is dressed or undressed; exhibitionism; felatio; cunnilingus; and penetration of the vagina or anus with sexual organs or with objects. *Id.* It is important to consider developmental factors in assessing whether sexual behaviors between two children are abusive or normative.

89. CAPTA, *supra* note 49. The Act defines child maltreatment as "[t]he physical and mental injury, sexual abuse, neglected treatment or maltreatment of a child under age 18 by a person who is responsible for the child's welfare" Under this limited definition,

physical contact and noncontact.⁹⁰ Criminal statutes often characterize sexual abuse in terms of acts that are *per se* sexual abuse and others that qualify as abuse based on the actor's intent.⁹¹ Florida law has endeavored to define juvenile sexual abuse as "any sexual behavior which occurs without consent, without equality or as a result of coercion."⁹²

only a parent, legal guardian or caregiver could be a perpetrator of child abuse or neglect. *See also* Diana J. English, *The Extent and Consequences of Child Maltreatment*, in 8 *THE FUTURE OF CHILDREN 1, PROTECTING CHILDREN FROM ABUSE AND NEGLECT*, 39 (Richard E. Bechrman, M.D. ed., 1998).

90. David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, Vol. 4, No. 2, *THE FUTURE OF CHILDREN, SEXUAL ABUSE OF CHILDREN*, 31 (Richard E. Berchrman 1994).

91. ROBERT D. GOLDSTEIN, *CHILD ABUSE AND NEGLECT, CASES AND MATERIALS* 176 (West Group 1999).

Acts that are *per se* or presumed to be sexual include the (1) insertion of a penis into another's vagina, mouth or anus, or (2) the insertion of some other object (including oral contact) into a vagina or anus, other than a privileged insertion for medical or child care purposes (such as an enema) . . . Other acts that are sexual, by virtue of the actor's intent to satisfy his desires or arouse desire in another, include: fondling of private areas (through touching of skin or through clothing), including the genital or anal region, thighs, or breasts of the desired person (or inducing the desired person to do the same to the actor or another); other sexualized touching including frottage (rubbing of actor's genitals, often through clothing, against another); kissing or french kissing; nontouching acts such as voyeurism and exhibitionism (including masturbation in the presence of a child); explicitly sexualized speech.

Id.

92. Section 39.07(7) of the *Florida Statutes* provides:

Alleged juvenile sexual offender means (a) a child 12 years of age or younger who is alleged to have committed a violation of chapter 794, chapter 796, chapter 800, s. 827.071 or s. 847.0133; (b) [a] child who is alleged to have committed any violation of law or delinquent act involving juvenile sexual abuse. 'Juvenile sexual abuse' means any sexual behavior which occurs without consent, without equality, or as a result of coercion. For purposes of this paragraph, the following definitions apply: 1) 'Coercion' means the exploitation of authority or the use of bribes, threats of force, or intimidation to gain cooperation or compliance; 2) 'Equality' means two participants operating with the same level of power in a relationship, neither being controlled nor coerced by the other; 3) 'Consent' means an agreement, including all of the following: a. [u]nderstanding what is proposed based on age, maturity, developmental level, functioning, and experience; b. [k]nowledge of societal standards for what is being proposed; c. [a]wareness of potential consequences and alternatives; d. [a]ssumption that agreement or disagreement will be accepted equally; e. [v]oluntary decision; f. [m]ental competence.

Id.

As indicated, these definitions are clearly relevant in the context of adult sexual abuse of minor children. They incorporate concepts, such as knowledge, informed consent, intent, capacity, and purpose. However, they are less helpful in assisting with the identification, classification, and characterization of sexual conduct occurring between developmentally young children with limited cognitive abilities. Whether conduct involving a young sexually aggressive child with sexual behavioral problems may be equated to child sexual abuse is a difficult question of law and one not easily answerable by behavioral scientists.⁹³ Such incidents of sexual conduct involving similarly situated minor children blur the parameters of normative or acceptable behaviors on the continuum of child sexual development.⁹⁴ Therapists often differentiate deviant child sexual behaviors from exploratory child sexual play based on the dimension of power.⁹⁵ The disparity of power, control, and authority are often identified as factors consistent with child sexual abuse and not exploratory behavior.⁹⁶

Imprecise and inconsistent definitions of child sexual abuse make uniform reporting of these incidents difficult. It is suggested that a highly normed measure, such as the CSBI-3,⁹⁷ be employed to distinguish the extent to which children engage in developmentally expected and unexpected sexual behaviors.⁹⁸ A standardized inventory may be more accurate and consistent in detecting incidents of child sexual abuse.⁹⁹ The magnitude of child sexual abuse incidents must be recognized in order to fashion appropriate preventive measures.

93. Martin, *supra* note 85, at 292 (explaining the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") indicates clinical judgment must be used to take into account both the maturity of the victim and the age difference between the parties when assessing the appropriateness of sexualized contact between one adolescent and the other).

94. *Id.* at 290 (explaining that a concise and yet inclusive behavioral science definition of juvenile sex offending has proven to be elusive).

95. Ralph Underwager & Hollida Wakefield, *Antisexuality and Child Sexual Abuse*, available at www.tc.umn.edu/~under006/Library/Antisexuality.html (referencing Logg, C. *Trend of Younger Sexual Offenders on Increase*, BELLINGHAM HERALD, July 11, 1990, at A1).

96. Martin, *supra* note 85, at 291 n.104.

97. Friedrich, Child Sexual Behavior Inventory, *The Clinical Use of the Child Sexual Behavior Inventory: Frequently Asked Questions*. [hereinafter CSBI]. The APSAC Advisor, 8, 1–20, measures frequency that children six to twelve years of age have engaged in a variety of sexual behaviors over six month period as indicated by their parents.

98. William D. Pithers & Allison Gray, *The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention*, 4 PSYCH., PUB. POL'Y & L. 200, 205 (1998).

99. CSBI, *supra* note 97.

If prosecutors, mental health professionals, and society in general portray adults accused of child sexual abuse as abnormal and perverse monsters,¹⁰⁰ what label(s) shall we adopt for children whose sexual behavioral problems stem from their own past sexual victimization? Some suggest that criminalization of childhood sexual behavior promulgates terms such as “child perpetrator” and “very young sexual offender.”¹⁰¹ No one disputes that when a child has been sexually abused by the intentional act of a parent or through negligent supervision of the parent, the child has truly been victimized. But what happens if that child victim then sexually assaults another child? Does the original label of victim now change to that of perpetrator? If so, does this represent a fundamental shift in the paradigm of child sexual victimization?

VI. CHILD SEXUAL VICTIMIZATION IN FOSTER CARE SYSTEM

The highly publicized “Battered Child Syndrome”¹⁰² drew significant attention to the issue of child maltreatment in the late 60s and early 70s.¹⁰³ In addition to comprehensive child protection initiatives launched by the federal government, significant state resources have been devoted to the detection and prosecution of child abuse offences.¹⁰⁴ Incident rates of child sexual abuse appear to have increased over time although it is unclear if this increase is attributable to more stringent reporting requirements, data collection, or simply an increase in the actual number of incidents.¹⁰⁵ There has also been a significant increase in the number of prosecution-friendly statutes that have appeared on the child maltreatment landscape during the

100. Underwager, *supra* note 95. The authors take the position that our current sexual abuse system promotes an antisexual view of human sexuality. This view is seen in the negative depiction of sex in sexual prevention programs and the criminalization of child sexual behavior.

101. See GOLDSTEIN, *supra* note 91, at 196.

102. C.H. KEMP ET AL., *The Battered Child Syndrome*, 18 JAMA 1, 17–24 (1995).

103. Tomison, *supra* note 41.

104. Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for “Outrageous” Proposals?*, 19 L. & PSYCH. REV. 59, 60 (1995). There has been an explosive growth in the research and commentary on the plight of sexually abused children, which has resulted in vast legal reforms providing them with needed protection and treatment. These reforms have manifested through legislative and evidentiary considerations designed to enhance prosecution efforts. *Id.* at 60–79.

105. Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 475 (1998) (citing to results from studies which reflect a significant statistical increase in reports of child sexual abuse; it should also be noted that a system-wide failure to collect reliable data regarding incidents of child sexual abuse in foster care interfere with efforts to assess the scope of this problem).

past two decades.¹⁰⁶ In contrast, very little consideration has been given to the post-litigation life of child maltreatment victims in general, and specifically, child sexual abuse victims, placed in foster care systems ill-equipped to respond to their particularized needs.¹⁰⁷

Until recently, society has paid little attention to the issue of child sexual abuse as it pertains to incidents occurring exclusively between minor children.¹⁰⁸ It was not until the late 1980s that children with sexual behavior problems were even recognized as a clinical population having unique needs.¹⁰⁹ The fact that children and adolescents commit acts of sexual abuse is a relatively recent discovery.¹¹⁰ It is now estimated that nearly 40% of all child sexual abuse is performed by youth less than twenty years old, with six to twelve-year-old children being the source of thirteen to 18% of all substantiated incidents of child sexual maltreatment.¹¹¹

One study found the rate of "substantiated" cases of sexual abuse in foster care to be more than four times higher than the rate in the general population.¹¹² In group homes, the rate jumped to twenty-eight times higher than in the general population.¹¹³ In a study of 127 children with sexual behavior problems, 84% had been sexually abused,¹¹⁴ 48% had been physically abused, 33% had been emotionally abused, 18% had been neglected, and more than 56% of the children had experienced multiple forms of maltreatment.¹¹⁵

106. See generally JOHN E. B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES, Vol. 1, (2d ed. 1992) (containing a comprehensive treatise on significant cases and decisional law generated from criminal and civil litigation of child and abuse neglect).

