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Lashawn A. V. Dixon: Responding To The Pleas Of Children

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LASHAWN A. v. DIXON: RESPONDING TO THE PLEAS OF CHILDREN

> Many things we need can wait, the child cannot. Now is the time his bones are being formed, his blood is being made, his mind is being developed. To him we cannot say tomorrow, his name is today.[1]

The foster care system in the United States is in a shambles.[2] A state welfare agency will take a child away from an abusive home, only to place the child with a foster family that further abuses the child.[3] These children have but one wish—to survive.[4] Some children spend the better part of their childhood in foster homes and suffer mental, emotional, and physical abuse at the hands of state-appointed foster parents.[5] The unfortunate truth is that our foster care programs are failing the very people for whom the

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1. Gabriela Mistral, Chilean poet, *quoted in* NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES, Final Report of the National Commission on Children, at 1 (1991).

2. *See* BRIGHT FUTURES OR BROKEN DREAMS: THE STATUS OF THE CHILDREN OF THE DISTRICT OF COLUMBIA AND AN INVESTMENT AGENDA FOR THE 1990'S, Report of the Children's Defense Fund, at 90-116 (1991) [hereinafter BRIGHT FUTURES] (stating that thousands of children and adolescents are in crisis in District of Columbia and highlighting deficiencies in foster care program). *See generally* J.C. Barden, *Group Says Violations Pervade Capital Foster Care*, N.Y. TIMES, Oct. 28, 1990, § 1, at 22 (discussing how foster care systems in seven of twenty-three states reviewed failed to meet legal standards); Michael D'Antonio, *Foster-Care Failings: Abandoned, Abused Kids Stuck in a System Lacking Money—and Families*, NEWSDAY, Dec. 4, 1988, at 5 (discussing how foster care agency fails to meet its responsibilities); *Former Foster Child Tells Panel of Five Lost Years*, N.Y. TIMES, Apr. 17, 1988, § 1, at 53 (stating that shortcomings of New York City's foster care program are staggering); *Foster Care Woes in Baltimore*, N.Y. TIMES, Aug. 2, 1987, § 1, at 44 (reporting on order of judge ruling that serious deficiencies in foster care system of Baltimore are exposing children to serious risk of permanent damage); John Hurst, *County Accused of Letting Foster Children Suffer Abuse*, L.A. TIMES, Mar. 8, 1990, at A3 (stating that Los Angeles County Department of Children's Services continuously has failed to protect children in foster care from substandard conditions); Michael Powell, *It's A Scofflaw Budget*, NEWSDAY, June 20, 1991, at 7 (illustrating that states ignore court orders to fund programs such as foster care); Spencer Rich, *Lawmakers Fault HHS on Foster Care: Abuse of Children in Programs Cited*, WASH. POST, May 13, 1988, at A21 (stating that in recent years child welfare and foster care system has faced increasing problems).

3. *See supra* note 2 (discussing deficiencies in state foster care programs).

4. Douglas Martin, *Where Trail of Tears Ends for the Hard to Place*, N.Y. TIMES, Nov. 27, 1991, at B4 (depicting life of child who, when asked meaning of life, replied "to survive").

5. *See supra* note 2 (discussing abused foster children); *see also* K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (depicting foster child discovered to have contracted gonorrhea from vaginal intercourse when she was seventeen months old); Doe v. New York City Dep't of Soc. Serv., 709 F.2d 782, 783 (2d Cir.) (depicting foster child physically and sexually abused by foster father), *cert. denied sub nom.* Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

government designed the systems. Despite the fact that most states and municipalities are aware of the inadequacies of their foster care programs, budgetary constraints as well as ineffectual administrative and bureaucratic procedures hamper efficient implementation of the foster care programs.[6] In an ideal world, the state would be a protective guardian of its abused children; in our society, however, the state does little to protect its disadvantaged children, and often takes funding away from desperately needed children's health programs. Because children do not vote, cannot organize politically, and are incapable of donating financial support to political figures, the state finds it easy to overlook their needs.[7] Some municipalities

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6. *See* 126 CONG. REC. S6941 (daily ed. June 13, 1980) (statement of Senator Cranston) (stating that one of country's most serious and well-documented problems with existing foster care system is tendency for child to become lost in system); *see also* Paul Taylor, *Nonprofits Boost Advocacy in the Interest of Children*, WASH. POST, Jan. 13, 1992, at A1 (discussing how 32 community foundations across United States have formed loose alliance that will serve children by engaging in public advocacy, community organization and media campaigns); Paul Taylor, *Plight of Children: Seen but Unheeded*, WASH. POST, July 5, 1991, at A1 (stating that while children have become wrenching symbol of social neglect, social policy has not moved beyond lip service).

7. *See* Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV., 487, 492-493 (1973) (discussing inability of children to secure rights for themselves). Rodham writes

> That children's issues are political may seem obvious . . . In the United States, the problems of children have usually been explained without any consideration of children's proper political status. Accordingly, the obstructionist role of the unstated consensus and the laws reflecting it has seldom been appreciated. The pretense that children's issues are somehow above or beyond politics endures and is reinforced by the belief that families are private, non-political units whose interests subsume those of children. There is also an abiding belief that any official's failure to do what is best by a child is the exception, not the rule, and is due solely to occasional errors of judgment. Moreover, nothing countervails against this pattern, since children are almost powerless to articulate their own interests or to organize themselves into a self-interested constituency and adults allied with them have seldom exerted an appreciable influence within the political system.

Id.

See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing society's intuitive convictions of the primacy of justice). In *A Theory of Justice*, Rawls defines the concept of justice as

> a proper balance between competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance . . . The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages.

Id. at 10.

Applying Rawls' interpretation of justice to the position of children in American society, it is clear that a proper balance does not exist between rights of children and competing adult claims. Likewise, Rodham's observations indicate that children have little political status in America, and as a result are incapable of making their voices heard in the political arena. *See* Rodham, *Children Under the Law*, *supra*, at 493 (discussing fact that children are almost powerless to organize politically).

Under Rawls' interpretation of justice, various segments of society should have the ability to iterate their versions of justice and to voice their concerns in the channels established for

consciously disregard court orders commanding states to cure the inadequacies of their foster care programs.[8] When economic constraints require tradeoffs in a state's budget, children's services are usually the first to go—after all, the children cannot fight back.[9] Abused children must depend upon child activists to voice their concerns and call attention to their plight.[10]

Responding to the needs of children within foster care programs, child activists are demanding that states acknowledge the fact that some of their foster care systems are failing. Recently, these child activists have employed a new tactical maneuver to press their position: Litigation under section 1983 and the Due Process Clause of the Fourteenth Amendment. Initial judicial approval of these claims came in April 1991 when the District Court for the District of Columbia decided *LaShawn A. v. Dixon.*[11] In *LaShawn*, Judge Hogan held that District of Columbia officials had deprived children in the District's foster care of their constitutionally protected liberty interests in personal safety and freedom from harm.[12] The District of Columbia subsequently appealed this ruling on September 25, 1991.[13]

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meting out our theories of justice, *i.e.* the legislature, the judiciary, etc. Unfortunately, children have neither the status nor the stature to organize themselves into a politically operative force. Their voices are not heard on issues that pertain directly to them. Only through advocates who prominently and prolificly champion the rights of America's children will children transform into a political power commanding recognition in the political realm.

8. *See infra* note 120 and accompanying text (discussing District of Columbia's failure to comply with Judge Ricardo Urbina's numerous orders in children's rights suit).

9. Paul Taylor, *Nonprofits Boost Advocacy In the Interest of Children*, WASH. POST, Jan. 13, 1992, at A1 (stating that budget squeeze in states has not only slowed implementation of new children's programs, but has led to deepest round of cuts in Aid to Families with Dependent Children, the basic income support program for poor families); Paul Taylor, *Saving our Children—By Cutting Our Taxes*, WASH. POST, June 9, 1991, at D1 (quoting Congressman J. Dodd (D-Conn.) who stated that federal spending on children's programs grew at only one-quarter rate of overall federal budget); Richard Tapscott, *Maryland's Doomsday Option*, WASH. POST, Jan. 30, 1992, at A1 (stating that without increase in taxes, Maryland will trim $9,000,000 from children-at-risk program and over $7,000,000 from students with disabilities program).

