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Listening to Silenced Voices: Examining Potential Liability of State and Private Agencies for Child Support Enforcement Violations

Karen Gievers*

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I. INTRODUCTION

This article argues that private individuals may sue government agencies and employees for failing to enforce child support statutes. Failure to enforce child support orders is a systemic problem which directly affects countless children, including foster care children, who depend upon the money promised in child support enforcement orders for their existence. The ramifications of this failure to pay spread beyond the boundaries of the

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individual family unit, however, as custodial parents and children are forced to depend upon public assistance as a substitute rather than as what could potentially be a substitute.

This article does not purport to conduct a comprehensive analysis of the national child support enforcement policy. Rather, it focuses specifically upon the Florida support enforcement system, juxtaposed with examples elicited from other support enforcement schemes. Through a survey of primary sources, including federal and state statutes, Florida case law, and selected case law from other jurisdictions, this article intends to argue that state enforcement agencies and private agencies may be held responsible for their mismanagement of child support enforcement. It applies the primary source material two similar cases: children in the foster care system and children who reside with a custodial parent. It also analyzes private causes of action against government agencies and government employees, and argues that individuals should have a private cause of action for failing to collect child support enforcement.

Part II describes the extent of the support enforcement problem in Florida, which suggests that this problem is endemic to our society as a whole. Part II also describes the complex federal and state statutory scheme governing child support in an effort to highlight the separation of powers between federal and state government. This statutory analysis reveals additional reasons why private citizen suits are necessary, including lack of legal representation of the child's interests in current support enforcement suits.

Part III examines federal law as a potential source of liability, and argues that the application of section 1983 of title 42 of the *United States Code* ("section 1983"), which provides individuals with the ability to file private citizen lawsuits for violation of either constitutional or statutory rights, has resulted in varying outcomes.[1] Part III examines the predominant standards announced in decisions of the United States Supreme Court and the Eleventh Circuit that are used to determine whether section 1983 is satisfied. The common law does not clearly establish whether one of the tests prevails, but instead illustrates the usage of several tests. This analysis of case prece-

1. 42 U.S.C. §1983 (1994 & Supp. IV 1998). The statute provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

dent is designed to elicit factors that the courts commonly consider in deciding liability under section 1983 so as to apply these factors to the case of children and child support payments.

Part IV argues that government agencies may be held liable under section 1983 through violations of the Social Security Act, despite the welfare reforms which took place in 1996. Children may not recover through section 1983 for violations of substantive due process because the courts have not been willing to grant a property right to children in promised, but uncollected, child support payments. Despite welfare reforms which eliminated entitlement programs, a viable due process argument remains for foster care children. The right of non-foster children to recover under section 1983 was limited by the welfare reform law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), because such children can no longer claim that a due process violation arises from property rights to an entitlement when the State of Florida has explicitly established a welfare system that is not an entitlement. After the welfare reforms, section 1983 can be invoked for violations of due process only in those states where the welfare benefit remains an entitlement.

Part IV examines federal statutory liability by considering the provisions of the Social Security Act.[2] In order to receive block grants from the federal government, state governments must "substantially comply" with the statutory provisions regulating collection of child support payments.[3] However, the criterion of standard compliance is only seventy-five percent, but serves as an incentive and condones state action which fails to collect and distribute a fourth of the child support orders.[4] In *Blessing v. Freestone*[5] the Supreme Court held that Title IV-D of the Social Security Act did not bestow a private cause of action upon custodial mothers under section 1983 for a state's failure to operate its system in substantial compliance, but it left open the possibility that "some provisions of Title IV-D give rise to individual

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2. Social Security Act, Title IV-D, 42 U.S.C. § 651 (1994 & Supp. IV 1998). The statute provides as follows:

> For the purpose of enforcing the support obligations owed by non-custodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available . . . to all children (whether or not eligible for assistance under . . . [AFDC]) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sym sufficient to carry out the purposes of this part.

Id.

3. 42 U.S.C. § 609(a)(8) (1994 & Supp. IV 1998).

4. 45 C.F.R § 305.20 (1995); 42 U.S.C. § 609(c) (1994 & Supp. IV 1998).

5. 520 U.S. 329 (1997).

rights."[6] For example, *Blessing* does not preempt the possibility of a private recovery in instances of failures to distribute pass-through payments and failures to comply with gap-filling provisions.[7] If a state fails to distribute the predetermined portions of child support payments after collection, then it violates the rights of children who live with their custodial parents.[8] Such a private right of action is necessary so children may seek enforcement of the child support orders to which they are entitled. Part IV argues that the courts would sustain a private action beyond summary judgment if that action is brought for child support that the state is obligated to distribute to children upon collection.

Part V examines sovereign immunity and the State of Florida to determine what factors are necessary for the state to be held liable.

Part VI applies the concept of sovereign immunity, and argues that the State of Florida is liable under sovereign immunity for violation of statutory provisions in collecting and distributing child support amounts on behalf of children.

II. UNREPRESENTED INTERESTS IN CHILD SUPPORT ENFORCEMENT

Child welfare, family responsibility, and decreased welfare rolls-each is an asserted policy interest of the state in establishing and enforcing child support orders.[9] In creating child support policies, states must balance the interests of family autonomy and fiscal economy with concern for the child's standard of living; as a result, "fiscal interest" or "self-supporting families" dominate child support policy.[10] An issue emerges from this interest balancing as to how to construct the optimal procedure for child support enforcement that would protect the rights of the children without unduly burdening the fiscal resources of the state. This article asserts that private citizen suits against the public and private agencies are one additional means which empower custodial parents and children to protect their own interests while encouraging states to abide by the statutory provisions to which the legislatures have agreed. The purpose of Part I is to assess the current federal and Florida state procedures in child support enforcement in an effort to frame the importance of private citizen suits.

6. *Id.* at 345.
7. *Id.*
8. *Id.* at 345–46.
9. JYL J. JOSEPHSON, GENDER, FAMILIES, AND STATE CHILD SUPPORT POLICY IN THE UNITED STATES 148 (1997).
10. *Id.* at 149.

A. *Federal Statutes as a Skeleton for Child Support Enforcement Programs*

Federal statutes provide the skeletal framework within which states formulate child support enforcement programs. Federal child support enforcement began with the enactment of Title IV-D of the Social Security Act, the Child Support Enforcement Amendments ("CSEA") of 1984, and the Family Support Act ("FSA") of 1988.[11] The Social Security Act requires each state to establish a Title IV-D child support enforcement agency, which serves both recipients and nonrecipients of welfare benefits.[12] Furthermore, the Office of Child Support Enforcement ("OCSE") is responsible for "monitoring and assisting" the Title IV-D state agencies.[13] The CSEA mandated that each state establish formulas for calculating child support orders, but the courts were not bound to invoke them and the amount calculated from the formulas was not treated as "presumptively correct."[14] However, the FSA, enacted four years later, established a rebuttable presumption that the amount calculated by the formulas is correct unless it is demonstrated to be "unjust or inappropriate in a particular case" through a written record.[15] The cumulative effect of these three federal statutes was to structure states' child support enforcement activities and to render legitimacy to the calculation of child support awards.

Additional provisions offered further definition to states in formulating child support enforcement programs, including provisions that ensured state accountability. The PRWORA included a state mandate that each state

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11. NANCY S. ERICKSON, CHILD SUPPORT MANUAL FOR ATTORNEYS AND ADVOCATES 6 (1992). Title IV-D was enacted in 1974. *Id.*

12. *Id.* at 7.

13. *Id.*

14. *Id.* at 9.