107. *Id.*; see generally Levesque, *supra* note 104, at 61 (detailing the trend of criminalization and prosecution for sex crimes against children and the concomitant effect of diverting focus, attention, and financial resources). This fundamental shift in priorities has adversely affected the search for other models of child sexual maltreatment, prevention, and control. There have been few general and genuine policy reforms aimed at helping children deal with victimization. *Id.* at 60-79.

108. Sander N. Rothchild, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*, 4 J.L. & POL'Y 719, 720 n.7; see also KATHRYN CASEY, WHEN CHILDREN RAPE, LADIES HOME J., June 1995, at 112.

109. Pithers, *supra* note 98.

110. Tomison, *supra* note 41.

111. Pithers, *supra* note 98, at 200.

112. NCCPR *supra* note 40 (citing MARY I. BENEDICT & SUSAN ZURAVIN, FACTORS ASSOCIATED WITH CHILD MALTREATMENT BY FAMILY FOSTER CARE PROVIDERS, John Hopkins University School of Hygiene and Public Health, 28, 30 (1992)).

113. *Id.*

114. Pithers, *supra* note 98, at 208.

115. *Id.*

Sexual acting out by foster children poses serious problems for the foster care administrators, caseworkers, placement custodians, and other children in the home.¹¹⁶ Not only do children with sexual behavior problems present a threat of harm to themselves, they also present a threat of harm to others.¹¹⁷ The following factors may substantially impact the likelihood of child sexual victimization in foster care setting.

A. *Investigating Complaints of Child Sexual Abuse in the Foster Care System*

CAPTA required states to develop child protection policies and procedures to receive and investigate reports of child maltreatment and neglect. Although states have adopted investigative priorities, many jurisdictions failed to adopt any meaningful investigative response to allegations of child sexual abuse emanating from children placed in the state's own foster care system.¹¹⁸ Nationwide, the overall number of reports for child maltreatment has increased by 41% since 1988.¹¹⁹ The actual amount of abuse in foster care is likely to be far higher than reported figures indicate, as agencies have an inherent incentive not to investigate such reports.¹²⁰ For child welfare agencies to investigate their licensed foster care agents means they would be, in effect, investigating themselves.¹²¹ Given the agencies' lawful discretion to physically move children placed in their temporary legal and physical custody from one placement to another, many complaints of foster children

116. See DEPARTMENT OF HEALTH & REHAB. SERVS., OFFICE OF CHILDREN, YOUTH AND FAMILY SERVS., A STUDY OF SEXUAL ASSAULT AMONG FOSTER CARE CHILDREN IN FLORIDA, (1991) [hereinafter STUDY OF SEXUAL ASSAULT IN FLA.].

117. Pithers, *supra* note 98.

118. Grand Jury Report, *supra* note 3; Mushlin, *supra* note 35.

119. *Id.*

120. Mushlin, *supra* note 35 at 206 (indicating that rates of child abuse in foster care may be higher than anyone imagines). One study found that one foster care agency neglected to report 63% of suspected child maltreatment, although state law required such reports. *Id.* at 207 (citing D. Caplovitz & L. Genevie, *Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by the Division Of Family Services*, 83-84 (1982) (unpublished report)). Another study indicated that although seventy-five cases of abuse, neglect, or sexual abuse were reported from one area, "virtually no reports had been documented" by the official child abuse reporting system. *Id.* at 206-07 (citing Gil, *Institutional Abuse of Children in Out-of-Home Care*, 3 CHILD & YOUTH SERVS. 7, 8 (1981)).

121. Grand Jury Report, *supra* note 3 (stating that DCF officials would not report allegations to the abuse agency registry for investigation by the department and often failed to inform the court of allegations of abuse in foster care placements).

have escaped judicial scrutiny.¹²² In Florida this meant that DCF agents could change a child's placement when allegations of abuse arose instead of investigating the allegations or bringing the matter to the court's attention.¹²³

Child welfare officials appear to have been tacitly involved in what amounts to a "conspiracy of silence"¹²⁴ similar to that of public school officials who have failed or refused to address child sexual abuse in their districts.¹²⁵ This institutional failure encompasses mistakes made as result of negligent supervision,¹²⁶ while others are attributed to an intentional course of conduct to conceal the true dimensions of the problem.¹²⁷ On both accounts, DCF has demonstrated a tremendous capacity to tolerate child sexual abuse incidents in the state foster care population.

Agency discretion to selectively accept and investigate allegations of abuse has particularly harmed children in foster care.¹²⁸ Investigative policies that do not incorporate appropriate responses to allegations of child sexual abuse in foster care are irresponsible and perpetuate the problem.¹²⁹ Equally unacceptable are administrative policies that refer sexual abuse allegations of foster children to law enforcement officials as a singular response to the allegations.¹³⁰ This is especially true when vulnerable children remain in harmful placement regardless of prosecutorial merits of their allegations.

The investigative techniques employed by the agency can also compromise the integrity of sexual abuse allegations. Child sexual abuse encompasses complex familial and psychological dynamics that often require training and

122. See, e.g., FLA. STAT. § 39 (2000) (indicating that children placed in legal care and custody of the department are wards of the state, but DCF has an obligation to place those children). However, no state ordinance requires DCF to report to the court when foster care placements are made or changed, which seems to indicate that DCF has the authority to place children in care and monitor placements without court intervention.

123. The task of licensing is delegated to DCF, the child placing agency; licensing of DCF agents is under the exclusive control of DCF.

124. William W. Watkinson, Jr., *Shades of DeShaney: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1240 (1995) (noting that school officials operating under a "conspiracy of silence" within the institution attempt to ignore or conceal the problem of child sexual abuse in their institutions).

125. *Id.*

126. Grand Jury Report, *supra* note 3.

127. See *id.* at 15 (indicating that DCF may have intentionally concealed information from the court); see also Kestin, *infra* note 136.

128. Grand Jury Report, *supra* note 3, at 51. The report noted that the district needs to follow its legislative mandate—safety of the child is its overriding concern.

129. *Id.* at 16.

130. *Id.* at 11.

expertise to recognize.¹³¹ Although many jurisdictions rely on evaluations from a sexual abuse assessment center or a multidisciplinary team¹³² in cases of suspected sexual abuse, the child protective investigator must have the requisite skill to recognize the warning signs due to the secretive nature of the abuse. Investigating reports of abuse which occur in an institutional setting also require specialized training, as these allegations frequently involve children having multiple behavior problems that may interfere with their ability to communicate accurate information in a reliable fashion.¹³³ Foster parents, as well as other service contractors, may have financial, and potentially, penal interests that influence their decision to report incidents of abuse or otherwise cooperate with investigative efforts.¹³⁴

B. *Incomplete and Inappropriate Records*

Children in foster care present a challenging array of behavioral, psychological, educational, medical, and psychiatric problems.¹³⁵ The range of mental health needs for foster children is so varied, that multiple children placed in a single home can frustrate and exasperate even the best foster parents.¹³⁶ Although foster children suffer disproportionately from serious emotional, medical, and psychological disabilities, they generally receive woefully inadequate care and often no therapeutic intervention at all.¹³⁷ Accurate mental health records identifying children known to present a risk of

131. ANN M. HARALAMBIE, *CHILD SEXUAL ABUSE IN CIVIL CASES* 47 (ABA 1999).

132. DONALD C. BROSS ET AL., *FOUNDATIONS OF CHILD ADVOCACY* (1997). Multidisciplinary teams are designed to bring together experts from various disciplines to diagnose and treat child abuse out of recognition that abuse itself is a complex social problem that may have many underlying causation factors. *Id.*

133. Sally Kestin, *Volatile Environment Sometimes Leads to Abuse Investigations Lack Depth, Children's Input: Throwaway Kids*, SUN-SENTINEL (Broward), Nov. 11, 1999, at 6A.

134. Grand Jury Report, *supra* note 3. Civil Liability, criminal liability, licensing, and foster care placements are affected by the treatment the child receives. *Id.*; Mandelbaum, *supra* note 26, at 15.

135. Mandelbaum, *supra* note 26, at 17 (citing Robert Pear, *Many States Fail to Meet Mandates on Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at A1 ("91.5% of children were found to have at least one abnormality in at least one body system and more than half of the children's health problems warranted the need for referrals for medical services")).

136. Sally Kestin, *System Pulls Kids From Bad to Worse: Abuse Neglect, Apathy—The Failure of Foster Care*, SUN-SENTINEL (Ft. Lauderdale), Oct. 29, 1998, at 1A.

137. K. Edward Green, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 9 (citing Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse & Neglect*, HARV C.R.-C.L. REV. 199, 209 (1988)).

harm to themselves or others, especially from their own sexual behavioral problems, could serve as a catalyst for protecting the entire foster care population.¹³⁸ Formulating placement decisions with inaccurate information can be as disastrous as failing to communicate this critical background information to the foster parent.¹³⁹ With inadequate background information, recognizing foster children with sexual behavioral problems may be difficult as they engage in developmentally expected sexual exploration in addition to more unexpected and intrusive acts.¹⁴⁰

Detailed information on every child in the foster care system was a prerequisite for comprehensive case planning which was to serve as the cornerstone of AACWS.¹⁴¹ In support of this goal, state foster care agencies were required to develop comprehensive record keeping systems to track children entering foster care.¹⁴² Agencies were obliged to review the academic and health records of the child and to keep those records current to enhance the foster parent's ability to meet the child's needs.¹⁴³ Agencies found themselves overwhelmed with paperwork requirements.¹⁴⁴ Caseworkers, already overworked and underpaid, had to prioritize immediate case demands over book-keeping responsibilities.¹⁴⁵

These missing records would also enlighten and assist the court at judicial review hearings,¹⁴⁶ which are designed to ensure agency accountability and reunification efforts.¹⁴⁷ For many states, literal compliance with AACWS unfortunately denigrated into the perfunctory task of filling out cookie-cutter forms while paying only lip service to the spirit and intent of the act.¹⁴⁸ These

138. *Id.*

139. Kestin, *supra* note 139.

140. Pithers, *supra* note 98, at 204.

141. Atwell, *supra* note 74, at 620 (stating that the case plan must provide specific information and provide for ensuring every child in foster care receives "proper care" which is defined to include both the physical and emotional well-being of the child); *see also* Garrison, *supra* note 12.