10. *See supra* note 7 and accompanying text (discussing inability of children to secure political rights for themselves). *See, e.g.*, Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986) (challenging racial and religious discrimination in placement of children into publicly funded, voluntary child-care agencies), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); Joseph A. v. New Mexico Dep't of Human Serv., 575 F. Supp. 346 (D.N.M. 1982) (focusing on state's failure to provide adoptive homes to children who could not return to their biological families); G.L. v. Zumwalt, 564 F. Supp. 1030 (W.D. Mo. 1983) (highlighting serious problems in recruiting, training, and supervision of foster parents and equally serious problems in training and supervision of workers). These cases, brought by the ACLU's Children's Rights Project, are illustrative of the types of suits which child activists press on behalf of children. *See generally* Marcia Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255 (1986) (discussing early child welfare litigation); *see also* Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681 (1987) (proposing extending professional responsibility tenets to provide guidance to attorneys who represent minors).

11. 762 F. Supp. 959 (D.D.C. 1991).

12. LaShawn A. v. Dixon, 762 F. Supp. 959, 996 (D.D.C. 1991).

13. Tracy Thompson, *Foster Care Ruling Appealed*, WASH. POST, Oct. 1, 1991, at B2.

Judge Hogan's ruling that children have a constitutional right to adequate foster care is the culmination of recent judicial enforcement of legislative attempts to implement adequate child protection measures in the District's foster care program.[14] Judge Hogan's ruling is an innovative approach in the virtually uncharted territory of children's rights.[15] Court systems historically have treated children as political non-entities, considering them to be wards of the state or chattel of families.[16] In the last half of the twentieth century, however, the Supreme Court has held that the Constitution requires recognition of particular rights of children, especially in the juvenile justice and educational arenas.[17] Nevertheless, the Supreme

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14. *LaShawn*, 762 F. Supp. at 996. *See* District of Columbia v. Jerry M., 571 A.2d 178, 192 (D.C. 1990) (holding District of Columbia in contempt for ignoring consent decree issued by trial court in children's rights litigation).

15. *LaShawn*, 762 F. Supp. at 996. *See In re* Gault, 387 U.S. 1, 13 (1967) (holding that juveniles are entitled to same due process procedures granted to adults in criminal proceedings). *Gault* is a famous children's rights case in which the Supreme Court declared that the Fourteenth Amendment and the Bill of Rights applied to children as well as to adults. *Id.* The *Gault* Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.*: *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (holding that children are persons under Constitution). As a result of *Gault* and *Tinker*, the Court afforded children their initial political status under the law. *See supra* note 7 and accompanying text (discussing children's political status under law). Children, however, have not been explicitly granted many of the constitutional protections that apply to adults. *See infra* note 16 (discussing how few rights children actually have under Constitution).

16. *See* Rodham, *supra* note 7, at 489 (discussing how eighteenth century commentator William Blackstone wrote little about children's rights and instead stressed duties owed by "prized possessions" to their fathers). While children have long held rights as parties injured by tortfeasors, legatees under wills, or intestate successors, adult representatives must exercise these rights on behalf of the children. *Id.* However, older children do possess several statutory rights, such as the right to drive a motor vehicle, the right to drop out of school, the right to work, the right to vote, and the right to marry. *Id. But see* Gardner v. Parson, 874 F.2d 131, 141 (3d Cir. 1989) (ordering district court to appoint person to prosecute retarded child's claims). In *Gardner*, the district court removed the grandmother of a severely mentally retarded teenager as the teenager's next friend, refused to appoint a replacement, and dismissed the teenager's claims. *Id.* at 136. The Third Circuit determined that the district court had abused its discretion by failing to appoint a new next friend and by dismissing the teenager's claims. *Id.* at 141. This is one example of how a handicapped child, unable to prosecute her own claims, becomes the subject of seemingly endless litigation that prevents her from receiving, on a continuous basis, the special familial, educational, and medical services that she requires.

17. *See* Rodham, *supra* note 7, at 489-490 (discussing recent trends of Supreme Court in children's rights arena); *see also* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (arguing that compulsory school law violated Amish children's religious freedom) (Douglas, J., dissenting); *In re* Winship, 397 U.S. 358, 368 (1970) (concluding that case against child in juvenile court must be proven beyond reasonable doubt); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding that three teenagers had right to don black arm band to protest Vietnam war); *In re* Gault, 387 U.S. 1, 30 (1967) (holding that adult procedural protections in criminal trial extend to delinquency proceedings); Kent v. United States, 383 U.S. 541, 543 (1966) (holding that waiver from juvenile court has to meet minimum requirements of due process); Haley v. Ohio, 332 U.S. 596, 601 (1948) (holding that protection of Fourteenth Amendment against coerced confession extended to fifteen year old boy in state criminal trial); West. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (granting right

Court has refused to extend to children all rights constitutionally assured to adults.[18]

The status of children as political beings under the law is beginning to emerge from its embryonic form.[19] The courts tend to see the family as a private unit and generally find it inappropriate to subject a family to political analysis or moral scrutiny.[20] Though the autonomy granted to an individual family unit manifests itself in a variety of circumstances,[21] the ever-increasing atrocities that face children trapped within traditional family settings have opened the family unit to the public eye.[22] Because children are powerless to assert their own interests or to organize themselves into a

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to refuse to salute flag in public schools when doing so would violate religious beliefs). *But see* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 29-39 (1973) (rejecting claim that there is fundamental personal right to education under the Constitution). In *Rodriquez* the Supreme Court cited Brown v. Bd. of Educ., 347 U.S. 483 (1954), as stating the Court's unanimous holding that education was perhaps the most important function of state and local governments. *Brown*, 347 U.S. at 493. The *Rodriguez* Court refused to extend this holding into the constitutional realm, however, holding that education is not afforded either explicit or implicit protection under the Constitution. *Rodriquez*, 411 U.S. at 35.

18. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that jury trial is not constitutionally required in juvenile court's adjudicative stage); *see also* Organization of Foster Families for Equality & Reform v. Dumpson 418 F. Supp. 277, 282 (S.D.N.Y. 1976) (holding that before foster child can be peremptorily transferred from foster home in which he has been living, he is entitled to hearing in which all concerned parties may present any relevant information to administrative decision maker charged with determining future placement of child), *rev'd*, 431 U.S. 816, 856 (1977) (reversing lower court on grounds that already existing procedures were adequate). *See generally*, John F. Gillespie, Annotation, *Status and Rights of Foster Children and Foster Parents under Federal Constitution*, 53 L. Ed. 2d 1116 (1978) (analyzing federal court cases discussing status and rights of foster parents and foster children under federal constitution).

19. *See supra* note 17 and accompanying text (discussing rights Supreme Court has granted to children).

20. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (stating that fundamental liberty interest of natural parents in care, custody, and management of child does not evaporate simply because they have not been model parents or have lost temporary custody of child to state). The *Santosky* Court stated that "even when blood relationships are strained, [natural] parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.*

21. *See id.* at 768-69 (stating that due process requires that courts find "permanent neglect" by clear and convincing evidence before terminating parental rights); Prisco v. United States Dep't of Justice, 851 F.2d 93, 97 (3d Cir. 1988) (holding that non-custodial parent has right to notice and hearing when state places child in Witness Protection Program), *cert. denied*, 490 U.S. 1089 (1989); Ruffalo v. Civiletti, 702 F.2d 710, 715 (8th Cir. 1983) (same); Franz v. United States, 707 F.2d 582, 608 (D.C. Cir. 1983) (same); Winston v. Children & Youth Serv., 748 F. Supp. 1128, 1134 (E.D. Pa. 1990) (stating that parent's liberty interest in relationship with child continues even when courts grant temporary custody to state or to another parent), *aff'd*, 948 F.2d 1380 (3d Cir. 1991); Williams v. Carros, 576 F. Supp. 545, 547 (W.D. Pa. 1983) (stating in dicta that regular and appropriate visits between mother and her children are fundamental liberty interests protected by Constitution).

22. *See* Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 525 (1987) (stating that when focus in family setting shifts from child neglect to child abuse, value accorded family privacy considerations seems to diminish).

self-interested constituency,[23] children are dependent upon particular institutions to recognize the need for the establishment of children's rights and to assume responsibility for enforcing these rights.[24]

Until recently, the Supreme Court has been reluctant to define or formalize the status of children's needs and interests.[25] Likewise, lower courts have followed the Supreme Court's lead, preferring to define what is *not* a child's constitutional right rather than what *is* a child's constitutional right.[26] Traditionally, courts have preferred to carve out an area between parental dominion and state prerogative allowing certain adult rights to extend to children under specific circumstances.[27] As the suffering of the nation's children has increased,[28] however, so has the activism within legislatures and courts.[29] All three branches of government are beginning to

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23. *See* Rodham, *supra* note 7, at 492 (discussing powerlessness of children).