15. 42 U.S.C. § 667(b) (1994). The statute provides as follows:

> (1) The guidelines established pursuant to subsection (a) shall be made available to all judges and other officials who have the power to determine child support awards within such State.
>
> (2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

Id. Florida has adopted an "income sharing" model in which the income of both custodial and noncustodial parents is augmented to calculate the child support contribution. ERICKSON, *supra* note 11, at 192–93. The guidelines are set forth in section 61.30 of the *Florida Statutes.*

conduct an annual report pertaining to its child support enforcement program and submit a copy to the Secretary of the Department of Health and Human Services.[16] This represented a shift in policy to "focus on data reliability and to assess performance outcomes instead of determining compliance with process steps."[17] While the federal government subscribes to results-oriented child support legislation, state governments retain authority to execute the federal requirements through individual child support programs.[18] Federal statutes provide the boundaries within which, and the limits according to which, state governments must formulate and enact child support enforcement programs.

Federal legislation also includes an indomitable incentive for states in the formulation of child support enforcement provisions. The federal statutes include a system of penalties to be imposed upon state governments for their failure to establish child support enforcement programs.[19] For example, under Title IV-D, states forfeit block grants for Temporary Assistance for Needy Families ("TANF") if they fail to achieve certain paternity percentages, if they submit "incomplete or unreliable" statistical information, or if they fail to "substantially comply," unless the violation is corrected within the following year and the statistical information submitted for the following year is not "incomplete or unreliable."[20] The fiscal penalties imposed upon

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16. State Self-Assessment Review and Report, 65 Fed. Reg. 7772-01 (Dec. 12, 2000) [hereinafter State Self-Assessment Review and Report] (to be codified at 45 C.F.R. Pt. 308).

17. *Id.* at 7774.

18. *Id.* The federal government's suggested role was described as assisting the states in conducting and evaluating their self-assessment reviews, supervising the enactment of state self-assessment, referring states to the optimal procedures of the other states, and considering the potential success of possible self-assessment actions. *See id.* at "Federal Role."

19. *See id.*

20. 42 U.S.C. § 609(a)(8) (1994 & Supp. 1998). The statute provides as follows:

> (i)(I) [If] the State program failed to achieve the paternity establishment percentages . . . or to meet other performance measures that may be established by the Secretary;
> (II) on the basis of the results of an audit or audits conducted . . . that the State data submitted . . . is incomplete or unreliable; or
> (III) on the basis of the results of an audit or audits conducted . . . that a State failed to substantially comply with 1 or more of the requirements of part D; and
> (ii) that, with respect to the succeeding fiscal year-
> (I) the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance as described in subparagraph (A)(i); or
> (II) the data submitted by the state pursuant . . . is incomplete or unreliable; the *amounts otherwise payable to the State . . . shall be reduced by the percentage specified* in subparagraph (B).

Id. (emphasis added).

the states vary from one to five percent according to the number of consecutive years in which the state procedure fails to conform with federal child support enforcement regulations.[21] The federal statute wields a sword against states as a compelling incentive for the enactment of child support enforcement provisions that satisfy federal requirements. Indeed, a Florida statute specifically acknowledged that noncompliance with PRWORA could lead to severe economic tragedy, which "poses a direct and immediate threat to the health, safety, and welfare of the children and citizens of the state and constitutes an emergency."[22]

Given the potential for federal penalties, the states have little alternative but to satisfy the federal statutes to the letter when creating child support enforcement schemes. In fact, some agencies have recognized the current statutory scheme as overly burdensome. For example, the National Child Support Enforcement Association passed a resolution that urged Congress to "simplify the distribution of child support to provide additional support to families attempting to reach self-sufficiency and to provide relief for states and families from the burdensome complexity of the PRWORA distribution rules" given the welfare reforms in the 1990s.[23]

Each state formulates its own child support enforcement program through which intrastate child support orders can be enforced by a variety of means, including garnishing wages, seizing tax refunds, or placing the obligor in jail.[24] However, approximately one third of child support enforcement cases are interstate cases, in which the non-custodial parent resides in a different state than the custodial parent and child.[25] Jyl Josephson describes interstate child support cases as more complex: while he suggests that the child support enforcement system be uniform across the country adminis-

21. § 609 (a)(8)(B). The statute provides as follows:

> The reductions required under subparagraph (A) shall be-
>
> (i) not less than 1 nor more than 2 percent;
>
> (ii) not less than 2 nor more than 3 percent, if the finding is the 2nd consecutive finding made pursuant to subparagraph (A); or
>
> (iii) not less than 3 nor more than 5 percent, if the finding is the 3rd or a subsequent consecutive such finding.

Id.

22. FLA. STAT. § 61.1826(1)(e) (2000); *see also* § 61.1826(1)(d) (providing that "[n]oncompliance with federal law could result in a substantial loss of federal funds for the state's child support enforcement program and the temporary assistance for needy families welfare block grant").

23. Nat'l Child Support Enforcement Ass'n, Resolution on Child Support Distribution Reform, *available at* http://www.ncsea.org/resolutions/res-dist.PDF (last visited Feb. 10, 2001).

24. JOSEPHSON, *supra* note 9, at 148.

25. *Id.*

tered by a federal agency, such as the Internal Revenue Service, rather than each state conducting its own support enforcement program, he recognizes that this change is most likely not feasible.[26] The Uniform Reciprocal Enforcement of Support Act ("URESA") was designed to enforce interstate child support obligations.[27] However, the Uniform Interstate Family Support Act ("UIFSA") was enacted in 1998 to replace URESA.[28] Unlike URESA, which lacked uniformity among the states, UIFSA was designed to provide "uniform rules, procedures, and forms for interstate cases."[29] Congress also passed the Child Support Recovery Act in 1992 in an effort to address the enforcement problems that arise in interstate cases.[30] Policy efforts regarding interstate child support cases are designed to increase collection percentages by integrating state procedures. However, interstate child support enforcement continues to challenge the statutory scheme.

B. *Florida's Legislative Response*

In response to federal legislation, the State of Florida granted the authority to adopt and administer child support enforcement provisions to the Department of Revenue ("DOR"), and custodial parents who have a child support order that is more than thirty days past due may solicit the DOR to collect the overdue support payment.[31] Under Florida law, child support

26. *Id.* at 153. Josephson describes "administrative upheaval" as the reason why child support enforcement could not be conducted on a federal rather than a state level; this would most likely include systemic costs in combining the various provisions from each of the fifty states into a uniform federal standard. *See id.*

27. ERICKSON, *supra* note 11, at 306.

28. 64 Fed. Reg. 8382, 8383 (1999).

29. ERICKSON, *supra* note 11, at 306.

30. 18 U.S.C. § 228 (1994 & Supp. V 1999). The Act establishes penalties for an individual who:

> (1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $ 5,000;
> (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $ 5,000; or
> (3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $ 10,000.

Id.