142. Guggenheim, *supra* note 45. A federal law requiring better statewide record keeping for children in foster care makes it easier than ever before to learn a great deal about children that enter foster care. *Id.*

143. Atwell, *supra* note 74.

144. *Id.*

145. Gordon, *supra* note 42. The AACWS tripled the number of issues lawyers and judges must deal with in juvenile proceedings. For example, the expansion of these hearings requires social workers to document far more about children thereby devoting less time to other priorities. *Id.*

146. *See generally* 42 U.S.C. § 675(1)(B) (1992).

147. *Id.*

148. CAPTA, *supra* note 49; *see also* Herring, *supra* note 55, at 335.

standard forms and procedures did little to facilitate the conveyance of information to the court. Agencies come to enjoy what is essentially an exclusive license to control information disseminated to the court. This means critical information regarding foster care developments may bypass judicial scrutiny when the agency intentionally or negligently, failed to communicate that information to the court.¹⁴⁹

C. Caseload Responsibilities

Child protection workers carry caseloads often much higher than recommended, making the expectation of quality performance often unrealistic.¹⁵⁰ Caseloads have grown beyond the worker's ability to provide minimal care to their constituents.¹⁵¹ Although the National Child Welfare League recommends only fifteen cases per foster care worker,¹⁵² many systems are so overburdened that caseworkers are required to handle caseloads of forty or more cases.¹⁵³ The Supreme Court of Florida has consistently stated, "reasonable workloads are essential to the proper functioning of dependency courts in performing multiple important reviews and hearings required of them by law and necessary for the best interests of children."¹⁵⁴ However, caseworkers must often prepare time consuming reports documenting six months worth of case developments for each review hearing even though these proceedings are apportioned fifteen minutes or less.¹⁵⁵

Caseworkers have become easy targets for venting system frustrations and often recognize the indefensible position in which their agency has placed

149. Grand Jury Report, *supra* note 3, at 15.

150. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 119 (1997).

151. Levesque, *supra* note 2, at 10.

152. NCCPR, *supra* note 40; Mandelbaum, *supra* note 26.

153. Gordon, *supra* note 42, at 679 ("[s]ocial workers and their supervisors regularly handle more cases than recommended by licensing organizations: in some jurisdictions, more than four times more"); *see also* Gendell, *supra* note 20, at 34.

154. *M.W. v. Davis*, 756 So. 2d 90, 108 (Fla. 2000) (holding no due process violation existed where a child adjudicated dependent and placed in the legal custody of the state protection agency, was involuntarily hospitalized in a locked mental health facility for six weeks, without prior evidentiary hearing on placement). *Id.* at 109.

155. Gendell, *supra* note 20, at 34 (citing Melissa D. Protzek, *A Voice for the Children: Court Appointed Special Advocates are Trying to Make a Difference One Case at a Time in the Lives of Children in the Juvenile Justice System*, 22 PA. LAWYER 26, 26 (2000)). Juvenile court judges in urban areas have about fifteen minutes to decide the fate of abused and neglected children and often do so without being informed of all the facts. *Id.*

them.¹⁵⁶ They do not have sufficient time to work closely with individual families even though their cases obviously present difficult and complex issues that are not quickly ameliorated.¹⁵⁷ Agencies that do not or cannot attract qualified employees may simply shift the burden onto the current caseworkers. The resulting lack of staff and time causes some caseworkers to simply fabricate case details they have not otherwise been able to confirm.

Clearly, some problems facing the child welfare system are budgetary and financial in nature, while others stem from a lack of "credibility and accountability."¹⁵⁸ No child welfare agency should tolerate policies for caseworkers that intentionally provide erroneous information to the court, fabricate reasons for shoddy work, or create false documents instead of completing assignments.¹⁵⁹

D. *Therapeutic Indications*

By definition, children placed in foster care have already experienced some type of maltreatment or neglect by those charged with their care.¹⁶⁰ These children enter the system psychologically and emotionally vulnerable.¹⁶¹ It is estimated that approximately 30% of all children in foster care have severe emotional, behavioral, or developmental problems—physical health problems are also common.¹⁶² The prevalence of such disorders in this population complicates the task of identifying children that have undiagnosed sexual behavioral problems. Child victims of sexual abuse commonly experience a variety of negative impacts from the victimization, such as "delayed recall, negative self-image and body image, eating disorders, running away and delinquency, anxiety and depressive disorders, participation in high risk sexual behaviors, feelings of helplessness and self-blame, difficulty with relationship and with sexuality, and underdeveloped spirituality."¹⁶³ One authority on child sexual abuse suggests that only two symptoms are consistently found more frequently in sexually abused children than non-abused children: post-

156. Grand Jury Report, *supra* note 3.

157. Mushlin, *supra* note 35.

158. Grand Jury Report, *supra* note 3, at 10.

159. *Id.* at 50 (holding "[t]he Department must emphasize to its employees that classification of records or false reports to the courts is not only intolerable but illegal").

160. *Id.*

161. Green, *supra* note 137, at 5; *see also* Mushlin, *supra* note 35, at 204.

162. Green, *supra* note 137, at 5.

163. Loue, *supra* note 105, at 480–81.

traumatic stress disorder and developmentally unexpected sexual behaviors.¹⁶⁴ It is also suggested that the etiologically significant factor in the emergence of abusive sexuality is exposure to trauma, not a unique associate of sexual victimization.¹⁶⁵ This factor expands the potential threat of sexual abuse far beyond those children that may presumptively be suspected as having sexual behavioral problems due to a history of prior sexual victimization. Research data also convincingly establishes that deviant sexual interests can have an onset early in development, underscoring the need for early intervention.¹⁶⁶ Once children that have sexually offend, or are at risk of being sexually offending, have been identified, comprehensive assessment is required to facilitate treatment and intervention strategies.¹⁶⁷

Placement of children with extended family members often fails to provide the child with emotional and psychological support necessary to foster therapeutic intervention.¹⁶⁸ Research has demonstrated that support for the child is especially critical in facilitating symptomatic improvement in very young children, who are particularly dependent on parents for physical and emotional needs.¹⁶⁹ Not surprisingly, kinship placements often form the most reliable form of placement alternatives.¹⁷⁰ Although many mental health experts believe that removal of a sexually abused child from a nonoffending

164. Pithers, *supra* note 98, at 206.

165. *Id.*

166. *Id.* at 201. The study showed that more than half of adult offenders (53.6%) report becoming interested in at least one deviant sexual interest before age eighteen. *Id.*

167. RIGHTHARD, *supra* note 86, at 27. Due to the heterogeneous nature of juveniles that have offended, comprehensive assessment should include assessment of each juvenile's needs, such as psychological, social, cognitive, and medical, family relationships, risk factors, and risk management possibilities. *Id.*

168. Levesque, *supra* note 2, at 26.

169. Judith A. Cohen & Anthony P. Mannarino, *Factors that Mediate Treatment Outcome of Sexually Abused Preschool Children: Six- and 12-month Follow-up*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 44 (1998). Children living in short-term foster home placements were not included in this study which hypothesized that two particular factors: "parental emotional distress regarding the abuse and lack of parental support of the child, would predict poorer child outcomes at both follow-up points." *Id.* The findings demonstrate the importance of appropriate parental support on the short-term function of sexually abused children. *Id.* The study highlights the importance of parental reaction to the abuse and including parents in the treatment of young sexually abused children. In particular, the study reveals the importance of focusing on these issues during parental therapy. *Id.*; see also E. DEBLINGER ET AL., SEXUALLY ABUSED CHILDREN SUFFERING POSTTRAUMATIC STRESS SYMPTOMS: INITIAL TREATMENT OUTCOME FINDINGS; CHILD MALTREATMENT 1:310-321 (1996).

170. Edith Fein & Anthony N. Maluccio, *Permanency Planning: Another Remedy in Danger?*, 66 SOC. SERV. REV. 335, 336 (1992).

parent may be counter productive to the therapeutic interests of the child, safety concerns will prevail.¹⁷¹

E. *Inappropriate Placements*

Foster care placement decisions should be given the highest degree of care—since the state is substituting its decision for that of the parent.¹⁷² There is strong evidence to suggest that inappropriate foster care placements, which mimic the child's abusive home environment, only serve to further damage the child and increase the likelihood of serious emotional and psychological harm.¹⁷³ Children suffer additional victimization and often irreparable harm when child welfare agencies have failed to establish appropriate pre-placement criterion for foster care placements or otherwise fail to accurately evaluate the individual dynamics of each child's placement.¹⁷⁴ Placements in overcrowded and inadequate foster homes fail to provide for children's basic needs.¹⁷⁵ Beyond this, some governmental officials have consciously abdicated their obligation to provide remedial protection for foster children even where they have specific knowledge of threatened or actual harm to such children.¹⁷⁶

171. Cohen, *supra* note 169.

172. *T.M. v. Carson*, 93 F. Supp. 2d 1179, 1187 (D.C. Wyo. 2000). The professional judgement standard was appropriate to determine liability for placement decision of child welfare workers who placed children with sexually abusive foster parent. *Id.* at 1195.