24. *See supra* note 7 (discussing children's need for powerful advocates); *see also supra* note 10 and accompanying text (listing examples of lawsuits that ACLU brings on behalf of abused children).

25. *See supra* note 17 and accompanying text (discussing children's limited rights under Constitution); *see also* Planned Parenthood v. Casey, 947 F.2d 682 (3d. Cir. 1991) (upholding Pennsylvania's Abortion Control Act of 1989), *cert. granted*, 112 S. Ct. 931 (1992). The dissension that currently exists in determining whether required parental consent to a minor's abortion is unconstitutional is illustrative of the tension that exists between state and parental control over a minor's life and the right of a minor to exercise control over her own body. *See id.*

26. *See* Child v. Beame, 412 F. Supp. 593, 603 (S.D.N.Y. 1976) (holding that foster children do not have substantive due process right to adoptive homes and that right to adequate, safe, and sanitary housing is not constitutionally protected right); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that jury trial is not constitutionally required in juvenile court's adjudicative stage).

27. *See* Rodham, *supra* note 7 at 494-495 (discussing extension of adult rights to children); *see also supra* note 18 and accompanying text (discussing Supreme Court cases granting limited rights to children).

28. *See generally* NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES, Final Report of the National Commission on Children (1991) (assessing status of children and families in United States and proposing new directions for policy and program development); *see also* Tracy Thompson, *Children Get Dingy First View of D.C. Caring*, WASH. POST, Dec. 10, 1991, at E1 (stating that administrative chaos is major hinderance to court ordered foster care improvements); *Finding a Place for Children*, WASH. POST, Aug. 27, 1991, at A22 (addressing problems inherent to delivery of social services); Alison Howard, *Judge Faults D.C. Youth Detention*, WASH. POST, Aug. 22, 1991, at B1 (reporting on District's contempt citation for defying five year old court order to provide neighborhood shelters and foster care for young defendants).

29. *See* Social Security Act 42 U.S.C. §§ 420-427, 470-476 (1988) (outlining child welfare services); 42 U.S.C. §§ 620-627, 670-676 (1988 & Supp. I 1989) (same); *see also* Artist M. v. Johnson 917 F.2d 980, 982 (7th Cir.) (affirming decision to enter preliminary injunction requiring assignment of case worker to wards of juvenile court within three days), *rev'd sub nom.* Suter v. Artist M., 112 U.S. 1360 (1992). For a discussion of the Supreme Court's decision *see infra* note 117. *See also* L.J. v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988) (holding that present or former foster children in custody of city department of social services were entitled to preliminary injunction to redress deficiencies in administration of foster children program), *cert. denied*, 488 U.S. 1018 (1989); Lynch v. King, 550 F. Supp. 325, 340-42 (D. Mass. 1982) (holding that preliminary injunction would be issued requiring Massachusetts

realize that platitudes do not feed hungry children, do not eradicate abuse, do not provide shelter for the homeless, and do not provide rudimentary health care and educational benefits.[30] Judge Hogan refused to succumb to these platitudes in the *LaShawn* decision.[31]

The foster care program in the District of Columbia is representative of the plight that many American children face today.[32] *LaShawn* is an excellent example of the judicial involvement that is necessary to eradicate the abuse that is inherent in many of our nation's foster care programs. An analysis of *LaShawn* as a natural extension of the Supreme Court's decision in *Deshaney v. Winnebago County Social Services Department*[33] will reveal that Judge Hogan correctly decided *LaShawn* and that the United States Court of Appeals for the District of Columbia should uphold the case on appeal. A comparison of *LaShawn* to similar cases in other jurisdictions, as well as an examination of the sociological and economic realities in the District of Columbia, will substantiate the necessity for *LaShawn*'s affirmation. Additionally, an examination of the consent decree initially accepted by both parties in *LaShawn* will explore the enforcement issues that underlie the effectiveness of such orders in foster care litigation. This examination will reveal that judicial involvement in the execution of state foster care programs is necessary to insure that states adequately provide for the children in their care.

LaShawn: Carrying Deshaney to its Logical Extension

In *Deshaney v. Winnebago County Social Services Department*[34] the Supreme Court paved the way for lower courts to expand the constitutional rights of children. The facts of *Deshaney* are undeniably tragic. The plaintiff, Joshua Deshaney, was born in 1979.[35] His parents divorced in 1980, and the court awarded custody of Joshua to his father, Randy Deshaney.[36] Joshua's father severely beat Joshua on several occasions.[37] Although the

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Department of Social Services to provide each foster child with case plan and to provide periodic review of each child's case), *aff'd sub nom* Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

30. *See supra* note 2 and accompanying text (describing failure of foster care system).

31. *See* LaShawn A. v. Dixon, 762 F. Supp. 959, 961 (D.D.C. 1991) (stating that evidence in case compelled court to find District liable even though court was uncomfortable entertaining challenge to local government action).

32. See generally Bright Futures, *supra* note 2 (outlining what new administration can do to push District from bottom to top of national performance on key child indicators).

33. 489 U.S. 189 (1989).

34. Deshaney v. Winnebago County Soc. Serv. Dep't, 489 U.S. 189 (1989).

35. *Id.* at 191.

36. *Id.*

37. *Id.* at 191-93. In *Deshaney*, the beatings that Joshua's father inflicted upon his son were sometimes so severe that hospital treatment was necessary. *Id.* Three times prior to the beating that instigated the *Deshaney* litigation, emergency room personnel notified DSS that in their opinion Joshua was a victim of child abuse. *Id.* The DSS took certain remedial precautions, but in all instances concluded that there was no basis for action. *Id.* Joshua is now expected to spend the rest of his life in an institution for the profoundly retarded. *Id.*

Winnebago County Department of Social Services (DSS) received complaints that Joshua's father was abusing the child and took various steps to protect Joshua, the DSS did not remove Joshua from his father's custody.[38] Eventually, Joshua's father beat his son so severely that Joshua suffered permanent brain damage and acute retardation.[39]

Joshua and his mother sued the DSS under the United States Civil Rights Act of 1988.[40] In the suit, Joshua and his mother alleged that the DSS, in violation of Joshua's rights under the substantive component of the Fourteenth Amendment's Due Process Clause, had deprived Joshua of his liberty interest in bodily integrity by failing to intervene to protect him from his father's violence.[41] The United States District Court for the Eastern District of Wisconsin granted summary judgment for the DSS, holding that the failure of a state agency to render protective services to persons within its jurisdiction does not violate the Due Process Clause.[42] The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision,[43] holding that although the state had deprived Joshua of liberty within the meaning of the Due Process Clause, the state did not share responsibility for that deprivation because a state employee was not responsible for the deprivation of Joshua's liberty interest in bodily integrity.[44]

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38. *Id.* at 191-93.

39. *Id.* at 193.

40. 42 U.S.C. § 1983 (1988). Section 1983 provides that:

> 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.

Id.

41. *Deshaney*, 489 U.S. at 193.

42. Deshaney v. Winnebago County Dep 't of Soc. Serv., 812 F.2d 298, 301 (7th Cir. 1987) (holding that although state denied child liberty within meaning of due process clause, state did not share responsibility for that deprivation). The plaintiff's complaint contained a pendent party claim against Randy DeShaney, but the district court relinquished jurisdiction of the pendent claim when it dismissed the federal claim on DSS's motion for summary judgment. *Id.*

43. *Deshaney*, 812 F.2d at 304.