31. FLA. STAT. § 61.13 (2000). The statute provides that "[t]he Department of Revenue shall have the authority to adopt rules to implement the child support enforcement provisions of this section." § 61.13(1)(b)(4); *see also* State of Florida Department of Revenue,

orders made after January 1, 1985, or made before January 1, 1985, but subsequently modified shall "direct that the payments of child support be made . . . through the depository in the county where the court is located."[32] The depository is the default method according to which child support awards are paid. Parties may avoid the depository per the statute, but only upon their mutual agreement and only if it is in the "best interest of the child."[33] The Public Information Office of the Florida Office of Child Support Enforcement indicated that the information with respect to whether the majority of orders uses the depository's exact members was not readily available.[34] Florida statutes also direct "each depository to perform duties with respect to the operation and maintenance of a State Disbursement Unit and the non-Title IV-D component of the State Case Registry."[35] The state defines the relationship between the DOR and the depository as a cooperative agreement that permits access to the State Disbursement Unit and non-Title IV-D provisions of the State Case Registry, which "complies with all state and federal requirements."[36] In Title IV-D cases, the rights of the obligee regarding the depository are conveyed to the government agency.[37]

The clerks of court are charged with collecting, enforcing, and distributing child support payments.[38] In furtherance of this duty, the clerks created a statewide system that permits automated processing of child support payments.[39] Specifically, the Florida legislature noted that only a contract between the DOR and the Florida Association of Court Clerks would ensure state compliance sufficient to avoid a federal financial penalty.[40]

The actual application of Florida procedure to the child support enforcement system may be sufficient to avoid federal penalties, but it is not adequate for collecting child support. In fact, one DOR Quarterly Report indicates that $45 million more in child support was collected than distrib-

Child Support Services, *at* http://sun6.dms.state.fl.us/dor/childsupport/enforcement.html (last visited March 31, 2001).

32. § 61.13(1)(d)1.

33. § 61.13(1)(d)3.

34. April 2, 2001 telephone conversation with OCSE Public Information Officer Dave Burns.

35. § 61.1826(1).

36. § 61.1826(2). The depositories also must enter into a "written agreement" with the Florida Association of Court Clerks and the Department of Revenue. *Id.*

37. § 61.13(1)(d)5.

38. *See* § 61.1826(1)(a).

39. § 61.1826(1)(g) (recognizing the establishment of the Clerk of Court Child Support Enforcement Collection System).

40. *See* § 61.1826(1), (3), (4) (recognizing the importance of the clerk's involvement and directing the Department of Revenue [hereinafter DOR] to contract with the Florida Association of Court Clerks).

uted to the children for the quarter covered, even though Florida law specifies that collected support ought to remain in the depository for only two days.[41] In addition to child support money that is not collected, the child support enforcement program in Florida exhibits a fundamental problem in distributing the money collected, as evidenced by the DOR holding sizeable amounts that should have been distributed. In the current system, the interests of the State of Florida are satisfied because the child support enforcement program avoids federal penalty. However, the result is an ineffective, inequitable, and unjust system. Children, whether they reside with their custodial parents or in foster homes, do not receive the support to which they are entitled. The system, although the result of complex statutory interaction and interest balancing between family autonomy and state fiscal interest, fails in its primary goal: to provide financial support to children. This systemic failure in Florida warrants the extension of private citizen suits against public and private entities to ensure that the child support orders are enforced and distributed correctly.

In addition to the failure to distribute child support awards, another systemic feature provides support for private citizen suits. Under the current statutory scheme, the DOR specifies that an attorney-client relationship does not exist between the attorneys which it hires to enforce child support orders and the custodial parent; rather, the client is the DOR itself.[42] The DOR has the authority to collect child support orders, and it may impose remedies upon noncustodial parents, including seizing IRS tax refunds, freezing and seizing bank accounts, income deduction, liens on real and personal property, liens on workers' compensation and unemployment compensation, and by suspending professional licenses and drivers licenses.[43] Thus, the attorney who is hired to seek child support enforcement is an advocate for the state and not for the interests of the custodial parent. Nancy Erickson notes that because the attorney is representing the interests of the state, the attorney will not represent the interests of the custodial parent (or the child) when they are in conflict with or do not coincide with those of the state.[44] Furthermore, Erickson cites the following examples of the conflict between the interests of the state and those of custodial parents: when a state seeks child support from the noncustodial parent even if the custodial parent does not desire it, or

41. October 1999 report submitted by Florida Department of Revenue office of Child Support Enforcement to federal OCSE in HHS.

42. State of Florida Department of Revenue, *supra* note 31.

43. *Id.* Other remedies include: suspending Florida driver, professional, and hunting licenses; issuing interstate arrest warrants; reporting nonpayment of child support to credit bureaus and garnishing wages; denying passport applications or causing passports to be suspended (if the unpaid obligation is $5,000 or more). FLA. STAT. §§ 409.2551, .2598 (2000).

44. ERICKSON, *supra* note 11, at 128.

when a state supports custody for the father in an effort to eliminate the mother and child from public assistance.[45]

If Erickson's assertion is correct, there is a systemic interest in permitting custodial parents their own representation. This systemic feature provides a compelling argument that custodial parents must retain a corollary right to sue to protect their individual interests. If a custodial parent is not allowed to sue for support enforcement under Title IV-D, the result would be the disenfranchisement of an entire segment of custodial parents and their children. Congress would not intend, and the courts would not allow, this result. Indeed, a custodial parent may sue a noncustodial parent even after and even though their right to receive child support was assigned under Title IV-D.[46] Erickson reports that it is essential for a custodial parent to retain the private right to sue the noncustodial parent because the interests of states do not necessarily coincide with those of the custodial parent.[47] The question that this article pursues extends the justification stemming from lack of representation of custodial parents against noncustodial parents to the issue of whether one has a right to sue private and public agencies who are responsible for child support enforcement. As privatization of public agency enforcement increases through application of section 409.25575 of the *Florida Statutes*, this remedy can be even more important to ensuring timely distribution of child support collected to the child's custodian.[48]

Part II described the federal legislation in child support enforcement that resulted in state enforcement programs by virtue of the threat of severe penalties. The child support enforcement system in Florida is no exception. Part II also explored the failure of the current Florida statutory scheme to fully distribute money owed to children and to represent the interests of children in enforcing support orders. A private cause of action against public or private agencies in charge of collecting and distributing child support funds is necessary to correct these systemic failures.

III. FEDERAL LAW AS A SOURCE OF LIABILITY

Federal law offers a possible source for private action against agencies that fail to enforce child support orders or that fail to distribute child support funds collected, which are necessary to the livelihood of foster children and children who live with their custodial parents. If an individual is acting as an agent of the state, then that individual may be sued for a violation of section

45. *Id.* at 127–28.

46. *See id.* at 129.

47. *Id.* If the custodial parent is able to collect the child support money, the potential for attaining freedom from public assistance increases. *Id.*

48. § 409.25575.

1983.[49] Section 1983 allows citizens to sue those who act "under the color of any statute . . . of any State" for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[50] Section 1983 provides two possible foundations on which a suit for noncompliance with a child support order can be based: a private action must arise from a violation of either constitutional or statutory rights. Part III will apply the provisions of section 1983 to constitutional violations of procedural and substantive due process in addition to statutory violations of Titles IV-D and IV-E of the Social Security Act.

The common law is less than clear as to when individuals have a private right of action under section 1983. If the statute providing the rights allegedly being denied contains an express prohibition against the bringing of an independent action pursuant to section 1983, or if the statute includes remedial measures that were sufficient to demonstrate congressional intent to exclude such a remedy, then no private right of action will likely be allowed to go forward pursuant to section 1983.[51] For example, the enforcement mechanisms of the Federal Water Pollution Control Act and the administrative mechanism from the Education of the Handicapped Act both demonstrated that Congress intended to preempt the private action remedy established in section 1983.[52] Furthermore, if a state alleges that the statute either expressly prohibits or provides sufficient mechanisms such that section 1983 becomes unnecessary, then the state has the burden of proof in establishing that a private cause of action does not arise.[53]

The United States Supreme Court and the Eleventh Circuit courts have predominantly applied combinations of the criteria announced in *Wright v.*

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49. Maine v. Thiboutot, 448 U.S. 1 (1980). An implied cause of action was no longer necessary to private enforcement under section 1983, and the four-part inquiry was simplified because section 1983 allows for recovery for a violation of rights under a federal statute. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 525–26 (1990). The court mentions one common requirement that remained between both implied causes of action and section 1983: the statutory language "must confer identifiable enforceable rights." *Id.* at 526. It is important to remember that the Eleventh Amendment precludes actions for any relief directly against the state itself, and also precludes damage actions against state government employees and agents in their state representative capacity. U.S. CONST. amend. XI. The Eleventh Amendment does not, however, preclude damage actions against state personnel in their individual capacity, nor does the Eleventh Amendment preclude actions for declaratory or equitable relief against state personnel in their representative capacities. *Id.*

50. 42 U.S.C. § 1983 (1994 & Supp. 1998).

51. Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987).

52. *See Wilder*, 496 U.S. at 521 (describing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981)); Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

53. *Wilder*, 479 U.S. at 521.

City of Roanoke Redevelopment & Housing Authority[54] and *Wilder v. Virginia Hospital Association.*[55] The standards applied in *Wright* and *Wilder,* although formulated differently, encompass similar criteria. In *Wright,* the Court applied section 1983, holding that the regulations gave low income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute.[56] The Court noted that the Brooke Amendment evinced a mandatory right and a clear intent to benefit the tenants.[57] In *Wilder,* the Court considered whether the legislature intended to benefit the tenants in the utility and rental rates, and articulated the prevailing test used to determine whether a private cause of action arises under section 1983: 1) the statutory or constitutional provision must be "intended to benefit the putative plaintiff;" 2) the obligation upon government must be mandatory; and 3) the plaintiff's interest must not be "'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.'"[58]

Although the criteria enunciated in *Wilder* provides a useful test, *Golden State Transit Corp. v. Los Angeles* formulates the section 1983 test along different lines. The Court in *Golden State* described the question of a private cause of action under section 1983 in terms of two criteria: 1) violation of a federal right; and 2) Congress "'specifically foreclosed a remedy under [section] 1983.'"[59] In determining whether a violation of a federal right occurred, *Golden State* cited *Wright* as precedent and considered issues such as whether the provision created binding obligations upon the state, whether the plaintiff's interest was too vague to be enforceable, and whether the provision benefited the plaintiff.[60] However, in addition to the criteria applied from *Wright,* the Court also considered whether Congress intended to preempt a private action under section 1983. In response, *Golden State* cited

54. *Id.* at 418 (finding a private cause of action under section 1983 against the public housing authority for violating the rent ceiling of the Brooke Amendment to the Housing Act and the regulations of the Department of Housing and Urban Development).

55. 496 U.S. at 498 (holding that the Boren Amendment to the Medicaid Act includes a private cause of action for health care providers to seek reimbursement of costs from state officials).

56. *Wright,* 479 U.S. at 420.

57. *Id.* at 430.

58. *Wilder,* 496 U.S. at 509.

59. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (quoting *Smith,* 468 U.S. at 1005 n.9). *Golden State* held that the Supremacy Clause of the Constitution does not create a right to private enforcement under section 1983 because it "secures federal rights by according them priority whenever they come in conflict with state law." *Id.* at 107 (quoting from Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979)).

60. *Golden State,* 493 U.S. at 106.

precedent where the provision included ample enforcement procedures, and where a suit by plaintiff "'would be inconsistent with Congress' carefully tailored scheme.'"[61] Thus, the *Golden State* Court conducted an analysis similar to that developed in both *Wright* and *Wilder*.

However, *Suter v. Artist M.*[62] appeared to retreat from the standard enunciated in *Wilder* in failing to apply *Wilder* to decide whether a private cause of action exists under section 1983.[63] It was not sufficient that the provisions of the Adoption Assistance and Child Welfare Act were mandatory; this fact alone did not give rise to section 1983 liability.[64] The Supreme Court in *Suter* found it significant that the provisions of the Adoption Assistance and Child Welfare Act did not include a formula or percentage by which to quantify "reasonable efforts," and the Court interpreted the legislative intent as intending to exclude recovery under section 1983 if rights instilling such a cause of action were omitted from the statutory language.[65] The Court distinguished *Suter* from *Wilder* in that the statute in *Wilder* specified that the "reasonable utilities" costs were limited and rent costs were limited to thirty percent of the recipient's income; *Wilder* gave rise to a cause of action under section 1983, while *Suter* did not.[66] In holding that section 1983 did not supply a private cause of action, *Suter* conducted a "careful examination of the language . . . in the context of the entire act," which led to the conclusion that the "'reasonable efforts' language does not unambiguously confer an enforceable right upon the Act's beneficiaries."[67]

Unlike *Wilder* and *Wright,* the Court in *Suter* adopted a standard of intense statutory scrutiny to determine whether a right suitable for section 1983 enforcement arises. The dissent in *Suter* described the majority opinion's holding not only as "plainly inconsistent" with *Wilder*, but also conspicuously lacking the application of the common law principles to determine section 1983 liability.[68] However, the majority did not explicitly

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61. *Id.* at 107 (quoting *Smith*, 468 U.S. at 1012).

62. 503 U.S. 347, 357 (1992).

63. *Id.* (holding that children beneficiaries of the Adoption Assistance in Child Welfare Act did not have a section 1983 cause of action against the Illinois agency responsible for exerting "reasonable efforts" to administer the placement of foster care children because such language was too vague to be enforceable).

64. *Id.* at 358.

65. *See id.* at 360.

66. *Id.* at 361–62.

67. *Suter*, 503 U.S. at 363.

68. *Id.* at 365 (providing a thorough summary of principles for finding a private right of action under Section 1983). The dissent stated: "I cannot acquiesce in this unexplained disregard for established law." *Id.*

overrule *Wilder's* three-part analysis, thus leaving it unclear which analysis should or will be conducted.[69]

In the more recent *Blessing* decision, the Court indicated that the analysis from *Wright* and *Wilder* remains good law as shown when the court applied a three-part test to determine whether a private cause of action exists under Title IV-D of the Social Security Act.[70] The *Blessing* Court reversed the lower court's order recognizing a cause of action for failure of the Arizona child support system to meet the federally mandated "substantial compliance" requirement of the federal statute, commenting that neither the plaintiffs nor the lower court had engaged in the proper analysis of the specific rights infringed upon. The Court also found, however, that the child support statutory scheme was not comprehensive enough to preclude section 1983 liability and found there was no express preclusion.[71] The Court went on to suggest amendment of the complaint to include a request for relief connected to plead failure to distribute the support payments due, which it implied would be action pursuant to section 1983.[72]

Other decisions reveal that the Eleventh Circuit and related district courts also treat the test formulated in *Wilder* favorably. For example, in *Doe v. Chiles*,[73] the issue was whether the failure of the Florida Department of Health and Rehabilitative Services to furnish Medicaid within the reasonably prompt time mandated by the Medicaid Act[74] constituted a valid basis for the lower court's providing of injunctive relief pursuant to section 1983.[75] The circuit court distinguished *Suter*, analyzed *Wilder* and *Wright*, and held that the plaintiffs had a federal right to reasonably prompt Medicaid assistance and found the right properly enforceable under section 1983.[76] In *Mallo v. Public Health Trust of Dade County*,[77] the court used the two-part test to determine whether a private right of action exists under section 1983,

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69. *See* Ashish Prasad, Comment, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197, 206 (1993), for a thorough discussion and comparison of standards enunciated in both the *Wilder* and *Suter* decisions. It should also be noted that Congress amended the statute after the ruling in *Suter*, with the statute-related notes and legislative history suggesting congressional desire to effectively overrule *Suter*.

70. Blessing v. Firestone, 520 U.S. 329, 340–41 (1997).

71. *Id.* at 338–39.

72. *Id.* at 345–46.

73. 136 F.3d 709 (11th Cir. 1998).

74. 42 U.S.C. § 1396a(8) (1994).