173. Pithers, *supra* note 98, at 209.

174. *Carson*, 93 F. Supp. 2d at 1194.

175. Mandelbaum, *supra* note 26, at 175 (explaining that children in foster care fail to have their mental, emotional, and physical health needs met).

176. *See, e.g., LaShawn*, 762 F. Supp. 959, 996–97 (D.D.C. 1991). In a class action brought by children in foster care, the court held:

The facts in this case established beyond any doubt that defendants have failed to protect these plaintiffs from harm—whether physical, psychological, or emotional—by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things . . . [K]nowledge of these problems and refusal to take action confirm that the problems are not isolated, but amount to “a persistent pervasive practice . . . decisions made by officials within the DHS have not been the result of the exercise of professional judgement These failures are not the result of choosing among several professionally acceptable alternatives. The failures are the result of making no choices at all.

Id. at 995.

Foster children desperately need stability, security, and consistent nurturing.¹⁷⁷ Multiple placements cause emotional bonds to break as children learn to develop shallow roots in relationships with others, which may interfere with normal and healthy attachments.¹⁷⁸ “Imagine as an adult, you go through a courtship, a marriage and a divorce—now imagine you do that thirteen times in a year—that’s what is happening to these [foster] children.”¹⁷⁹ Placement options may be so limited for teenage children that foster care workers permit them to sleep in their own work offices or even motel rooms.¹⁸⁰ Overcrowded placement and the concomitant lack of privacy may lead to fewer inhibitions and increase the likelihood of sexual assault among the foster children.¹⁸¹ Placing vulnerable young children with older children that may have sexual behavioral problems while failing to provide necessary support and supervision can be a terribly unwise decision.¹⁸² There are countless examples where foster children have been abused by the very person sanctioned to

177. Robinson, *supra* note 72, at 409.

178. *Id.* (citing Kenneth Jost, Foster Care Crisis, CQ Researcher, 706–07 (1991)).

179. Sally Kestin, *Foster Care System Exposes Children to Abuse & Neglect*, SUN-SENTINEL (Ft. Lauderdale), Oct. 25, 1998, at 1A.

180. Shana Gruskin, *Agencies Look for a Place for Troubled Teens to Call Home*, SUN-SENTINEL (Ft. Lauderdale), Feb. 28, 2000, at 1A (detailing the shortage of foster homes for older teens and the unattractive placement options that face DCF).

181. Tomison, *supra* note 41 (citing David Finkelhor, *Child Sexual Abuse: New Theory and Research*, THE FREE PRESS, N.Y. (1984)).

Overcrowding was but one risk factor that may increase the risk of sexual offending based on Finkelhor’s four part model for on child victimization by an adult, not victimization by a child. Finkelhor suggest four essential factors must exist for CSA to occur: (1) A potential offender must have some motivation to sexually abuse a child. The potential offender must feel some form of emotional congruence with the child, sexual arousal with the child must be a potential source of gratification, and alternative sources of gratification must be unavailable or less satisfying; (2) Any internal inhibitions against acting on the motivation to engage in sexual assault must be overcome.; (3) Any external impediments to acting on the impulse to abuse must be overcome. Inadequate care or supervision by a parent or guardian can provide an opportunity for an offender to act; (4) Avoidance or resistance by the child must be overcome. This may involve enticing an emotionally deprived child into accepting inappropriate attention, or over coercion to achieve domination of the relatively powerless child.

Id.

182. Grand Jury Report, *supra* note 3; Kestin, *supra* note 136 (detailing how DCF placed an eight year old child in a foster home with eight or nine older children that had mental handicaps. The child was sexually assaulted as often as twice a day by teenagers in the home). The Court had previously found the placement inappropriate for this child and unsafe.

provide foster care placement.¹⁸³ Some suggest that privatized services or even institutional care would be a better solution.¹⁸⁴ No substantial body of research supports the conclusion that privatization of child welfare services will dramatically improve the delivery or quality of those services.¹⁸⁵ It has been suggested that private agencies, which work directly with families, are in a better position to inform courts of the needs and welfare of children. However, there is no data to suggest that they have been any more or less effective than the state agencies in protecting children in foster care.¹⁸⁶

Constitutional limitations imposed by the separation of powers doctrine,¹⁸⁷ prohibit courts from micromanaging child welfare agency affairs.¹⁸⁸ Courts may establish placement criterion for a specific child being placed in foster care but they are generally prohibited from selecting the actual placement,¹⁸⁹ which may effectively tie the court's hands in regards to its important placement decisions. The child welfare agency is charged with monitoring and supervising their licensed agents; others have little ability to police agency

183. See generally Taylor v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987); K.H. v. Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (girl sexually abused while in foster placement).

184. The Florida Legislature currently requires DCF to contract out all placement services to private providers. FLA. STAT. § 39.01 (2000).

185. See generally Margaret Gibleman, *Theory Practice and Experience in the Purchase of Services, in The Privatization for Human Services: Policy and Practice Issues*, Vol. II, 1-46 (1998) (explaining the nature of services being subcontracted, and noting that public administration or business management may be more relevant).

186. Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397 (1999).

187. See generally Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (discussing competing interests in custody disputes and how those interests are impacted by separation of powers issues).

188. *Id.*

189. K.A.B. v. Hyson, 483 So. 2d 898, 899 (Fla. 5th Dist. Ct. App. 1986). A court which adjudicates a child to be dependent and places the child with Department of HRS (now known as DCF) does not have authority to direct precisely where child is to be placed. *Id.* "It is crystal clear that it is within the discretion of the agency to decide where to keep a child who is in its custody." *Id.* It is not within the province of the court to manage the affairs of another branch of government. *Id.*; see also FLA. STAT. § 39.521(1)(b)(3) (2000), (providing that "[the court shall] [r]equire placement of the child either under the protective supervision of an authorized agent of the department in the home of a relative of the child or another adult approved by the court, or in the custody of the department").

practices.¹⁹⁰ Even when there is an objection to an agency placement decision, there may be little recourse until the child is harmed.¹⁹¹

F. *Delinquency*

Foster care youth are at greater risk than non-foster care youth for involvement in the juvenile justice system.¹⁹² One study of foster children placed in a group home found that twenty-seven of twenty-eight teenagers had been arrested at least once, and that almost half had been arrested as a result of an incident in placement.¹⁹³ When foster care children are charged with violations of a criminal statute, they tend to be incarcerated for longer periods of time and tend to receive stiffer punishments than their non-foster care counterparts.¹⁹⁴ Expenditures for treatment of children with sexual behavioral problems remain minuscule compared with funds dedicated to investigating, prosecuting, and incarcerating adult sex offenders.¹⁹⁵ Almost half of all child sexual abuse is committed by youth less than eighteen years old, yet our social, political, and legal focus remains incarceration.¹⁹⁶ Failure to promptly and effectively respond to children with sexual behavior problems only results in far greater costs of criminal prosecution and subsequent incarceration in either juvenile or adult facilities.¹⁹⁷

There are rising concerns that the affect of portraying adult sexual offenders as abnormal and perverse monsters¹⁹⁸ will adversely impact therapeutic interventions for children with sexual behavioral problems—many of whom were also previous sexual assault victims. Criminal justice

190. Lupu, *supra* note 187, at 1371 (explaining the paradox of power separation models in child protection legislation that adversely impact the protection goals).

191. Kestin, *supra* note 133 (reporting that an eight year old child was sexually molested in foster care over the judge's objection to DCF's placement decision).

192. Molly Armstrong, *The Importance of Bridging the Gap Between Child Welfare and Juvenile Justice for Arrested Foster Youth*, at 55 (PLI Crim. Order No.: 00-0016 (2000) (explaining the relationship between child maltreatment and disposition to the juvenile justice system)).

193. *Id.* (citing results of a study on foster children and the juvenile justice system conducted by the Vera Institute of Justice).

194. *Id.*

195. Pithers, *supra* note 98, at 201. *But see* Rothchild, *supra* note 108, at 736 (citing WILLIAM L. MARSHALL ET AL., *HANDBOOK OF SEXUAL ASSAULT* 6 (1990) (noting that some behavioral scientists consider juvenile sex offenders to be untreatable because extensive studies on adult sex offenders indicate a high rate of recidivism)).

196. Pithers, *supra* note 98, at 203.

197. *Id.*

198. Underwager, *supra* note 95.

intervention does not offer promising solutions to children with sexual behavior problems.

G. *The Child's Voice*

The child's voice frequently disappears into the abyss of the child welfare system once the child is placed in foster care. Pursuant to CAPTA, children are entitled to representation by a guardian ad litem ("GAL") when they are subject to child protection proceedings.¹⁹⁹ Congress subsequently amended the statute to expand child representation by permitting the court-appointed advocate to be an attorney.²⁰⁰ The child's advocate is charged with the responsibility, "to obtain first hand, a clear understanding of the situation and needs of the child and to make recommendation to the court concerning the best interests of the child."²⁰¹ It has long been recognized that independent representation for dependent children is necessary to protect their interests and rights. Every state has enacted legislation providing for child representation in protection proceedings, yet many states fail to meet this obligation.²⁰²

In practice, the child welfare agenda is often inconsistent with the child's best interest; this creates a conflict between agency responsibility and the child's rights.²⁰³ A primary manifestation of this conflict occurs when foster children are harmed in care, leaving the agency to defend failed placement and or case decisions for political, administrative, and economic reasons. Because children enjoy no federal constitutional rights to programs for protection from abuse and exploitation, and no rights to basic nutrition, income supports, shelter, and healthcare,²⁰⁴ they are at a distinct disadvantage in prevailing against agency bureaucracy. Inconsistent representation in child protection proceedings serves to reinforce the disenfranchisement of foster children, and limits the court's ability to accurately determine what is in a child's best

199. 42 U.S.C. § 5106a(b)(2)(A)(ix) (2000); Mangold, *supra* note 186, at 1441 (tracing the history of private service providers and their historical significance in protection proceedings).