44. *Id.* at 301-04 (7th Cir. 1987). The Seventh Circuit adheres to the theory that a state's failure to protect people for private violence not attributable to the conduct of its employees is not a deprivation of constitutionally protected property or liberty. *Id.* at 301; *see* Walker v. Rowe, 791 F.2d 507, 510 (7th Cir.) (holding that Due Process Clause does not ensure safe working conditions for state employees), *cert. denied*, 479 U.S. 994 (1986); Ellsworth v. Racine, 774 F.2d 182, 185 (7th Cir. 1985) (holding that nothing in constitution requires governmental units to act when members of general public are in danger), *cert. denied*, 475 U.S. 1047 (1986); Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984) (holding that city could not be held liable for deaths of children and property damage in fire which occurred during strike by municipal fire fighters because fire fighters had no constitutional duty to act and did not effect deprivation within meaning of Fourteenth Amendment when they carried out strike threat); Beard v. O'Neal, 728 F.2d 894, 898-900 (7th Cir.) (holding that FBI informant who

The Supreme Court affirmed the lower courts' decisions.[45] First, the Court held that the state's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause because it imposes no duty on the state to provide members of the general public with adequate protection services.[46] Second, the Court rejected the contention that the state's knowledge of Joshua's danger and expressions of willingness to help protect him against that danger established a "special relationship" that gave rise to an affirmative duty to protect.[47] The plaintiff found support for the "special relationship" theory in several United States Court of Appeals cases that held that once the state learns that a third party poses a special danger to an identified victim, and then demonstrates its willingness to protect the victim against that danger, a "special relation-

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accompanied murder victim on night of murder did not have constitutional duty to prevent murder), *cert. denied*, 469 U.S. 825 (1984); Jackson v. Joliet, 715 F.2d 1200, 1203-04 (7th Cir. 1983) (holding that attempt by state officers to assist at accident is not deprivation of life without due process of law when attempt fails because of negligence or even gross negligence of offices and accident victim dies), *cert. denied*, 465 U.S. 1049 (1984); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (holding state does not violate Due Process Clause by failing to protect citizens against being murdered by criminals or madpersons, absent any discrimination in providing protection against crimes of violence). The First and Eleventh Circuits, as well as the District of Columbia, have adopted the Seventh Circuit's view. *See* Estate of Gilmore v. Buckley, 787 F.2d 714, 722 (1st Cir.) (holding that fact that state psychiatrists knew or should have known inmate legally in state custody while on furlough was of special danger to victim, as distinct from public at large, did not create special relationship of constitutional dimension between state and victim such that failure to protect victim implicated Due Process Clause), *cert. denied*, 479 U.S. 882 (1986); Bradberry v. Pinella County, 789 F.2d 1513, 1516 (11th Cir. 1986) (holding that county had no constitutional obligation to provide lifeguards, and thus could not be held liable for gross negligence on grounds that swimmer drowned because of lack of such services); Washington v. District of Columbia, 802 F.2d 1478, 1481-82 (D.C.Cir. 1986) (holding that reckless failure of state officials to remedy unsafe prison condition did not deprive prison guard of Fourteenth Amendment liberty interest). *But see* Estate of Bailey v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985) (holding that once state is aware of danger that particular child may be abused, special relationship arises between it and child and places on state constitutional duty to protect child from abuse). The Seventh Circuit explicitly rejected the Third Circuit's holding. *See Deshaney*, 812 F.2d at 303. The Seventh Circuit, however, has held that the Constitution protects defenseless children whom the state places in danger. *See* White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979) (holding that to leave helpless minor children subject to inclement weather and great physical harm is clear intrusion upon personal integrity).

45. *Deshaney*, 489 U.S. at 194.

46. *Id.* at 194-197.

47. *Id.* at 198. Prior to *Deshaney*, the Supreme Court had found that the state could create or assume certain "special relationships" that would give rise to an affirmative duty, enforceable through the Due Process clause, to provide adequate protection. *See* Youngberg v. Romeo, 457 U.S. 307, 314-325 (1982) (holding that when state voluntarily commits mentally retarded individual to state institution, individual has constitutionally protected liberty interest under Due Process Clause of Fourteenth Amendment to reasonably safe conditions of confinement and freedom from unreasonable bodily restraints); Estelle v. Gamble, 429 U.S. 97, 104-105 (1976) (holding that deliberate indifference by prison personnel to prisoner's serious illness or injury constituted cruel and unusual punishment contravening Eighth Amendment).

ship" arises between the state and the victim, causing the Due Process Clause to impose an affirmative duty on the state to render adequate protection.[48] Refusing to acknowledge that a "special relationship" existed between Joshua and the state, the Court found that while the state may have been aware of Joshua's plight, the state had played no part in the creation of the abuse, and therefore, the Due Process Clause did not impose upon the state an affirmative duty to provide Joshua with adequate protection.[49]

The Court, however, did infer that when the state initiates or assumes a custodial relationship over a child, a constitutional duty to assume responsibility for the child's safety and well-being arises.[50] The Court compared the custodial relationship that the state assumes over a child placed in foster care[51] to the relationship that the state has with incarcerated or institutionalized men and women.[52] The Court rationalized that when the state affirmatively exercises its power and restrains an individual's liberty so that it renders him unable to care for himself, and then subsequently fails to provide for the individual's basic human needs, the state's failure to provide even rudimentary care for these restrained individuals violates the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[53]

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48. Deshaney v Winnebago County Soc. Serv. Dep't, 489 U.S. 189, 198 n.4 (1988).

49. *Id.* at 198.

50. *Id.* at 201 n.9. The *Deshaney* Court stated that

> . . . Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.

Id.

51. *Id.* at 198-99.

52. *See id.* (citing Robinson v. California, 370 U.S. 660 (1962) which required state to provide adequate medical care to incarcerated prisoners); Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-46 (1983) (holding that Due Process Clause requires responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by police); Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that Due Process Clause of Fourteenth Amendment requires state to provide involuntarily committed mental patients with such services necessary to ensure their "reasonable safety" from themselves and others).

53. *Deshaney*, 489 U.S. at 199-200. The *Deshaney* Court stated that:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . .The rational for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . 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

Judge Hogan presided over the *LaShawn* litigation slightly more than two years after the Supreme Court handed down its decision in *Deshaney*. *LaShawn* arose from the inefficiency with which the District of Columbia runs its foster care and adoption programs.[54] Taken from their natural homes through affirmative state action, many children under the District's foster care, are victims of abuse within their foster homes, as well as being victims of the bureaucratic foster care system.[55] The American Civil Liberties Union (ACLU) brought the *LaShawn* class action on behalf of thousands of District of Columbia children and alleged both statutory and constitutional violations in the administration of the District's foster care system.[56] The ACLU's allegations included the failure of the District of Columbia Department of Human Services (DHS) to initiate timely investigations into reports of abuse and neglect, the failure to place in appropriate foster homes and institutions those who may not safely remain at home, the failure to develop case plans and monitor children in the state's foster care, and the failure to place children in a permanent home, whether by returning them to their natural homes or by freeing them for adoption.[57]

Due to budgetary constraints, excessive caseloads, staff shortages, an inept foster care program, and the indifference of the District of Columbia's administration, many children under the care of the DHS live in a perpetual state of limbo, have no home truly to call their own, and often suffer abuse within the homes in which the DHS places them.[58] These children must rely on the DHS to protect them from physical, mental, and emotional abuse, and also to provide them with a permanent home.[59] The egregious facts of *LaShawn*,[60] as well as reports published in numerous newspaper articles and

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imposed on his freedom to act on his own behalf.

Id. See 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, 201 (1988) (arguing that foster children have equal, if not greater, claim to federal judicial protection from harm while in state care than do institutionalized persons who are already accorded significant protection).

54. LaShawn v. Dixon, 762 F. Supp. 959, 960 (D.D.C. 1991).

55. *Id.*

56. *Id.* at 961. The ACLU alleged that the District violated the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-27, 670-79 (1988 & Supp. I 1989), and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-06. The ACLU alleged further that the District violated several of their own municiple statutes. The District statutes in controversy are the Prevention of Child Abuse and Neglect Act of 1977, D.C. LAW 2-22 (1977) (codified as amended at D.C. CODE ANN. §§ 2-1351-57 (1988) and D.C. CODE ANN. §§ 6-2101-07, §§ 6-2121-27, and §§ 16-2351-65 (1989), and the Youth Residential Facilities Licensure Act of 1986, D.C. LAW 6-139 (1986) (codified as amended at D.C. CODE ANN. §§ 3-801-08 (1988). *Id.*

57. *See* Social Security Act, 42 U.S.C. §§ 420-427, 470-476 (1988); 42 U.S.C. §§ 620-627, 670-676 (1988 & Supp. I 1989) (providing procedures to insure that children receive adequate foster care).

58. *LaShawn*, 762 F. Supp. at 960.