75. *Chiles*, 136 F.3d at 714. The complaint alleged the time being taken exceeded four years. *Id.*

76. *Id.* at 709.

77. 88 F. Supp. 2d 1376 (S.D. Fla. 2000).

and the *Wilder* framework is encompassed within this test.[78] The burden of the first step falls upon the defendants, who must demonstrate that Congress either explicitly or implicitly intended to "foreclose such private enforcement."[79] The court held that the defendants failed to meet the burden that Congress intended to preclude recovery private action in conjunction with the Medicaid Act.[80] The burden of the second step falls upon the plaintiffs, who must demonstrate that their federal rights were violated.[81] As part of the second step, the court incorporated the *Wilder* three-part test "to determine whether statutory provisions implicitly create [a] federal right."[82] Thus, the three-part test from *Wilder* remains in good standing in the Eleventh Circuit.

Part III analyzed the development of common law standards for determining whether a private cause of action arises under section 1983, arguing that, although there is not one definitive standard, the prevailing law represents a combination and relationship of factors developed from cases such as *Wilder* and *Golden State.* Part IV will apply the tests to argue that federal law-violations of the constitutional guarantee to due process and violations of the Social Security Act-gives rise to a private cause of action of both custodial parents and foster children.

III. VIOLATION OF A CONSTITUTIONAL OR A STATUTORY RIGHT

A. *Constitutional Right*

Child support orders implicate issues raised by the Fifth and Fourteenth Amendments. The CSEA mandates that states establish "expedited processes" in instances of Title IV-D child support enforcement.[83] Accordingly, states must protect the due process rights of the parties in such expedited processes, and custodial parents are entitled to notice and to an opportunity to be heard.[84] However, this exception does not provide an avenue for liability under section 1983 because the problem of failure to enforce does not trigger the due process requirement of the expedited processes. Rather, this article examines the issue of whether a state or a private agency acting under the

78. *Id.* at 1379.
79. *Id.* at 1380 (citing *Wright,* 479 U.S. at 423).
80. *Id.*
81. *Id.*
82. *Mallo,* 88 F. Supp. 2d at 1381.
83. ERICKSON, *supra* note 11, at 355.
84. 45 C.F.R 303.101(c)(2) (2000). The regulation provides as follows: "[u]nder expedited processes . . . the due process rights of the parties involved must be protected." *Id.* Section 303.101(c)(1) of Title 45 of the *Code of Federal Regulations* specifically governs the issue of paternity determination. *Id.*

color of state authority may be held liable for mishandling or failing to collect child support.

When injunctive relief is sought, rule 65 of the *Federal Rules of Civil Procedure* requires the Court to consider the following four factors: 1) the substantial likelihood that plaintiff will succeed on the merits; 2) the substantial threat that plaintiff will suffer irreparable injury if the temporary restraining order is not issued; 3) the threatened injury outweighs the harm a temporary restraining order may cause the defendants; and 4) the grant of a temporary restraining order will not disserve the public interest.[85] As to the four factors, "'no particular quantum of proof is required as to each of the four criteria.'"[86] The four factors, which also govern the grant of preliminary injunctive relief, favor the issuance of a temporary restraining order in this case. Likelihood of success on the merits is not to be equated with success on the merits.[87]

As to children in foster care, the government cannot condition receipt of a benefit, such as remaining in foster care, on the relinquishment of a constitutional right.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command di-

85. *E.g.*, Levi-Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995).

86. Laboratorios Roldan v. Tex Int'l, Inc., 902 F. Supp. 1555, 1565 (S.D. Fla. 1995) (quoting Louis v. Meissner, 530 F. Supp. 924, 925 (S.D. Fla. 1981)).

87. Paul Y. v. Singletary, 979 F. Supp. 1422, 1425 (S.D. Fla. 1997) (citing Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981)); Norman v. Johnson, 739 F. Supp. 1182, 1190 (N.D. Ill. 1990) (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386–87 (7th Cir. 1984)) (holding in an action against the Illinois' state child welfare agency for inadequate caseworkers and other services the party requesting a preliminary injunction must show as a threshold matter, that they have "some likelihood of succeeding on the merits" in the sense that their "'chances are better than negligible'").

> rectly." [citation omitted] Such interference with constitutional rights is impermissible.[88]

"At a minimum, 'due process requires that government officials refrain from acting in an irrational, arbitrary or capricious manner.'"[89] "The absence of standards governing the withdrawal or modification of services permits arbitrary decisionmaking" in violation of due process.[90] This is equally true if the government agency imposes standards that are different from those established by written policies or regulations.[91]

> It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. [citation omitted] For this reason alone due process requires that selections among applicants be made in accordance with "ascertainable standards," [citation omitted] . . . .[92]

Administering a government program "using unwritten standards leads to rule by decree and not by law."[93]

The property and liberty interests that are protected by procedural due process are creatures of state law, including statutes, regulations, and decisional law interpreting state common law or the federal constitution.[94] The touchstone for a property interest is that it creates "a legitimate claim of entitlement" to a benefit.[95] "[R]ules and understandings, promulgated and fostered by state officials . . . may justify [a] legitimate claim of entitlement" to the benefit.[96]

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88. Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990) (alteration in original) (quoting Perry v. Sinderman, 408 U.S. 593, 597 (1972)); *see also, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) ("[t]he State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process").

89. Pressley Ridge Schools, Inc. v. Stottlemyer, 947 F. Supp. 929, 940 (S.D. W. Va. 1996) (quoting Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985)).

90. Mayer v. Wing, 922 F. Supp. 902, 911 (S.D.N.Y. 1996).

91. *Pressley Ridge*, 947 F. Supp. at 940–41.

92. Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968).

93. U.S. Dep't of Justice, DEA v. Burke, 968 F. Supp. 672, 681 (M.D. Ala. 1997).

94. *E.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972).

95. *Id.* at 577.

96. Perry v. Sinderman, 408 U.S. at 602; *see also* Brown v. Ga. Dep't of Revenue, 881 F.2d 1018, 1027 (11th Cir. 1989) (fact that rules provide for a hearing to challenge dismissal weighs in favor of finding a protected interest); Shahawy v. Harrison, 875 F.2d 1529

The recipient has a property interest in a benefit if the government cannot terminate it except for good cause, and the existence of procedures to challenge the termination is evidence of the state's recognition that the interest is protected.[97] A protected interest is created if state law restricts the government's discretion in extending or terminating benefits.[98]

When state law creates an entitlement to a benefit, the next issue is what process is due. In *Mathews v. Eldridge*,[99] the Court articulated the three factors that must be considered in determining the sufficiency of the process that is afforded:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[100]

When the nature of the benefit is such that its termination deprives the former recipient of the "means to obtain essential food, clothing, housing, and medical care," only a pre-termination hearing will suffice.[101] Foster care is unquestionably such a benefit.

Foster children have a protected interest in remaining in foster care past their eighteenth birthday. The analysis of Plaintiffs' property right begins with the statute that establishes the availability of foster care for youngsters over eighteen years of age. Section 409.145(3)(a) of the *Florida Statutes* provides:

> The department is authorized to continue to provide the services of the children's foster care program to individuals 18 to 21 years of age who are enrolled in high school, in a program leading to a high school equivalency diploma as defined in s. 229.814, or in a full-

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(11th Cir. 1989) (finding of protected interest supported by specific standards and procedures to be applied when considering discharge or suspension).

97. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–12 (1978).

98. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Occean v. Kearney, 123 F. Supp. 2d 618, 623 (S.D. Fla. 2000) (right to remain in foster care past eighteenth birthday); Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) (wide variety of child welfare services); Sockwell v. Mahoney, 431 F. Supp. 1006, 1012 (D. Conn. 1976); Brian A. v. Sundquist, No. 3:00-0443, 2000 U.S. Dist. LEXIS 18771 at *12 (M.D. Tenn. Oct. 26, 2000).