200. 42 U.S.C. § 5106a(b)(2)(A)(ix).

201. *Id.* § 5106a(b)(2)(A)(ix)(I), (II).

202. Mandelbaum, *supra* note 26, at 22–23 (describing system shortcomings such as inadequate resources and support for representation).

203. *Id.*

204. Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999) (describing theories in support of and against the extension and/or creation of constitutional rights for children).

interest.²⁰⁵ Without the voice of a court appointed advocate that has knowledge of the child's past and present circumstances, history proves that the vast majority of all foster children will remain in status quo.²⁰⁶ An independent voice for the child can direct the court's attention to: inappropriate placements, therapy concerns, visitation rights, educational needs, and physical or sexual abuse allegations stemming from a placement—all of which impact the welfare of the child but may be filtered through agency discretion.²⁰⁷

H. *Training to Recognize Child Sexual Abuse in Foster Care*

Child sexual abuse research has consistently concluded that sexual abuse is extensively undisclosed and underreported.²⁰⁸ Children often fail to report incidents of sexual abuse because they fear disclosure will bring consequences even worse than being victimized again.²⁰⁹ The length, duration, and severity of the abuse can affect disclosure of the abuse.²¹⁰ Some child victims of sexual abuse may not exhibit the effects of the abuse until adolescence or adulthood, when they become involved in intimate relationships.²¹¹ Sexual abuse investigations often rely largely on history and nonexclusive behavioral or emotional symptoms due to the lack of physical injuries.²¹²

205. Mandelbaum, *supra* note 26, at 52 (arguing why the court cannot adequately protect the child's best interest in protection proceedings); *see also* Homer, *supra* note 34 (noting studies showing that judicial reviews and dispositional hearings are not conducted on time in many states and the thoroughness of these reviews are questionable).

206. *Id.*

207. *Id.*

208. Nancy Faulkner, *Pandora's Box: The Secrecy of Child Sexual Abuse Sexual Counseling Digest*, available at <http://www.prevent-abuse-now.com/pandora.htm>; *see also* C. Bagely, *Development of an Adolescent Stress Scale for Use of School Counselors*, SCH. PSYCH. INT'L 13, 31-49 (1992).

209. Faulkner, *supra* note 208; *see also* MYERS, *supra* note 107, at 304 (explaining that many victims of child sexual abuse never disclose their abuse, of those that do, delayed reporting is common).

210. MYERS, *supra* note 106, at 304.

211. English, *supra* note 89, at 48 (describing a variety of emotional, -psychological and behavioral responses observed in child victims of child sexual abuse). Symptomology of abuse may surface immediately for some children yet be delayed in others) (citing BRIERE & ELLIOT, IMMEDIATE AND LONG TERM IMPACTS OF CHILD SEXUAL ABUSE, THE FUTURE OF CHILDREN 2:54-69 (1994)).

212. HARALAMBIE, *supra* note 131 (describing a variety of acts that constitute sexual abuse, such as fondling, oral-genital contact, kissing, rubbing, and touching).

Florida's DCF has historically rejected agency responsibility to investigate child sexual abuse allegations from within the state foster care system.²¹³ Florida has not, until recently,²¹⁴ required reporting of a "child-on-child" sexual or physical abuse in foster care where the care provider was not at fault.²¹⁵ Foster care workers often lack training techniques utilized to detect sexual abuse.²¹⁶ With no reporting or investigative obligations, there would be no need to train caseworkers on appropriate protocols to investigate these incidents.

A significant percentage of the foster care population displays symptomatic behaviors resulting from various forms of abuse and neglect.²¹⁷ Without knowing the extent of abuse or neglect attributed to each child in care, it is difficult to predict or detect children that may have sexual behavioral problems.²¹⁸ Child sexual offenders constitute a markedly heterogeneous group.²¹⁹ Between 1980 and 1995 juvenile arrest rates for children less than twelve years old escalated 125% for sex offenses (excluding rape) and 190% for forcible rape, while there was only a 24% increase for general crimes during this same period of time.²²⁰ This increase underscores the need to provide foster care workers with appropriate training.

Given the lack of systemic protections, foster children appear to be particularly vulnerable to sexual abuse.²²¹ In the absence of a permanent kinship for foster children, the traditional incest taboo does not operate.²²² Children residing with non-genetic parents appear to be at greater risk of sexual exploitation.²²³ Caseworkers must be better trained to recognize warn-

213. Grand Jury Report, *supra* note 3; *see also* NCCPR, *supra* note 40.

214. FLA. STAT. § 39.307 (2000).

215. Howard M. Talenfeld, Prepared Statement, at 2 (Dec. 9, 1998) (on file with author); *see also* Dep't of Health & Rehab. Servs. Office of Children Youth and Family Servs., *A Study of Sexual Assault Among Foster Children in Florida* (Feb. 1991); D.A.O. v. Dep't of Health & Rehab. Servs., 561 So. 2d 380 (Fla. 1st Dist. Ct. App. 1990) (holding that sexual intercourse between a thirteen-year-old boy and his five-year-old niece did not constitute child abuse pursuant to section 415.503(12) of the *Florida Statutes*).

216. *Foster Care vs. Family Preservation: The Track Record on Safety*, available at <http://www.nccpr.org/newissues/index.html>.

217. *See generally* English, *supra* note 89, at 48.

218. *Id.*

219. Tomison, *supra* note 41.

220. Pithers, *supra* note 98, at 206.

221. Mushlin, *supra* note 35, at 204.

222. *Id.* at 205.

223. *Small Children by Stepfathers v. Genetic Fathers*, 15 *ETHOLOGY & SOCIOBIOLOGY* 207-17 (1994).

ing signs and employ specific strategies to ensure the safety of all children in foster care from the known danger of child sexual abuse.

VII. FLORIDA'S SYSTEMATIC FAILURE: *WARD V. KEARNEY*

Considering the abundance of dreadful foster care systems across the nation, there is probably no place where it is worse to be a foster child than in Florida.²²⁴ The Secretary of Florida's Department of Children and Families Kathleen Kearney,²²⁵ has likened the problems of her agency to those of the Titanic.²²⁶ In 1998, a grand jury convened in Broward County to consider evidence regarding Florida's foster care system and specifically the system within Broward County.²²⁷ The report found serious deficiencies with DCF's handling of services to abused and neglected children and found particular danger associated with the foster care system.²²⁸ "[T]he problems facing the Department are extensive and so systemic that the children in the custody of or under the protection of the Department are in peril."²²⁹ The report also indicated that Broward County's foster care system was on the brink of catastrophe and would collapse if serious intervention was not initiated.²³⁰ One child welfare expert described the situation in Broward County as "dangerously out of control. . . . These are the worst conditions I am aware of in a child welfare system"²³¹

In addition to physical, emotional, and mental abuse, foster children in Broward County also suffered sexual victimization: an eight-year-old child

224. *National Coalition for Child Protection Reform, Shadow on the Sunshine State*, available at <http://www.nccpr.org>. [hereinafter *Sunshine State Report*].

225. Kathleen Kearney was appointed as the Secretary of the Department of Children and Families by Governor Jeb Bush. Prior to her appointment as Secretary, Kathleen Kearney was a Broward County Circuit Court Judge in the Seventeen Judicial Circuit of Florida. Judge Kearney spent approximately ten years in the state's juvenile dependency division immediately prior to her appointment as Secretary. Judge Kearney was a vocal critic of Florida's Department of Children Services. She remains a staunch child advocate.

226. Douglas C. Lyons, *New Track Needed for this Swamped Boat*, *SUN-SENTINEL* (Ft. Lauderdale), Nov. 6, 1999, at 15A.

227. Grand Jury Report, *supra* note 3, at 1.

228. *Id.*

229. *Id.*

230. Grand Jury Report, *supra* note 3, at 48 (finding "[t]here is agreement from Dependency Court Judges, District employees and other persons familiar with the child welfare system that the problems facing the Department and District Ten are so extensive and so pervasive that they threaten to collapse the entire system and that serious intervention is imperative."). *Id.*

231. *Sunshine State Report*, *supra* note 224.

forced to commit sex acts in foster placement;²³² an eleven-year-old girl lured away by another foster child and then gang-raped by several men;²³³ a sexually aggressive teenager placed in a foster home with three younger children—subsequently charged with sexually abusing one of the younger children, a four-year-old girl;²³⁴ foster parents gave a child a whistle to blow if older children in the foster home tried to sexually molest him.²³⁵ Additionally, a court-appointed lawyer swore that he was made personally aware of fifty instances of “child-on-child sexual abuse” involving more than 100 foster children in Broward County alone.²³⁶ During this same period of time, DCF official records indicate only seven complaints because the child abuse registry would not accept reports of such sexual abuse.²³⁷ Prior to October 1, 1998, Broward DCF did not investigate sexual abuse allegations the department considered to be crimes committed by children upon children in foster care. Those complaints were dubbed “child-on-child” and were regarded by the agency as exclusively within the jurisdiction of the police.²³⁸

A class action lawsuit was filed in October 1998, on behalf of children who had been sexually molested and severely abused while in foster care.²³⁹ The evidence in that case demonstrated that DCF caseworkers repeatedly left children in dangerous homes, falsified department records, and mislead judges.²⁴⁰ Broward caseworkers were often responsible for fifty to seventy

232. Sally Kestin, *Caseworker Has “Lied to the Court;” Sex Abuse prompts Judge to Order Contempt Inquiry*, SUN-SENTINEL (Ft. Lauderdale), Oct. 24, 1998, at 1A. The judge ordered the State Attorney to initiate proceedings that could result in criminal contempt for lying to the court. The case worker that placed the teen in the home then pleaded with the family not to tell the judge.