59. *Id.*

60. *See id.* at 983-87 (outlining harm to named plaintiffs in *LaShawn*). Four child psychiatrists testified on behalf of four named plaintiffs in the *LaShawn* litigation. *Id.* at 983.

child activist studies, prove that the DHS consistently has failed to meet the needs of many of the District's children.[61]

In *LaShawn*, Judge Hogan unequivocally found for the plaintiffs, asserting that section 1983 provides a federal remedy for violations of the federal Adoption Assistance and Child Welfare Act of 1980 (AACWA).[62] Judge Hogan determined that the DHS, by virtue of official policy or custom, deprived foster care children of rights conferred to them by the AACWA.[63] He also held that District officials deprived children in the District's foster care of their constitutionally protected liberty interests in violation of section 1983.[64] Judge Hogan concluded that the DHS had exhibited the level of affirmative state intervention and control that the *Deshaney* Court had indicated was necessary to find that a state had deprived an individual of his liberty interest in bodily integrity. This determination

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The psychiatrist who examined LaShawn A. found that LaShawn suffered from "Attention Deficit Hypersensitivity Disorder" (AD-AH), was severely emotionally delayed, and was overwhelmed by stimuli. *Id.* While the psychiatrist admitted that LaShawn A. had psychological problems before entering foster care, he concluded that the mishandling of her case while she was in the District's custody contributed to her disorders. *Id.* The District mishandled LaShawn A.'s case in a myriad of ways. LaShawn A.'s mother voluntarily placed LaShawn A. in the District's custody when LaShawn A. was two-and-a-half years old. The District did not attempt to enable LaShawn A. to stay at home. *Id.* The District placed LaShawn A. with a woman who had no intention of adopting the child. *Id.* A psychiatric evaluation indicated that the child's foster mother may have physically abused the child, as well as exposed the child to sexual abuse in the foster home. *Id.* Throughout the trial, despite these allegations, LaShawn A. remained in her foster home. *Id.*

The other named plaintiff's stories are similar to LaShawn A.'s story. The District shuffles many children around from one foster home to another, and sometimes transfers the children between institutions and foster homes. The children are given no sense of permanency, no chance to be adopted, and they are often abused in the environments in which they find themselves. *Id.* at 983-86. As a result of these findings, Judge Hogan found that the District has irreparably harmed the children in its foster care. *Id.* at 986.

61. *Id.* at 982-983.

62. *Id.* at 989. Judge Hogan looked to the First, Fourth, and Sixth Circuits in determining that the federal statutes relied upon by plaintiffs create actionable rights under section 1983. *See* L.J. v. Massinga, 838 F.2d 118, 122-24 (4th Cir. 1988) (finding provisions of Social Security Act gave foster children right to protections enforceable under § 1983), *cert denied*, 488 U.S. 1018 (1989); Lesher v. Lavrich, 784 F.2d 193, 197-98 (6th Cir. 1986) (holding plaintiffs not entitled to damages for alleged violations of Adoption Assistance Act but agreeing with *Lynch* that it may be reasonable to allow parents and children affected by programs it funds to sue to force those programs to comply with federal funding requirements); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983) (holding that federal Adoption Assistance Act confers enforceable rights upon children in custody of states receiving federal funding under Act). *But see* Del A. v. Roemer, 777 F. Supp. 1297, 1309 (E.D. La. 1991) (holding that provisions of Adoption Assistance and Child Welfare Act requiring case plan and case review system were so vague and amorphous as to evade judicial enforcement under section 1983). The *Del A.* court also held that the provision of the Adoption Assistance and Child Welfare Act requiring placement in foster homes and institutions that are reasonable in accord with national standards was so vague as to be incapable of judicial enforcement under section 1983. *Id.* at 1310. The *Del A.* court also held that the language of the statute did not imply a private right of enforcement. *Id.* at 1310-11.

63. *LaShawn*, 762 F. Supp. at 989.

64. *Id.* at 998.

enabled Judge Hogan to find that the District's egregious behavior had resulted in the violation of the children's constitutional rights.[65]

Children's rights activists hail as a landmark decision Judge Hogan's holding that the District deprived foster children of their constitutionally protected liberty interests.[66] One of the reasons for such praise from child activists is that Judge Hogan was not reluctant to tackle the constitutional issues raised in *LaShawn*.[67] By determining that children do have a constitutional right to adequate foster care when embraced by a state welfare program, Judge Hogan considerably expanded the rights of children.[68]

In *Deshaney*, the Supreme Court found that the DSS did not assume a custodial relationship over Joshua even though the DSS removed him from his father's care.[69] The Court found that although the state had once assumed temporary custody over Joshua, the DSS had not created the custodial relationship that triggers a constitutionally protected liberty interest because the DSS ultimately placed Joshua back with his father.[70] In the Court's view, no state liability existed because the state placed Joshua in no worse and in no better a situation; instead the state placed Joshua back in the same abusive environment from which the DSS had originally removed him.

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65. *Id.* at 992. *But see Del A.* 777 F. Supp. at 1318 (finding no violation of children's constitutional rights under Federal Adoption Assistance Act). Plaintiffs in *Del A.* alleged the existence and violation of several substantive constitutional rights. *Id.* at 318-320. Plaintiffs asserted that they had a right to reasonable physical safety, emotional and psychological safety, and placement in a less restrictive setting. *Id.* at 318-20. The *Del A.* court found that there is no clearly established right to a stable foster home environment. *Id. See also* Drummond v. Fulton County Dep't, 563 F.2d 1200 (5th Cir. 1977) (rejecting right to stable foster home environment), *cert. denied*, 437 U.S. 910 (1978). The *Del A.* court also stated that there is not a liberty interest in the emotional well-being of the children. *Del. A.*, 777 F. Supp. at 1319. *See also* Griffith v. Johnston, 899 F.2d 1427, 1439 (5th Cir. 1990) (stating no liberty interest in individual's emotional well-being exists), *cert. denied*, 111 S. Ct. 712 (1991). The *Del A.* court also found that children in state custody do not have a right to be placed in the least restrictive foster care arrangement. *Del A.*, 777 F. Supp. at 1320.

66. Proposed Final Order, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991) (No. 89-1754).

67. BRIGHT FUTURES, supra note 2, at 109. Child activists are pleased with *LaShawn* because Judge Hogan's opinion and decree provided an opportunity for District officials to begin to address the problems that have plagued the District's child welfare system for years. *Id.*; *see also* Tracie Reddick, *ACLU, City Sign Pact to Upgrade Care*, WASH. TIMES, Aug. 27, 1991, at B1 (quoting ACLU attorney as stating "we are confident that this [joint agreement] can become an important blueprint for changing the city's child care system and making it into a model for the nation").

68. *Children's Rights: 1991 Biennial*, ACLU UPDATE (Children's Rights Project, New York, N.Y.) 1991. The ACLU hails *LaShawn* as the first class-action in the United States to result in a litigated judgement in which a court has declared that a state operated an entire foster-care system illegally. *Id.* at 3.

69. Deshaney v. Winnebago County Soc. Serv. Dep't, 489 U.S. 189, 201 (1989). Writing for the *Deshaney* majority, Chief Justice Rehnquist expressed the view that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.*

70. *Id.* at 201.

In contrast, the District of Columbia DHS had removed the children in *LaShawn* from their natural families and placed them in foster homes.[71] Foster parents are agents of the DHS because the state empowers them to provide substitute family care for children when a child's natural parents are unable to do so properly.[72] The *LaShawn* plaintiffs, therefore, were in the custodial arms of the state when the abuse occurred.[73] Thus, the facts of *LaShawn* met the Supreme Court's requirements for the special custodial relationship that the dicta in *Deshaney* indicated was necessary for establishing state liability under the Fourteenth Amendment.[74] This qualified custodial relationship gave Judge Hogan the opportunity to carry *Deshaney* to its natural extension: When a state assumes a custodial relationship over children by embracing them within the state's welfare programs, the children have a liberty interest in safe conditions while in state custody.[75]

Flores v. Meese: The Ninth Circuit Fails to Follow Judge Hogan's Lead

On August 9, 1991, three months after the *LaShawn* decision, the United States Court of Appeals for the Ninth Circuit decided *Flores v. Meese*.[76] Citing *Deshaney* and *LaShawn* in its analysis, the *Flores* opinion additionally addresses the liability that federal agencies face when placing children in a state-initiated custodial relationship.[77] Unfortunately, instead of following Judge Hogan's lead and encouraging judicial involvement in the child welfare arena, the *Flores* court preferred to encourage a laissez faire approach to agency intervention in the child care realm.

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71. LaShawn v. Dixon, 762 F. Supp. 959, 962 (D.D.C. 1991).