99. 424 U.S. 319 (1976).

100. *Id.* at 335.

101. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

> time career education program, and to continue to provide services of the children's foster care program to individuals 18 to 23 years of age who are enrolled full-time in a postsecondary educational institution granting a degree, a certificate, or an applied technology diploma, if the following requirements are met:
> 1. The individual was committed to the legal custody of the department for placement in foster care as a dependent child;
> 2. All other resources have been thoroughly explored, and it can be clearly established that there are no alternative sources for placement; and
> 3. A written service agreement which specifies responsibilities and expectations for all parties involved has been signed by a representative of the department, the individual, and the foster parent or licensed child-caring agency providing the placement resources.[102]

Section 409.145(3)(b) of the *Florida Statutes* provides that "[s]ervices shall be terminated upon completion of or withdrawal or permanent expulsion from high school" or other enumerated educational program.[103]

Section 409.145(3) may give DCAF the discretion whether to create a program of providing foster care services beyond a child's eighteenth birthday, but once the program is in place, DCAF's discretion is restricted concerning which youngsters will be entitled to continue to receive the benefits.[104] The program is limited to youngsters who attend one of the enumerated educational or vocational programs, who were in foster care prior to reaching eighteen years of age, and for whom no other placement resource has been identified despite a thorough search.[105] DCAF cannot extend foster care benefits to a youngster who does not meet these requirements and, obversely, cannot deny the benefits to a child who meets the listed criteria.

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102. FLA. STAT. § 409.145(3)(a) (2000).

103. § 409.145(3)(b).

104. *See* § 409.145(3).

105. A DCAF document that clearly is specifically intended for foster youth who have turned eighteen years of age, states as follows:

> You are 18! You made it! Now what? Many teens, staff and foster parents have asked what happens to a teen in foster care when he or she turns 18. You have several options: . . . You may choose to remain in foster care to complete your education. You may remain in a foster home, group placement, or Supervised Practice Living through the Independent Living Program. . . . To remain in foster care after 18, you must be attending a full time educational program. This could be high school, A G.E.D. Program, technical school or college. . . . Once you are 18 if you do not attend school full-time, you are no longer eligible to be in foster care.

Id. There are no other eligibility requirements cited in this document.

"Once the Department begins to provide services [under section 409.145(3)(a)], its obligation is not voluntary. Subsection 409.145(3)(b) mandates that the services continue so long as the individual complies with the statutory requirements."[106]

Section 409.145(3)(b) and this operating procedure recognize that an individual can be involuntarily discharged from the program only for cause, that is, noncompliance with the case plan or program. Under *Memphis Light* and related cases, this fact establishes foster youth have a protected property interest in remaining in foster care past their eighteenth birthday.[107]

Applying the *Mathews v. Eldridge* analysis and analogizing to the welfare recipients in *Goldberg v. Kelly*, it is clear that a pre-termination hearing before an impartial decision maker is essential to achieve due process. The interest at risk for the youth being discharged is in having minimally adequate food, shelter, and clothing. In the words of *Goldberg*, such children will face "brutal need" upon discharge. Indeed, their need will be at least as great as that faced by an adult welfare recipient who is not disabled.[108] Consequently, like welfare recipients, children must be allowed to retain the benefit by remaining in foster care-pending review of DCAF's discharge decision.

Disputes concerning whether the foster youth was, in fact, out of compliance with the program or the case plan and, implicitly, whether the case plan was appropriate to the young adult's individual needs, involve intensely fact-sensitive issues which require an opportunity for an oral presentation before an impartial fact finder in an environment that is suited to the foster youth's abilities. Finally, the government has a very substantial interest in retaining youth in foster care until they are able to live independently. Not only will there be long term financial benefits from reduced welfare rolls and these individuals' contributions to the state's economy, defendants, as these youngsters' custodian, also have an interest in seeing former foster children succeed in life.

The Eleventh Circuit has held that "[a] showing of irreparable harm is 'the *sine qua non* of injunctive relief.'"[109] The Fourth Circuit decision in *L.J. v. Massinga*[110] is illustrative of the test for irreparable injury in the foster care setting. Foster children in the custody of the Baltimore City Department of Social Services brought an action against state and city officials for their part

106. Melody v. Dep't of H.R.S., 696 So. 2d 430, 433 (Fla. 4th Dist. Ct. App. 1997) (Pariente, J., concurring).

107. *Occean*, 123 F. Supp. 2d at 624.

108. *Goldberg*, 397 U.S. at 261.

109. N.E. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990).

110. 838 F.2d 118 (4th Cir. 1988).

in administering Maryland's foster care program.[111] Plaintiffs alleged that as a result of the Defendants' "maladministration of the program, they were victims of physical and sexual abuse as well as medical neglect" and "sought broad interim and permanent injunctive relief to redress the deficiencies in the administration of the program and money damages."[112] The district court in *Massinga* found that there was a likelihood of irreparable harm to the Plaintiffs if the interim relief was not granted.[113]

The irreparable harm that foster youth face if terminated from foster care without the opportunity to complete their education and develop necessary job and independent living skills is borne out by the well-documented outcomes of many youth discharged from foster care upon reaching age eighteen. Because foster youth are not adequately prepared to survive on their own at eighteen, the foster care system has created a whole new category of homeless. Indeed, nationwide studies have shown that twenty to forty percent of our country's homeless population consists of former foster youth.[114] In fact, a 1991 National Association of Social Workers study found that more than one fifth of teens at homeless shelters arrive directly from foster care nationwide.[115]

In addition to comprising a large segment of our homeless population, foster youth are disproportionately represented on public assistance rolls, in state mental hospitals, and in state prisons.[116] These youth are more likely to end up in prison or on welfare, and they often turn to drugs or prostitution.[117]

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111. *Id.* at 119.

112. *Id.*

113. *Id.* at 120.

114. *See* J.C. Barden, *After Release From Foster Care, Many Turn to Lives on the Streets*, N.Y. TIMES, Jan. 6, 1991, at A1.

115. *See* Study by the Nat'l Ass'n of Social Workers, *A Summary of Findings from a National Survey of Programs for Runaway and Homeless Youth and Programs for Older Youth in Foster Care* (1991) (on file with the Nat'l Ass'n of Social Workers).

116. *See* Somini Sengupta, *Youth Leaving Foster Care with Few Skills or Resources*, N.Y. TIMES, Mar. 28, 2000, at A1; Barbara Vobejda, *At 18, It's Sink or Swim; For Ex-Foster Children, Transition is Difficult*, WASH. POST, July 21, 1998, at A1; Sonia Nazario, *Sex, Drugs, and No Place to Go*, L.A. TIMES, Dec. 12, 1993, at A1; *see also* Diana J. English, Sophia Kouidou-Giles & Martin Plocke, *Readiness for Independence: A Study of Youth in Foster Care*, 16 Children and Youth Services Review, 147, 157 (1994) (indicating the skills that youth lack by the time they emancipate from state foster care seriously impact their successful transition to adulthood).

117. *See* U.S. House Rep. Nancy Johnson, *Bill Before House Tomorrow*, Congressional Press Releases, June 24, 1999 (LEXIS, News Library, Press Release); *The Foster-Care Trap*, N.Y. YORK POST, May 16, 1999, at 56; Michael Kelley, *Not That Easy to be Free; Life Can Sting at 18, on Your Own After Foster Care*, The Commercial Appeal, May 4, 1999, at C1; Senator Kit Bond, Testimony before the U.S. Senate Finance Subcommittee of Health Care, October 13, 1999 (LEXIS, News Library, Capitol Hill Hearing Testimony).