233. Talenfeld, *supra* note 215.

234. Kestin, *supra* note 232.

235. Grand Jury Report, *supra* note 3, at 22.

236. Affidavit of David S. Bazerman, Esq., *Ward v. Kearney*, No. 98-7137, at 4 (S.D. Fla. Dec. 16, 1998).

237. NCCPR, *supra* note 40.

238. Grand Jury Report, *supra* note 3, at 11.

239. Suit was filed by the Youth Law Center, a nonprofit child advocacy group based in San Francisco, California. Professor Michael Dale and Howard Talenfeld were the lead attorneys representing the plaintiffs. Professor Michael Dale is a tenured professor of law at Nova Southeastern University, Shepard Broad Law Center, in Fort Lauderdale, Florida. Attorney Talenfeld is a partner in the law firm of Coladny, Fass and Talenfeld.

240. Compl. at 1, *Ward v. Feaver* (S.D. Fla. 1998) (No. 98-7137) [hereinafter *Ward Complaint*]; see also Grand Jury Report, *supra* note 3; see generally Sally Kestin, *Children’s Safety Net Collapsing; Grand Jury Finds Cash-Strapped System Fails Kids Again and Again*, SUN-SENTINEL (Ft. Lauderdale), Nov. 11, 1998, at 1A.

cases each, over four times the recommended caseload.²⁴¹ It also became apparent that, “[a]ccountability, integrity and efficiency” were so lacking from DCF foster care operations that child safety devolved into a secondary issue.²⁴² During a six-month period of time immediately prior to the settlement announced in *Ward v. Kearney*,²⁴³ more than thirty foster children had been sexually assaulted by other foster children.²⁴⁴ DCF could not account for more than eighty children who either ran away from foster care or were simply missing—that number was seventy-seven during 1999.²⁴⁵

Florida has a long track record of failing to provide adequate services to children in state care.²⁴⁶ While the safety and quality of Florida’s foster care system continued to decline during the 1990s,²⁴⁷ other states were developing comprehensive plans to revamp their child protection proceedings and foster care services.²⁴⁸ Although Florida was also working on its own foster care

241. Ward Complaint, *supra* note 240.

242. Dep’t of Children & Families, Inspector General Report No. 99-0053 (2000); *see also* Susan Gruskin, *Report Blasts DCF Workers Staff Ignored Court Order to Interview Kids—Children Placed in Dangerous Home*, SUN-SENTINEL (Ft. Lauderdale), Feb. 18, 2000, at 3B.

243. *Id.*

244. Settlement was announced indicating that the case would be resolved by consent decree.

245. Shana Gruskin, *Broward Foster Care Troubles Settled? Agency Lawsuit May Be Put to Rest Today*, SUN-SENTINEL (Ft. Lauderdale), Feb. 15, 2000, at 1A.

246. Grand Jury Report, *supra* note 3, at 55.

The administration is unfortunately reflective of the nearly complete indifference with which child welfare is regarded by the general public as well as our elected leaders. It is an outrage that for at least 17 years the needs of our children, which are so desperate and so obvious, have been largely ignored. *Id.*; *see also* Sunshine State Report, *supra* note 224. “The problems [that plague DCF] are the result of poor policies, poor administration and what amounts to a form of government-sanctioned child neglect in Florida: the repeated failure of a succession of governors and legislatures to adequately fund DCF or its predecessor, the Department of Health and Rehabilitative Services.” *Id.*

247. *See generally* Grand Jury Report, *supra* note 3.

248. Aletha R. Stewart Jones & Kathleen R. Brault, *Improving Foster Care in Maryland*, 33 MD. B.J. 52 (2000). In 1993, Congress appropriated \$35 million dollars over a four year period for states to explore and develop more efficient handling of foster care cases by the courts. *Id.* Jones and Brault provide extensive information compiled from Maryland’s Foster Care Court Improvement Project. A three-part approach was adopted to improve juvenile court handling of foster care cases. “[F]irst, a comprehensive assessment of the rules, standards, and criteria imposed under state law effecting abused and neglected children; second, the development of recommendations for implementing change based upon the assessment; third, the implementation of recommended procedures and practices to improve the performance of juvenile court system.” *Id.* at 53.

court improvement plan ("DCIP"),²⁴⁹ many critics continued to point the blame directly at the Florida Legislature for woefully under-funding the child welfare system.

As early as February 1991, Florida Legislature directed Florida DCF officials to investigate child sexual victimization in the state's foster care system.²⁵⁰ The results were published in a study which indicated that approximately nine and a half percent of the foster care population were "of concern,"²⁵¹ for exhibiting sexual behaviors.²⁵² The actual number of delinquency referrals represented only twenty-five percent of the actual number of sexual assaults perpetrated by children in foster care; when all child welfare programs were considered, the number of delinquency referrals for sexual battery almost doubled.²⁵³ Further, approximately ninety-eight percent of foster care counselors indicated that specialized placements for children that had

[The approach yielded] thirty-seven recommendations to improve the performance of the juvenile court in [child-in-need-of assistance cases], [termination of parental rights], and adoption cases [and can be] categorized as follows: 1) uniformity of terminology and reconstructing of information and data collection procedures; 2) training for members of the judiciary assigned to handle [child-in-need-of-assistance] and related cases; 3) statutory revisions; and, 4) standards for counsel representing parties in a child-in-need-of services proceeding.

Id.

249. This plan is called the Dependency Court Improvement Project.

250. The Florida Legislature ordered DCF (then recognized as HRS) to investigate child-on-child sexual abuse, however, the concept of child sexual victimization was not used by DCF in the report.

251. Jones, *supra* note 248, at 53. No definition of the terminology "of concern" was utilized in that report to explain the concept. However, it seems clear from a review of the report that the agency had sufficient notice that certain children did in fact display sexualized behaviors of sufficient nature to come to the attention of agency operatives.

252. See DEP'T OF HEALTH & REHAB. SERVS. OFFICE OF CHILDREN, YOUTH AND FAMILY SERVS., *A Study of Sexual Assault Among Foster Care Children in Florida* (Feb. 1991) [hereinafter Dep't of HRS Study]. The report indicates the following: approximately 1168 children in foster care had engaged in sexual behavior that was of concern to the foster care counselor; foster care counselors identified 200 children who had sexually assaulted another child within the previous 12 months; 147 placement disruptions occurred as a result of foster children sexually assaulting foster children; serious deficits in service provisions to sexual offenders and victims exist; training currently available to foster care staff and foster parents does not adequately address this population. *Id.* at 1. Notwithstanding the inability of the department to adequately answer questions regarding the scope and severity of the problem, the department described the problem as "a small number of cases of sexual assault among foster children." *Id.*

253. *Id.* at 7.

committed sexual offenses were not available in their district.²⁵⁴ DCF interpreted data as an indication that child-on-child²⁵⁵ sexual abuse only represented “a small number of cases.”²⁵⁶

In 1995, a report prepared by DCF indicated that Broward County had the highest population of foster children known to have been sexually abused—41%.²⁵⁷ At the same time, it was known that 15% of this population consisted of children that had reported involvement in an incident of sexual assault on another child.²⁵⁸ The high rate of sexual abuse reported in foster care, 67% greater than the state sample population, was consistent with the high rate of children known to be sexually abused in foster homes that were determined unsafe.²⁵⁹ The Broward County rate of “unsafe” foster homes was 67% greater than the sample group.²⁶⁰

There remains a critical lack of foster care homes in Broward County.²⁶¹ In 1986 the situation was described by a previous grand jury as “desperate,” and if anything, it has only become worse.²⁶² Other counties in Florida have also experienced a dramatic shortage of foster home placements as the number of children coming into care continues to surpass available resources.²⁶³

In June 2000, a statewide class action lawsuit was filed on behalf of foster children alleging they had suffered sexual, physical, and emotional abuse in addition to languishing for years in the states foster care system.²⁶⁴ After a four-week investigation of the allegations, the court appointed advocate²⁶⁵ filed

254. *Id.* at 9.

255. *See* Dep’t of HRS Study, *supra* note 252. “Child-on-child sexual abuse” was not defined in the 1991 report but it apparently references incidents or behaviors that involve more than one child. *See id.* at 1.

256. *Id.*

257. RESEARCH STUDY, DIST. TEN, BROWARD CITY, 177 CHILDREN AND FAMILIES RECEIVING TARGETED CASE MANAGEMENT SERVICES (Oct. 11, 1995) [hereinafter District Ten Research Study] (noting that “areas of Broward County scored significantly higher than the entire group”). *Id.* ¶ 6.

258. *Id.* ¶ 4.

259. *Id.*

260. *Id.* ¶ 3.

261. Grand Jury Report, *supra* note 3, at 17.

262. *Id.*

263. Mike Schneider, *Agency Issues Rare Plea for More Foster Parents*, SUN-SENTINEL (Ft. Lauderdale), June 3, 1999, at 6B.