72. *See Deshaney*, 489 U.S. at 199-200 (stating that had state removed Joshua from free society and placed him in foster home operated by state agents that there might have been affirmative duty to protect). *Deshaney* indicates that the Supreme Court views foster families as agents of the state. The United States Court of Appeals for the Seventh Circuit has decided that *Deshaney* stands for just such a proposition. In K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 860 n.6 (7th Cir. 1990), Judge Posner stated that "those persons to whom the state contracts its responsibilities for the supervision of the placement and care of foster children act as agents of the state." *But see* Weller v. Dep't of Soc. Serv., 901 F.2d 387, 392 (4th Cir. 1990) (interpreting Milburn v. Anne Arundel County Dep't Soc. Serv., 871 F.2d 474 (4th Cir.), *cert denied*, 493 U.S. 850 (1989)) (holding that harm suffered by child at hands of foster parents is not harm inflicted by state agents). *Milburn* emphasized the state's lack of responsibility for a child's voluntary placement by the natural parents in an abusing private foster home. *Milburn*, 871 F.2d at 476.

See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 823 (1977) (citing Child Welfare League of America's definition of foster care). The *Smith* Court stated that foster care is defined as a child welfare service which provides substitute family care for child when his or her own family cannot care for him or her for temporary or extended periods of time, and when adoption is neither desirable nor possible. *Id.* at 823.

73. *LaShawn*, 762 F. Supp. at 960.

74. *Id.* at 959.

75. *Id.* at 992.

76. 942 F.2d 1352 (9th Cir. 1991).

77. Flores v. Meese, 942 F.2d 1352, 1363-64 (9th Cir. 1991), *cert. granted sub nom.* Barr v. Flores, 112 S. Ct. 1261 (U.S. Mar. 2, 1992) (No. 91-905).

In *Flores*, the National Center for Immigrants' Rights, Inc., brought a class action on behalf of children whom state authorities had arrested on suspicion of being illegal aliens, but whom the state had not yet determined to be deportable.[78] The suit challenged an Immigration and Naturalization Service (INS) policy that required governmental detention of children during the pendency of deportation proceedings.[79] The INS required detention of the children unless an adult relative or legal guardian was available to assume custody, even if another responsible adult was willing and able to care for the child and to ensure the child's attendance at a deportation hearing.[80] In *Flores*, the INS admitted that the regulation was not necessary to ensure the children's attendance at deportation hearings, and did not contend that the release of the detained children would create a threat of harm to the children or to anyone else.[81]

The United States District Court for the Central District of California held that a blanket detention policy was unlawful.[82] The court entered an order compelling the state, where feasible, to release to a responsible third party those children whom the state would have released had a parent or other relative come forward.[83] The INS appealed, and a divided panel of the United States Court of Appeals for the Ninth Circuit reversed the district court's holding that the detention policy was unlawful.[84] The majority of the panel held that the INS detention policy did not involve any of the children's fundamental rights, and that deference to the INS's implementation of congressional immigration policy mandated judicial approval of the INS policy restricting the release of the children.[85] On rehearing, *en banc*, however, the Ninth Circuit reversed the divided panel and affirmed the district court's order.[86] The United States Supreme Court granted certiorari on March 2, 1992.[87]

The INS contended that the plaintiffs' status as aliens and as children limited their liberty interests.[88] The Ninth Circuit did not agree with the INS, stating that aliens have a fundamental right to freedom from govern-

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78. *Id.* at 1354.

79. *Id. See* 8 C.F.R. § 242.24 (1988) (codifying INS policy that requires governmental detention of children during pendency of deportation proceedings).

80. *Flores*, 942 F.2d at 1354; *see* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that because aliens are persons present in United States they must be afforded procedural protection in conjunction with any deprivation of liberty). The *Flores* court extended the *Mathews* rational that presence within the United States triggers due process procedural protections to children suspected of alien status. *Flores*, 942 F.2d at 1354.

81. *Flores*, 942 F.2d at 1354.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1358.

86. *Id.* at 1354.

87. Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991), *cert. granted sub. nom.* Barr v. Flores, 112 S. Ct. 1261 (U.S. Mar. 2, 1992) (No. 91-905).

88. *Id.* at 1358.

mental detention unless there is a judicial determination that confinement is necessary.[89] The INS then asserted that detention would better serve the children's interests than would release to an adult whose living environment the INS did not have the means to investigate.[90] A principle concern of the INS, however, dealt not with the detained children's interests, but with the INS's interest in avoiding liability.[91] The INS attempted to justify its detention policy by asserting that the policy was necessary to protect the agency from potential liability in the event any harm befell the children after such a release.[92] The INS's fear of imposition of liability undoubtedly stemmed from the *Deshaney* and *LaShawn* decisions highlighting agency liability in the face of inept administration and allegations of abuse within child welfare programs.

The Ninth Circuit rejected the INS's arguments, stating that because child welfare was not a field of INS expertise, the INS was incapable of determining that detention served the best interests of the plaintiff children.[93] The court found that it was highly unlikely that the INS would be subject to liability for releasing a minor to a responsible unrelated adult without a "home study."[94] In reaching this decision, the court cited *Deshaney* as expressing the Supreme Court's view that under section 1983 a state welfare department, an agency with far more expertise in child welfare than the INS, is not liable for allowing a child to remain in the custody of an adult despite clear evidence that such custody placed the child in danger.[95]

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89. *Id.* at 1360. *See* R. HOROWITZ & H. DAVIDSON, LEGAL RIGHTS OF CHILDREN § 10.10, at 431 (1984) (stating that child's "right to be treated in the manner least restrictive to the child's liberty . . . has its roots in the well-settled concept that, while constitutional rights may be restricted by the state for legitimate purposes, the restriction must be no greater than necessary to achieve these purposes").

90. *Flores*, 942 F.2d at 1362.

91. *Id.*

92. *Id.* at 1363.

93. *Id.* at 1362-1363. The *Flores* court relied on Hampton v. Mow Sun Wong, 426 U.S. 88, 114-15 (1976), which states that a court should not defer to an agency determination in any area outside of agency's expertise. *Flores*, 942 F.2d at 1362-1363. The court also found that the policy was contrary to the congressional determination that institutional detention of juveniles is disfavored. *See* 18 U.S.C. §§ 5035, 5039 (1988) (stating that juveniles should be detained in foster home or community facility whenever possible); *see also In re* Gault, 387 U.S. 1, 31-52 (1967) (holding that adult procedural protections in criminal trial extend to delinquency proceedings); United States v. Salerno, 481 U.S. 739, 748 (1987) (stating that government's regulatory interest in community safety can in appropriate circumstances outweigh individual's liberty interest); Schall v. Martin, 467 U.S. 253, 264-274 (1984) (approving post-arrest detention of juveniles when they present continuing danger to community); Carlson v. Landon, 342 U.S. 524, 541-542 (1952) (holding no denial of due process under Fifth Amendment in detention of alien communists without bail, pending determination of deportability, where there is reasonable cause to believe release on bail would endanger safety and welfare of United States).

94. *Flores*, 942 F.2d at 1363; *see also infra* note 102 and accompanying text (discussing and elaborating on agency home studies).

95. *Flores*, 942 F.2d at 1363.

The *Flores* court's reliance on *Deshaney* in this context, however, is erroneous. In *Deshaney*, one of the Supreme Court's rationales for denying liability on the part of the state was the fact that the DSS placed Joshua back in the custody of his father, not with an unrelated third party.[96] The Ninth Circuit's failure to address the distinction between placing a child with an unknown adult and placing a child with his natural parent casts a large shadow on the court's curt rejection of state liability. Instead of directly addressing the issue, the Ninth Circuit acknowledged the distinction briefly in a footnote, stating that if the INS acted affirmatively to place a child in a home from which he had not originally come, the threat of liability on behalf of the agency would be greater.[97] The *Flores* court's acknowledgement of the possibility of state liability for placing a child in a home from which he had not originally come contradicts its finding that the INS would most likely not be held liable for releasing children to an unrelated adult without a home study. The *Flores* court went on to note that decisions such as *Deshaney* illustrate that state agencies face far greater exposure to liability by maintaining special custodial relationships with children than by releasing children from the constraints of governmental care and control.[98]

While the Ninth Circuit can legitimately make the assertion that states face greater exposure to liability when maintaining custodial relationships over individuals than by maintaining less protective relationships over individuals, the Ninth Circuit has ignored the impact that such a statement will have upon subsequent children's rights litigation. *Flores'* assertion that greater liability stems from custodial relationships might encourage state agencies to avoid such relationships whenever possible.[99] As a result, some children who are in need of the state's protection will find little, if any, assistance because of a state's desire to avoid liability. While future courts might depend on the dicta contained within *Flores* to excuse *LaShawn*-type

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96. Deshaney v. Winnebago County Soc. Serv. Dep't, 489 U.S. 189, 201 (1989).