Further, a recent study on former foster youth conducted by the University of Wisconsin found that "by 12-18 months past discharge, 37 percent of the young adults had not yet completed high school, [and that only] nine percent had entered college."[118] Additionally, "one-quarter to one-third of the youths reported a perceived lack of preparedness in several skill areas [including managing money, living on own and parenting]."[119] Moreover, it has been found that only fifty percent of post-foster care youths are employed twelve to eighteen months after leaving the foster care system.[120]

It was because of findings such as these that Congress originally created the federal Independent Living Initiative to ensure that all foster youth sixteen years old and older would receive independent living services and skills training in order to prevent these children from ending up homeless, on welfare, or in jail.[121]

Most recently, in enacting the Foster Care Independence Act of 1999, Congress found:

> Congress has received extensive information that adolescents leaving foster care have significant difficulty making a successful transition to adulthood; this information shows that children aging out of foster care show high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior; they are also frequently the target of crime and physical assaults.
>
> The Nation's State and local governments, with financial support from the Federal Government, should offer an extensive program of education, training, employment, and financial support for young adults leaving foster care, with participation in such program beginning several years before high school graduation and

118. Mark E. Courtney and Irving Piliavin, *Foster Youth Transitions to Adulthood: Outcomes 12 to 18 Months After Leaving Out-of-Home Care*, at 2 (July 1998 (Revised Aug. 1998)).

119. *See id.*

120. *See* David Reyes, *Something Lost in Transition for Foster Care Teens; Report Cites Need for Young Adults Leaving System to Have Financial or Emotional Support to Help Prevent Homelessness, Pregnancy and Joblessness*, L.A. TIMES, Feb. 10, 2000, at B1; Scott McCown, *Foster Children Get a Fighting Chance*, AUSTIN AM.-STATESMAN, Dec. 20, 1999, at A17.

121. 42 U.S.C. § 677 (1994 & Supp. IV 1998).

> continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of age.[122]

Society is best served by enabling youth who are committed to the foster care system as dependent children and who have not completed their education to remain in foster care after age eighteen in order to complete their education and make a successful transition to adulthood. It is unquestionable that the public interest is best served by a well-run, humane, and effectively administered foster care system, which will preserve the lives, health, and safety of foster youth. Without such a system, the harm to the public interest is substantial and tragic, with increased numbers of older foster care children suffering neglect of the most damaging nature and the costs to the youth, as well as the costs to our communities, continuing for a lifetime.

Numerous studies conducted throughout the nation and numerous legislative hearings leading up to the enactment of the Foster Care Independence Act of 1999 have come to the same conclusion, as has, most recently, President Bush who stated:

> The personal and emotional costs are especially high for young people who leave foster care at age eighteen without having been adopted. Research indicates that these young people experience alarming rates of homelessness, early pregnancy, mental illness,

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122. Foster Care Independence Act of 1999, 106 Pub. L. No. 106-169, § 101, 113 Stat 1823 (1999). Through the Foster Care Independence Act of 1999, Congress doubled the annual federal funding from $70 million to $140 million to enable states to serve foster youth through the age of twenty-one. *See id.* The legislation provides for expanded training and educational opportunities, access to health care, housing assistance, counseling and other services for teenagers and young adults in foster care to help them make a successful transition to adulthood. *See id.*; *see also* 42 U.S.C. § 677 (1994 & Supp. IV 1998). As noted by Rep. Mark Foley (Fla.) in the House debate on this bill,

> Last year Florida had 3,103 youths who were eligible for independent living programs. Although some of these kids have foster parents who stick with them and are willing to help, including giving them money out of their own pockets, many have been shuffled around so much that they do not have anyone to turn to.
>
> These foster children have barely been able to be kids, and suddenly they are forced to become instant adults. It is no wonder that many of them end up on the streets or on welfare, or as teenaged parents.

145 CONG. REC. H4962 (daily ed. June 25, 1999) (statement of Sen. Foley) This new law has had a significant impact on Florida's Independent Living budget for older foster youth, raising it from $900,000 to $6.1 million. *See* Shana Gruskin, *State to Help Foster Kids Master Adult Life*, SUN-SENTINEL (Ft. Lauderdale), Jan 2, 2000, at 1B.

> unemployment, and drug abuse in the first years after they leave the system.[123]

Florida courts have held that Florida law does not permit the retention of circuit court juvenile jurisdiction over a person after the age of eighteen when she continues to receive services from the Department of Children and Family Services.[124] Hence, if Leslie F. is improperly deprived of her right to continued foster care benefits, she has no other means to seek any legal remedy in the Florida state courts to make her whole.

B. *Social Security Act*

Agencies established under Title IV-D "must pursue enforcement" of child support enforcement rights because families must "assign their support rights to the state."[125] Just as the Supreme Court held in *Wright* that HUD has "authority to audit, enforce annual contributions contracts, and cut off federal funds [b]ut these generalized powers are insufficient to indicate a congressional intention to foreclose [section] 1983 remedies,"[126] so too should the Court hold that Title IV-D of the Social Security Act permits private enforcement through section 1983.

Pursuant to the CSEA, state agencies must collect child support "in order to reimburse the federal and state governments for the costs of maintaining children in the federal IV-E foster care program."[127] Specifically, the Federal Payments for Foster Care and Adoption Assistance

> provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A and plan approved under part D, to secure an assignment to the State of any rights to support on behalf

123. *A Blueprint for New Beginnings: A Responsible Budget for America's Priorities*, EXEC. DOC. NO. 041-001-00560-9, at 76 (2001) *available at* http://www.whitehouse.gov/news/usbudget/blueprint/blueprint.pdf. To help this class of youth, President Bush has proposed that the new federal budget "provide $60 million through the Foster Care Independence Program specifically for education and training vouchers to youth who 'age out' of foster care." *Id.*

124. L.Y. v. Dep't of Health & Rehabilitative Servs., 696 So. 2d 430 (Fla. 4th Dist. Ct. App. 1997); *see also* N.L. v. Dep't of Children & Family Servs., 770 So. 2d 220 (Fla. 3d Dist. Ct. App. 2000).

125. ERICKSON, *supra* note 11, at 10–11.

126. Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987).

127. ERICKSON, *supra* note 11, at 379.

> of each child receiving foster care maintenance payments under this part.[128]

Erickson describes policy concerns that arise under assignment and children in foster care that do not arise under assignment and AFDC: the assignment should be made only if it is appropriate and should be postponed because of the propensity for economic instability of the former custodial parent.[129] If the child returns home, then the support should be sent directly to the custodial parent, provided that they are not welfare recipients.[130] In this instance, the issue of right of action of foster care children merges with that of children who reside with their custodial parent.

V. SOVEREIGN IMMUNITY AND THE STATE OF FLORIDA

A. *In General*

As was demonstrated previously, the Eleventh Amendment of the United States Constitution protects the State of Florida and its representatives from federal law based damage actions and protects the state itself [though not representatives] from suits seeking declaratory or injunctive relief.[131] The state's liability is different under state law, and the significance of the differences varies depending on whether the suit is one sounding in tort or contract. The analysis begins with Florida's Constitution, which reflects a presumption of pre-existing state immunity from suit. It reads: "SECTION 13. Suits against the state. Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."[132]

The 1973 Legislature officially passed a partial waiver of sovereign immunity in tort cases, with various preconditions required and limitations on damages recoverable.[133] In pertinent part, the current statute provides as follows:

> (1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives

128. 42 U.S.C. § 671(17) (1994).