264. Preliminary Report of Guardian Ad Litem, *Foster Children v. Bush*, No. 00-2116 (S.D. Fla. Dec. 15, 2000).

265. Douglas Halsey, an attorney licensed to practice law in Florida, is an environmental attorney, with the law firm of White & Case, LLP in Miami. He is also a longtime child advocate and was appointed by U.S. District Court Judge Federico Moreno to act as a

a preliminary report with the court which stated, "Florida's foster care system, which is supposed to protect children, harms, often grievously, many of the children the state takes into custody."²⁶⁶

Statewide, child welfare services appear to be deteriorating. Recent DCF records indicate that the number of children abused in foster care have more than doubled, as children in foster care continue to be abused at alarming rates.²⁶⁷ This bad news was delivered almost two years after lawmakers in Florida doubled the DCF child protection budget.²⁶⁸

VIII. JUDICIAL INTERVENTION

Children in foster care have primarily relied upon the Due Process Clause of the Fourteenth Amendment or other federal statutes as a basis for asserting protection claims in federal court.²⁶⁹ Those cases have sought monetary damages on behalf of individual children and frequently seek immediate injunctive relief from placement conditions on behalf of all children in state care.²⁷⁰ The litigation success of foster children has largely been dictated by their placement status²⁷¹ or the identifiable harm suffered,²⁷² and the scope of the duty that is imposed upon states by federal legislation.²⁷³ Mere negligence has been insufficient to establish liability for constitutional tort claims.²⁷⁴ However, a cause of action will lie where officials are deliberately indifferent to injuries

guardian ad litem or independent court representative for the twenty-two children plaintiffs suing DCF for harm suffered while in the state foster care system. See also Shana Gruskin, *Advocate Boosts Foster Care Suit Judge to Hear Plea for Class Action Status, Which Would Encompass State*, SUN-SENTINEL (Ft. Lauderdale), Jan. 24, 2001, at 1B.

266. See *id.*

267. Miller, *supra* note 1.

268. Shana Gruskin, *Panel Hears DCF Chief Defend Her Agency*, SUN-SENTINEL (Ft. Lauderdale), March 7, 2001, at 5B.

269. Michele Miller, Note, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, 11 HASTINGS WOMEN'S L.J. 243, 243 (2000); see also SUSAN GLUCK MEZEY, CHILDREN IN COURT: PUBLIC POLICYMAKING AND FEDERAL COURT DECISIONS 109-110 (1996); Homer, *supra* note 33, at 203.

270. See Homer, *supra* note 33, at 217-27; see also Ward Complaint, *supra* note 240.

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

272. DALE ET AL., *supra* note 52, ¶ 2.03[2][a]. A special relationship is created when the state takes the affirmative act of placing a child in foster care and so restrains the child's liberty to render the child dependent upon the state to provide for the child's basic needs. By virtue of this special relationship, the state has an affirmative duty to provide the child with protection. *Id.*

273. *Suter v. Artist*, 503 U.S. 347 (1992).

274. Watkinson, *supra* note 124, at 1245.

children suffer in care when they know of the abuse and fail to take action to address the problem.²⁷⁵

Placement status has been a critical factor in determining state obligations to abused and neglected children.²⁷⁶ In *DeShaney v. Winnebago County Department of Social Services*,²⁷⁷ the Supreme Court adopted a bright line test to determine liability based upon custodial distinctions and the corresponding state obligations to children in state custody.²⁷⁸ The Court held that the Winnebago County Department of Social Services did not have a constitutional obligation under the Due Process Clause to protect Joshua DeShaney, from the abuse of his father²⁷⁹ where the state did not create the danger but was otherwise aware of it.²⁸⁰ The Court opined “[i]t is the state’s affirmative act of restraining the individual’s freedom to act on his own behalf . . . which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”²⁸¹ By declining to protect abused children not in “custody,” the Court departed from its previous due process methodology and treatment of special relationships.²⁸² However, the Court did not resolve the question of liability for harm suffered by children in foster care.²⁸³

275. *Id.* at 1246.

276. *See generally* DALE ET AL., *supra* note 51, ¶ 2.03[2][a].

277. 489 U.S. 189 (1989).

278. *Id.* at 200.

279. *Id.* at 195. The *DeShaney* Court interpreted the Constitution as a means to protect the people from the state, not to ensure that the state protect the people from each other. The Court held that “[n]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion of private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guaranty of certain minimal levels of safety and security.” *Id.*

280. *Id.* at 203.

281. *DeShaney*, 489 U.S. at 200. The dissenting opinion relies on *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Estelle v. Gamble*, 429 U.S. 97 (1976), to stand for the proposition of state created danger, when, for example, the state cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction. *See generally*, Robert Oren Eades, Note, *Snake Pits, Lion’s Dens and Section 1983: When Does Inaction Equal Action?—DeShaney v. Winnebago County Department of Social Services*, 24 WAKE FOREST L. REV. 781, 794–821 (1989) (discussing special relationship doctrine and applying the result in *DeShaney*).

282. Laura Oren, *The State’s Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 664 (1990). Professor Oren criticizes the Court’s due process analysis as applied to the facts in *DeShaney* and details the Court’s development of the implications for a constitutional right to protection based on a custodial or special relationship flowing from a statutory scheme based on: *Estelle v. Gamble*, 429 U.S. 97 (1976); *Martinez v. California*, 444 U.S. 277 (1980); *Youngberg v. Romeo*, 457 U.S. 307

Under limited circumstances, the state may have an affirmative obligation to protect an individual from harm.²⁸⁴ When a "special relationship"²⁸⁵ exists between the state agency and the individual, the state has an affirmative duty to protect that individual.²⁸⁶ A "special relationship" is frequently limited to situations where the state has taken physical custody of the person²⁸⁷ by the affirmative exercise of state power to so restrain an individual's liberty that it

(1982). In *Estelle*, the Court held that a state's failure to act when prison officials were consciously indifferent to an inmate's serious medical needs could violate the inmate's Eighth Amendment right to be free of cruel and unusual punishment. *Estelle*, 429 U.S. at 97. Inmates deprived of their liberty also lost their ability to care for themselves and must rely on prison authorities who have an obligation to care for them. *Id.* at 104-105. In *Martinez*, the Court held parole board officials were not liable when a parolee tortured and killed a fifteen year old victim even after it was recommended the parolee not be released from imprisonment. *Martinez*, 444 U.S. at 284-85. The Court held the Fourteenth Amendment only protected the victim from deprivation by the state and not a private actor. *Id.* The Court when on to suggest, in dictum that, the holding was based on the facts presented as the victimization was too remote a consequence to trigger civil rights liability. *Id.* In *Youngberg*, the Court held that a mentally retarded person involuntarily committed to state confinement had a constitutional right (rooted in the Fourteenth Amendment) to be free from harm inflicted by himself or from others. *Youngberg*, 457 U.S. at 324. Liability for a civil rights violation by the state could follow when decisions for the inmates care are "a substantial departure from accepted professional judgement, practice, or standards" as to demonstrate that the person responsible did not actually base the decision on such a judgement. *Id.* at 323.

283. *DeShaney*, 489 U.S. at 201 n.9. The court noted that:

Had the State . . . 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 children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.

Id.

284. *Id.* at 198.

285. Special relationships are created when the state is aware of a danger to a victim and indicates a willingness to protect that victim. Special relationships are commonly found where the state has created threat of harm to an individual through intervention of a nongovernmental actor. The court must find a "special relationship" in this situation in order to sustain a section 1983 action, for there is, in general, no constitutional duty imposed on state officials to protect members of the public at large from crime. *Wright v. City of Ozark*, 715 F.2d 1513, 1515 (11th Cir. 1983) (holding that "the due process clause . . . does not protect a member of the public at large . . . , at least in the absence of a special relationship between the victim and the criminal or between the victim and the state"); see also *Martinez*, 444 U.S. at 284-85.

286. *DeShaney*, 489 U.S. at 199-200.

287. *Id.* at 199.

renders him unable to care for himself.²⁸⁸ “The affirmative duty to protect arises not from the state’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”²⁸⁹

Along the same lines, when a child is placed in foster care,²⁹⁰ a special relationship between the state and the child arises²⁹¹ as state power has removed the child from the child’s normal source of protection thereby creating the affirmative duty of care.²⁹² “A child generally depends on his parents to guard against the dangers of his surroundings By removing the child from his home, even when the child’s best interest lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma.”²⁹³ When a child is placed in foster care, the child becomes dependent upon the state, through the foster family, to meet the child’s basic needs.²⁹⁴ Placement in foster care does in fact implicate state custody for the purpose of due process rights and protections.²⁹⁵ Accordingly, children in foster care that have suffered sexual victimization in violation of their civil rights may assert a viable cause of action.²⁹⁶

288. *Id.* at 200.

289. *Id.*

290. *Id.* at 199; *see, e.g., Youngberg*, 457 U.S. at 324 (explaining that involuntarily committed mental patients have constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement, and freedom from unreasonable bodily restraints and minimally adequate services); *Estelle*, 429 U.S. at 97 (explaining that incarcerated prisoners must be protected, and that deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain prohibited by the Eight Amendment).

291. *Doe v. Taylor*, 975 F.2d 137, 146 (5th Cir. 1992).

292. *Id.*

293. *Id.*

294. *See generally D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992).

295. Beth A. Diebel, *Mark G. V. Sabol: Substantive Due Process Rights, A Possibility for Foster Care Children in New York*, 64 ALB. L. REV. 823, 837 (2000) (explaining that litigation is often used for claimed violations of substantive due process rights in child welfare cases); *see also* Brendan P. Kearse, *Abused Again: Competing Constitutional Standards for the State’s Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 391 (1996).