97. *Flores*, 942 F.2d at 1363 n.2. Footnote 2 of the *Flores* opinion states that:

> A state would of course face a somewhat greater threat of liability after releasing a child to the custody of a responsible third party as opposed to the custody of a parent as in *Deshaney*. This is because the State would have acted affirmatively to place the child in a home from which the child had not originally come, as opposed to returning the child to the same home and assuring placement in "no worse position than that in which he would have been had [the state] not acted at all."

Id. (citing *Deshaney*, 489 U.S. at 198).

98. *Flores*, 942 F.2d at 1363. The Ninth Circuit cites *Deshaney*, *Youngberg*, and *LaShawn* in support of its conclusion that state agencies face greater exposure to liability when maintaining special custodial relationships with children than by releasing them from governmental control. *Id.*

99. *See* Jonathan Freedman, *Foster Child: A Generation of Neglect, A Legacy of Loss*, L.A. TIMES, Apr. 9, 1990, (Metro), at B5 (addressing fact that state orders child care it knows will not be given to children because state does not have to pay for services it requires). If California is willing to spend money on administrative measures to insure that it is free from the burdens of child welfare, it is likely that state agencies will take similar measures.

abuses of state responsibility, this dicta is far from decisive, because *Flores* is easily distinguishable from *LaShawn*.

First, although the *Flores* court found that the INS did *not* have the expertise to conduct adequate home studies, the court implied that some agencies *do* have the capacity to conduct home studies.[100] Child welfare agencies have the requisite proficiency to conduct meaningful home studies. Federal statutes recognize this level of expertise by requiring welfare agencies to conduct home studies before placing a child in a foster home.[101] Under *Flores*, the judicial system would grant greater weight to state welfare agency decisions based upon the agency's inherent expertise at evaluating home situations, than to the INS, which does not have the requisite expertise to evaluate a foster home situation.[102] This same level of expertise would undoubtedly be present in determinations made by adoption agencies and juvenile detention centers.[103] Thus, it would be much easier to prove negligence by a welfare agency for failing to conduct appropriate home studies—particularly when these studies are mandated by statute or propagated through internal agency regulations[104]—than to find the INS negligent for

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100. *Flores*, 942 F.2d 1352, 1362-63 (9th Cir. 1991), *cert. granted sub nom.* Barr v. Flores, 112 S. Ct. 1261 (1992) (U.S. Mar. 2, 1992) (No. 91-905).

101. 42 U.S.C. § 675 (1988 & Supp. I 1989). The statute states in pertinent part that

> (1) The term "case plan" means a written document which includes at least the following:
>
> (A) A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 472(a)(1) [42 U.S.C. § 672(a)(1)].
>
> (B) A plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the condition in the parent's home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

Id.

While the word "home study" does not appear within the statute, the statute provides for such a procedure by requiring a description of the home in which the state plans to place the child, and requiring the inclusion of a discussion of the appropriateness of the placement. These requirements cannot be adequately met without careful observation of the home into which the state plans to place a child. There are benefits to conducting thorough home studies before placing a child in a foster home. When such studies are conducted adequately, there is less of a chance of placing a child in a home injurious to his mental, physical, or emotional health. If there is to be a trade off due to lack of welfare agency staff or funding, a prudent preventative measure is a thorough, screening, precautionary home study.

102. *See id.* § 675(5)(a),(b),(c) (outlining case review procedures).

103. *See id.* § 670 (outlining case review procedures).

104. *See supra* note 104 and accompanying text (discussing home studies); *see also* 45 C.F.R. § 1392.16 (1969) (outlining regulations promulgated by Secretary of Health and Human Services regarding service plans for children in welfare programs). 45 C.F.R. § 1392.16 in

similar deficiencies, because the *Flores* court applies a different standard to the INS than it does to a welfare agency.

Second, a striking distinction exists between an "unrelated adult without a home study" and a "responsible third party." A responsible third party, such as a foster parent, constitutes the precise "special relationship" considered necessary in *Deshaney*.[105] This special relationship was formed because the state affirmatively acted to remove a child from his natural family and placed the child in a foster home operated by state agents. Under *LaShawn*, the state owes the children it places in foster homes a statutory and constitutional duty to ensure that they remain free from harm.[106] *LaShawn* and federal statutes do not require that the state place foster children in ideal environments, but rather that the state place these children in an environment conducive to the child's safety and general well-being.[107] Any agency that placed a child, without benefit of a home study, with an unrelated adult from whom the child was not originally taken would be negligent under *Deshaney* and *LaShawn*, and courts could hold these agencies liable for any harm that befalls the child while in these unexamined homes. Not only do both *Deshaney* and *LaShawn* provide for such liability, but the *Flores* court also admits the possibility of such liability,[108] implicitly agreeing with *Deshaney* and *LaShawn*. Despite this implicit agreement among the three cases, the language in *Flores* sends government agencies the message that a philosophy of laissez-faire toward child care will prevent multi-million dollar liability. Conversely, federal statutes such as the AACWA and cases such as *LaShawn* illustrate that the legislature, child activists, and the general public will not tolerate acts of brutality and abuse within foster homes. This public concern hopefully will override state apathy toward providing adequate foster care.[109]

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pertinent part reads as follows:

> (a) A service plan must be developed and maintained on a continuous basis for each family and child who requires service to maintain and strengthen family life, foster child development and achieve permanent and adequately compensated employment. . .
>
> (c) Such plans must be developed in cooperation with the family and must be responsive to the needs of each individual within the family, while taking account of the relation of individual needs to the functioning of the family as a whole. Families shall have the right to accept or reject such plans. . .
>
> (e) Each service plan must be reviewed as often as necessary, but at least annually, to assure that it is practically related to needs and is being effectively implemented.

Id.

105. Deshaney v. Winnebago County Soc. Serv. Dep't, 489 U.S. 189, 198 (1989).

106. LaShawn v. Dixon, 762 F. Supp. 959 (D.D.C. 1991).

107. *Id.* at 992.

108. *See supra* note 100-101 and accompanying text (discussing flaw in *Flores* logic).

109. *See* 125 CONG. REC. S22679 (daily ed. August 3, 1979) (remarks of Sen. Cranston) (introducing Adoption Assistance, Foster Care, and Child Welfare Amendments of 1979). Senator Cranston introduced the Adoption Assistance, Foster Care, and Child Welfare Amendments of 1979 to the senate by stating that

> the legislation we are introducing today is aimed at strengthening and improving the

ENFORCEMENT PROBLEMS INHERENT TO THE LASHAWN DECISION

Assuming that the Court of Appeals for the District of Columbia will affirm *LaShawn*, the issue to consider becomes whether a constitutional right to adequate foster care[110] will encourage enforcement of both the federal and District welfare statutes. The ACLU hailed the *LaShawn* enforcement order as an effective measure to ensure appropriate funding and compliance.[111] This commendation, however, is weakened by the fact that the District of Columbia has appealed the decision after working with the ACLU for nearly three months to come up with a mutually agreeable order.[112] The District of Columbia Office of Corporate Council based its appeal on the position that the federal courts should not have any say in the day-to-day running of city agencies.[113] The District also attempted to substantiate its appeal by asserting that the *LaShawn* decision contradicted the District's position in an *amicus curiae* brief filed in a case pending before the Supreme Court that is similar to *LaShawn*.[114]

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existing federally-supported foster care system for dependent and neglected children, establishing an adoption assistance program to encourage the adoption of children with special needs, and improving the existing federally-supported child welfare services program.

Id. While one of the main purposes of the act was to attempt to create legislation that would keep children with their natural families or that would find permanent adoptive families when necessary, *id.* at 22680, Senator Cranston's remarks indicate that the American public is concerned about child welfare.

110. *LaShawn*, 762 F. Supp. at 996 (D.D.C. 1991). Judge Hogan held that

the plaintiffs in the District's foster care have liberty interests in personal safety and freedom from harm. The facts of this case establish 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 insure permanent homes, among other things.

Id.