129. ERICKSON, *supra* note 11, at 379–80 (citing Carol Golubuck, *Cash Assistance to Families: An Essential Component of Reasonable Efforts to Prevent and Eliminate Foster Care Placement of Their Children*, 19 CLEARINGHOUSE REV. 1393, 1399 (April 1986)).

130. *Id.* at 381.

131. *See also* FLA. STAT. § 768.28(17) (2000).

132. FLA. CONST. art. X, § 13.

133. 1973 Fla. Laws ch. 73-313, § 1.

sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.[134]

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. . . . [135]

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as

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134. § 768.28(1).

135. *Id.* § 768.28(5). For each separate incident of negligence that causes or contributes to damage, the statutory caps can be stacked. *See, e.g.*, Pierce v. Town of Hastings, 509 So. 2d 1134 (Fla. 5th Dist. Ct. App. 1987).

> a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[136]

B. *Liability in Tort Cases*

The sovereign immunity waiver statute applies to all government entities, although municipalities were historically treated differently and could be held liable where a special duty to the injured person existed, even though another government entity may have been immune.[137] The 1973 adoption of the statute has effectively eliminated the different treatment of municipalities.[138] The Florida waiver statute essentially imposes liability on government entities when their negligent conduct is the type of conduct which would result in a private citizen being liable for damages caused by the same type of negligent conduct.[139] In analyzing the types of conduct for which waiver of immunity exists and those governmental non-private types of acts for which immunity continues without waiver, the Supreme Court of Florida adopted the following four-part test:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

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136. § 768.28(9)(a).

137. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967).

138. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).

139. § 768.28(1).

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? [140]

As a further litmus test, the court also adopted the analysis of *Johnson v. State*[141] to differentiate between planning and operational levels of decision making, with the waiver of tort immunity applying solely to nongovernmental, discretionary, operational level negligence.[142]

It is important to note that the statute can also have an effect on the liability of government employees and agents in their representative and individual capacities. The statute precludes personal liability suits against individuals in their individual capacity for any act "within the scope" of their employment or agency "unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[143]

Thus, individual liability remains for acts "not within the scope" and for egregious acts meeting the bad faith, malicious purpose, or willful disregard threshold.[144] A clerk of court officer whose duties expressly include the proper indexing of documents relating to real property can be sued in tort for damages caused by negligence in recording a title document; no immunity precluded the suit or the liability.[145] There can clearly be individual government employee liability for acts outside the scope of employment;[146] the

140. *Commercial Carrier*, 371 So. 2d at 1019 (citing Evangelical United Brethen Church v. State, 407 P.2d 440, 445 (1965)).

141. 447 P.2d 352, 360 (1968).

142. *Commercial Carrier*, 371 So. 2d at 1022.

143. § 768.28(9)(a).

144. *Id.* By statute, for non-egregious, covered acts "within the scope" the only proper defendant is the government entity itself. *See id.*

145. First American Title Ins. v. Dixon, 603 So. 2d 562, 566 (Fla. 4th Dist. Ct. App. 1992).

146. § 768.28(9); O.A.G. 80-57 (1980); *see* White v. Crandon, 156 So. 303 (1934) (member of county commission board will be held personally liable for money voted and paid out without authority of law where the payment is equivalent to misappropriation of public funds).

determination of whether a particular wrongful act is within the scope of employment or not is ordinarily a question for the trier of fact.[147]

As one contemplates potential theories of action against a state agency, it should be noted that the immunity stated relates to "liabilities,"[148] and actions against a government body for injunctive or other equitable relief are not necessarily precluded by sovereign immunity under state or federal law.[149]

Although the legislature has not enacted any law waiving sovereign immunity in contract actions, Florida's courts recognize the inequity that would be present if the state could violate its contractual obligations with impunity, and have allowed actions to go forward against the state. In *Pan-Am Tobacco v. Department of Corrections*,[150] the Supreme Court of Florida unequivocally held, in answering a question certified by the district court to be of the utmost importance, that sovereign immunity cannot be properly raised by government as a defense to an action for breach of an express, written contract.[151] In so doing, the court relied upon the general powers of state agencies to enter into contracts and reasoned that because such contracts would be valid only if mutually enforceable the legislature obviously intended for state agencies to be amenable to suits for breaches of said express contracts.[152] In *Champagne-Webber v. Fort Lauderdale*,[153] the court held that an action for breach of an implied covenant of good faith inherent in the express contract would also lie.[154] Similarly, governmental liability for prejudgment interest has been allowed, despite an absence of any statute expressly waiving immunity for same.[155] A cause of action may also be

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147. Alvarez v. Cotarelo, 626 So. 2d 267, 268 (Fla. 3d Dist. Ct. App. 1993).

148. FLA. CONST. art. X, § 13.

149. *E.g.*, Seminole Co. v. Mertz, 415 So. 2d 1286 (Fla. 5th Dist. Ct. App. 1982) (injunction requiring county to prevent the flow of surface water onto lower-lying property; sovereign immunity not applicable); *Mallo*, 88 F. Supp. 2d at 1381 (injunction requiring reimbursement of excess funds demanded and received by county).

150. 471 So. 2d 4 (Fla. 1984).

151. *Id.* at 5.

152. *Id.*

153. 519 So. 2d 696 (Fla. 4th Dist. Ct. App. 1988).

154. *Id.* at 698. In *Champagne-Webber*, the contractor relied on the city's representation that the soil on which construction would occur was all sand, and made its bid accordingly. *Id.* at 696–97. The rock discovered under the sand during construction increased the work to be done and the cost. *Id.* at 697. The *Champagne-Webber* court's rationale was expressly approved by the Supreme Court of Florida. County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049, 1051 (Fla. 1997).

155. *See generally* Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990) (from date of demand); Florida Livestock Bd v. Gladdens, 86 So. 2d 812 (Fla. 1956); Public Health Trust of Dade v. State, 629 So. 2d 189 (Fla. 3d Dist. Ct. App. 1993).

stated against an individual employee personally in an action for breach of a contractual duty of a gratuitous bailee.[156]

VI. APPLICATION OF FLORIDA LAW TO CHILD SUPPORT ENFORCEMENT VIOLATIONS

There are two situations in which it is likely that liability for violating the child support enforcement laws will easily be found. First, when the noncustodial parent is known, but no action is taken to obtain a support order, the state violates its nondiscretionary ministerial obligation under federal and Florida law. Suite would therefore be proper to compel the official to obtain the support order.

If the child is in foster care in the state's custody as a dependent child pursuant to section 39 of the *Florida Statutes*, there is an absolute duty to provide all basic services up to age twenty-one under federal law[157] and the extended assistance provided under state law up to age twenty-three for foster youth who continue to pursue their educations.[158] An action for injunctive relief on behalf of an in-school foster youth would be appropriate here as well, to compel the state to comply with its nondiscretionary duties.

In the case of non-foster children for whom the state receives money, but fails to distribute funds to the custodial parent for the benefit of the child, available remedies under the authorities cited above would appear to include actions for damages under tort or contract law against the state itself or the official whose nonfeasance or misfeasance delayed or prevented the distribution, as well as equitable remedies such as a suit for mandamus or other injunctive relief.

VII. CONCLUSION

Under federal and Florida law, legal action is appropriate to enforce the state's obligations to collect and distribute for the direct benefit of children the child support which the noncustodial parent has been ordered to pay. Such a suit can be brought against the agency head responsible for enforcement of the obligations pertaining to a non-foster child, and against the responsible official of the Department of Children and Families in the case of foster children.

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156. *See generally* Palm Court Corp. v. Smith, 137 So. 234 (1931).

157. Foster Care Independence Act of 1999, *supra* note 122.

158. *See generally id.*