296. A sexual assault can be a constitutional injury described as a violation of the substantive due process right to bodily integrity or privacy, and courts of appeal have recognized that the right may be violated by sexual fondling and touching or other egregious sexual contact. *See Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997); *see also Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (recognizing that a student was deprived of liberty interest under the substantive due process when she was sexually molested by a teacher and that she had a right to be free from sexual abuse and violations of bodily

Foster children have the right to sue for constitutional violations that occur when they are removed from their parents' care and placed by the state in an alternative custodial placement.²⁹⁷ Those claims are commonly asserted under section 1983 against agencies or state welfare officials acting under color of state law where the plaintiff is deprived "of any rights, privileges, or immunities secured by the constitution and law" of the United States.²⁹⁸ Section 1983 claims may be asserted for rights created by the Constitution or federal statutes unless the statute does not create enforceable rights or privileges within the meaning of section 1983, or the statute itself forecloses enforcement.²⁹⁹ There is no constitutional right of governmental protection when a private citizen intrudes upon the liberty of another citizen, therefore, public officials cannot be held liable under section 1983³⁰⁰ for their inactions when failing to protect children, absent a special relationship or state created danger exception.³⁰¹ The Due Process Clause was designed as a limitation on the state's power to act, not a guarantee of safety.³⁰²

Foster care has been described as an entitlement program, as such, the Supreme Court foreclosed a right of private of enforcement under the AACWA.³⁰³ The Court ruled in *Suter v. Artist*,³⁰⁴ that the reasonable efforts clause of the AACWA neither created rights for children to enforce nor created an implied private right of action.³⁰⁵ Absent a private right of enforcement, the

integrity); see *Harris v. City of Pagedale*, 821 F.2d 499, 508 (8th Cir. 1987); *Sisters Awarded Millions Foster Care System Contributed to their Repeated Abuse, Jury Concludes*, SUN-SENTINEL (Ft. Lauderdale), Oct. 24, 1999, at 1B (discussing a recent 4.4 billion dollar Florida jury award to two sisters for injuries they received while in foster care for repeated incidents of rape, which left one of the sisters with syphilis at the age of nine).

297. *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987).

298. *Atwell*, *supra* note 74, at 611 (noting that an essential element of any Section 1983 claim is that conduct alleged constitutional violation must occur while the actor is acting under the color of law).

299. *Id.* at 611-12.

300. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (7th Cir. 1989); see also 42 U.S.C. § 1983 (1994).

301. *Watkinson*, *supra* note 125, at 1249.

302. *DeShaney*, 489 U.S. at 196.

303. *Suter v. Artist*, 503 U.S. 347, 364 (1992) (holding that children in foster care or otherwise under state supervision have no private right of enforcement of federally mandated services under the Child Welfare Act—the only right to enforcement would belong to the Department of Health and Human Services via the Child Welfare Act).

304. *Id.*

305. *Id.* The Adoption Assistance and Child Welfare Act did not create a private right of enforcement. Congress must confer enforceable rights, privileges, or immunities unambiguously when it intends to impose conditions on grant of federal moneys before rights, privi-

Supreme Court has indicated that states may still be liable for harm when a child is "in custody" of a state agency.³⁰⁶ Thus, states may have a bare minimum obligation to protect a child from at least physical harm while placed in foster care.³⁰⁷

The failure to effectuate meaningful foster care reform lead to "Child Welfare Reform Litigation" as a primary tool in the effort to protect foster children around the country.³⁰⁸ *Doe v. New York City Department of Social Services*,³⁰⁹ was the first case to award damages based on a right to safety claim asserted in a foster care context.³¹⁰ There are at least twenty-one states, or regions therein, and the District of Columbia, currently embroiled in class action litigation because of their inability to protect children from abuse while in their foster care system.³¹¹ These cases are often filed in federal court and seek injunctive relief, declaratory relief, and monetary damages for violations of constitutional rights arising from the operation of a state or local welfare system.³¹² Since damage awards draw from limited resources and have little impact on systemic change,³¹³ individual damage claims may be more appropriately reserved for plaintiffs to file separate suits.³¹⁴

leges, and immunities may be enforceable under section 1983. Both section 1983 and section 671(a)(15) impose only a rather generalized duty under the "reasonable efforts" clause to be enforced by the Secretary of DHHS, not private individuals. *Id.* at 1370. *But cf.* Robinson, *supra* note 72 (arguing the efficacy of the act notwithstanding the lack of a private right of enforcement).

306. *DeShaney*, 489 U.S. at 199.

307. *See generally* *Doe v. Taylor*, 975 F.2d 137, 146 (5th Cir. 1992). In *Taylor*, the court held that a rudimentary duty of safety was owed to children in care. *Id.*

308. Homer, *supra* note 33 (discussing *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976) (conceptualizing "child welfare reform litigation" as a mechanism to improve conditions facing children in public institutions through litigation). *Id.* Homer notes that prior to a 1976 class action brought by foster children in New York seeking injunctive, declaratory, and damages relief, this form of litigation was virtually nonexistent. *Id.*

309. 649 F.2d 134 (2d Cir. 1981).

310. Although the Second Circuit in *Doe v. N.Y. City Department of Social Services* did award damages based on the right to safety claim, the court did not identify the source of the constitutional right nor did it address the application of such a right in a foster care context. The court did differentiate the nature of the foster care claim from those of prison inmates. *Id.*

311. Talenfeld, *supra* note 215, at II.

312. DALE ET AL., *supra* note 51, ¶ 2.03[2][a]; *see also* *Marisol A. v. Giuliani*, 185 F.R.D. 157-62 (S.D.N.Y. 1999). The court approved the parties' settlement which called for monitoring and reform of the New York City Foster Care system. *Id.* In so doing, the court noted that it does not preclude individuals from seeking equitable relief for individual circumstances or from pursuing individual claims against the state for damages. *Id.*

313. Homer, *supra* note 33, at 217-19 (explaining that damages as a form of relief for systemic deficiencies in state foster care systems are problematic for three essential reasons:

A common resolution to Child Welfare Reform Litigation often employs the use of a consent decree incorporating some type of plan to ameliorate state harm to children in care.³¹⁵ Such decrees characteristically encompass comprehensive systemic relief and have required state child welfare officials to alter foster care programs dramatically.³¹⁶ Consent decrees have become a popular and relatively effective mechanism to address systemic failure for a variety of reasons.³¹⁷ First, they often provide far-reaching mandates which require child welfare agencies to immediately employ corrective measures for the amelioration of systemic failures.³¹⁸ Consent decrees also devote funds to improve foster care programs, which benefit all children and which may serve to enhance quality and performance of the child welfare system.³¹⁹ And they bring together various system operatives in the development of new collaborative relationships to collectively address system failures. This tool attracts judicial, public, and legislative attention on the plight of foster children and to the child welfare reform agenda.³²⁰ Consent decrees are no panacea for systemic overhaul, but they may be one of the few palatable remedies available to foster children. There are at least twenty-seven states and many more localities presently ordered by a court to improve child welfare services.³²¹

IX. CONCLUSION

Despite more than ten years of welfare reform litigation, foster care systems across the nation continue to experience miserable failures when it comes to protecting foster children from all forms of abuse and neglect in

as a policy matter, their capacity to reform recalcitrant child welfare genic is questionable; qualified immunity protects many officials from constitutional challenges; and the foreclosure of a private right to enforce federal child welfare statutes may obviate claims even where immunity doctrines do not apply).

314. See Ward Complaint, *supra* note 240.

315. Homer, *supra* note 33, at 323.

316. *Id.*; see also Taylor, 818 F.2d 791. The Taylor settlement included: prohibition of corporal punishment by foster parents; exploration of relative placement alternatives; screening of potential foster parents; monthly face-to-face child visitation by foster care workers; response to complaints of abuse within 48 hours; and exchange of information between foster child and parent. *Id.*

317. Homer, *supra* note 33 (suggesting injunctive relief may hold more promise to reform foster care policies and practice in comparison to damage awards which may provide little incentive for change to recalcitrant child welfare agencies).

318. *Id.* at 12.

319. *Id.*

320. Mushlin, *supra* note 35, at 250.

321. Gelles, *supra* note 37 at 109.

foster placements. Foster children remain particularly vulnerable to sexual abuse in care. Recent attention focusing on children with sexual behavioral problems has clearly demonstrated that these children have specialized needs and present particularized concerns when they are placed in the general foster care population. State agencies must develop comprehensive policies and practices to identify and respond to children with sexual behavioral problems. Critical foster care placement decisions must be scrutinized by agency officials to ensure that child victims of sexual abuse and children with sexual behavioral problems are provided with adequate therapeutic intervention. Agencies must recognize quality that therapeutic intervention is necessary not only to address the suffering of individual children, but also to attempt to reduce the overall incidents of sexual abuse in care.

Children in foster care have a limited arsenal of legal protections. The federal government, bureaucratic foster care agencies, and state legislators have clearly demonstrated a collective failure to effectively protect children in state care from harm. Incompetent caseworkers, agency administrators, and legislators indifferent to the sexual victimization of foster care children have only served to perpetuate the victimization on a massive scale. Florida, and in particular Broward County, has experienced an unprecedented rise in the number of sexual assaults that occur among children in the foster care population and has demonstrated abysmal failure in dealing with the problem. There must be system accountability for every child in care. Judicial intervention may be the only way to address foster care systems which refuse to protect children in their care.