111. Telephone interview with Christopher Dunn, Staff Counsel for ACLU's Children's Rights Project in New York, N.Y. (September 3, 1991).

112. Tracy Thompson, *Foster Care Ruling Appealed*, WASH. POST, Oct. 1, 1991, at B1. The District has undermined the ACLU's commendation by the fact that the number of social workers overseeing children in the District has declined since both parties signed the consent decree in April. Tracy Thompson, *ACLU Says D.C. Losing Caseworkers*, WASH. POST, Jan. 7, 1992, (Metro), at D3. Further indication that compliance with the consent decree is far from forthcoming is the fact that on February 10, 1992, a undetermined number of District social workers staged a sickout to protest poor working conditions, frustration, and stress that they claim inhibit them from protecting children in the city's foster-care system. Christine Spolar, *Foster Care Employees Stage Sickout*, WASH. POST, February 11, 1992, (metro), at B5.

113. Thompson, *Foster Care Ruling Appealed*, *supra* note 115, at B1.

114. *See* Artist M. v. Johnson, 917 F.2d 980 (1990) (holding that Federal Adoption Assistance and Child Welfare Act of 1982 creates legal rights on part of children taken into government custody), *rev'd sub nom.* Suter v. Artist M., 112 S. Ct. 1360 (1992). *Artist M.* was an action challenging compliance by the Illinois Department of Children and Family Services with the Federal Adoption Assistance and Child Welfare Act. *Id.* at 982. The United States District Court for the Northern District of Illinois entered a preliminary injunction

The District's arguments do little to bolster its position. The facts in *LaShawn* indicate that the District is incapable of competently running its child welfare services, and a contrary position taken in an *amicus curiae* brief does little to relieve the plight of the District children who are receiving inadequate foster care at the hands of the state. Although the Supreme Court accepted the District's *amicus curiae* position,[115] the Court's ruling does not necessitate reversal of *LaShawn*.[116] Years of broken promises by District officials to provide aid to needy children undoubtedly will continue if the Court of Appeals of the District of Columbia Court overturns *LaShawn*.[117]

The plaintiffs in *LaShawn* sought only prospective injunctive relief, claiming that the District of Columbia has violated several federal and state statutes, as well as the Fifth Amendment through the District's ineptly managed foster care system.[118] Judge Hogan fashioned relief in the form of a comprehensive final order.[119] Judge Hogan did not exceed his authority

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requiring assignment of case workers to wards of the juvenile court within three days, and the state officials appealed. *Id.* at 984. The Court of Appeals for the Seventh Circuit held: (1) the act created rights enforceable under 42 U.S.C. § 1983; (2) there was a private right of action under the statute; (3) children living at home had standing to sue under the act; and (4) evidence supported the determination that the plaintiffs showed a likelihood of success on the merits of their claim. *Id.* at 980. Consequently, the state officials once again appealed and the Supreme Court granted certiorari. Suter v. Artist M. 111 S. Ct. 2008 (1991). On March 25, 1992, the Supreme Court reversed the Seventh Circuit holding that § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 does not confer on its beneficiaries a private right enforceable in a § 1983 action, and that the AACWA does not create an implied cause of action for private enforcement. *Artist M.*, 112 S. Ct. 1360 (1992). The Court's holding in *Artist M.* should not affect the *LaShawn* decision because Judge Hogan found that the operation of the District's welfare program violated the foster children's constitutional rights as well as their rights under a provision of the District's local law. *See* Ruth Marcus, *Court Shuts Out Foster Care Children*, WASH. POST, Mar. 26, 1992, at A3 (quoting Marcia Lowry, director of Children's Rights Project of ACLU, principal council for *LaShawn* plaintiffs).

115. *See* Suter v. Artist M., 112 S. Ct. 1360 (1992) (holding that §671(a)(15) of AACWA does not confer on beneficiaries private right enforceable in § 1983 action); *see generally* Brief of the States of Louisiana, Alabama, Arizona, et al. as Amici Curiae in Support of the Petitioner State of Illinois, Suter v. Artist M., 112 S. Ct. 1360 (1992), (No. 90-1488) (including District in list of *amici curiae*).

116. *See supra* note 117 (stating why Supreme Court's holding in *Artist M.* does not necessitate reversal of *LaShawn*).

117. *See* District of Columbia v. Jerry M., 571 A.2d 178 (D.C. 1990) (demonstrating how District repeatedly defies court orders in child welfare cases). The language of Judge Ricardo Urbina in his tenth order in the *Jerry M* lawsuit effectively illustrates that the District is reticent to honor its obligation to care for the foster children under its control. The opening line of this order states

> This memorandum order, the tenth issued since the signing of the consent decree in this case, arises as a result of defendants' continued noncompliance with the decree and this Court's attempts to effectuate the decree over the past five years.

Memorandum Order J at 1, District of Columbia v. Jerry M., 571 A.2d 178 (D.C.1990) (No. 1519-85).

118. Plaintiff's Pretrial Brief Addressing Issues of Liability and Standards for Appropriate Relief at 1-2, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991) (No. 89-1754).

119. Proposed Final Order, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1990) (No. 89-1754).

to issue the final decree in the *LaShawn* litigation because the Supreme Court has held that courts may find municipalities liable under section 1983 when execution of a government's policy or custom inflicts injury.[120] Section 1983 provides a federal remedy for violations of both federal statutory and constitutional rights.[121] The standards governing the establishment of liability for violations of statutory provisions differ from the standards governing the establishment of liability for violations of constitutional provisions. Judge Hogan, therefore, addressed each set of standards separately.

The District argues that courts should refrain from entering the administrative domain of governmental agencies;[122] however, federal statutes provide for state and municipal liability when these public entities disregard legislative mandates.[123] The AACWA imposes mandatory obligations on states and municipalities, and states subject to these obligations must comply fully with the statutory requirements.[124] The degree of noncompliance necessary to establish class-wide liability for violations of the AACWA was an issue of first impression in the District of Columbia District Court before *LaShawn*.[125]

The *LaShawn* plaintiffs argued that injunctive relief is appropriate when the state commits statutory violations that are as egregious and pervasive as those violations committed in *LaShawn*.[126] For example, in *Lynch v. King*,[127] a class of children in the foster care custody of Massachusetts sought injunctive relief for alleged violations of the AACWA.[128] Like the plaintiffs in *LaShawn*, the *Lynch* plaintiffs alleged that the state failed to

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120. *See* Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690-691 (1978) (holding that plaintiffs may sue local governing bodies directly under § 1983 for monetary, declaratory, and injunctive relief); *see also* Carter v. District of Columbia, 795 F.2d 116, 125-26 (D.C. Cir. 1986) (elaborating on *Monell* and establishing proof of municipal liability under § 1983). Plaintiffs must prove the existence of a persistent and pervasive practice, attributable to a course deliberately pursued by official policy-makers, that causes the plaintiff's deprivation of constitutional rights. *Id.*

121. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105-113 (1989) (holding that petitioner was entitled to maintain § 1983 action for compensatory damages); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (holding that § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional rights).

122. *See* Thompson, *Foster Care Ruling Appealed*, *supra* note 118, at B1 (discussing District's appeal of *LaShawn* decision).

123. Lashawn v. Dixon, 762 F. Supp. 959, 988 (D.D.C. 1991). *See* 42 U.S.C. §§ 620, 670 (1988 and Supp. I 1989) (outlining child welfare services).

124. *See* Smith v. Miller, 665 F.2d 172, 174-75 (7th Cir. 1981) (stating that while state's participation in Medicaid program is purely voluntary, once electing to participate, state must fully comply with federal statute and statute's requirements for administration of program).

125. Plaintiff's Pretrial Brief, *supra* note 121, at 2.

126. *Id.* at 3.

127. 550 F. Supp. 325 (D. Mass. 1982), *aff'd sub nom.* Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

128. Lynch v. Dukakis, 917 F.2d 507, 512 (1st Cir. 1983) (holding district court did not abuse its discretion in fashioning preliminary equitable relief under Title IV-E of Social Security Act relating to state's case plan and review obligations for federal funding of child foster care system).

provide them with written case plans and periodic review as required by federal statute.[129] The First Circuit held in *Lynch* that the findings of fact were sufficient to warrant the entry of class-wide relief.[130] In a similar case, the Fourth Circuit also has upheld the enforceability of the AACWA under section 1983.[131] Judge Hogan found the reasoning of the First and Fourth Circuits persuasive and stated that it would be illogical to hold that children, as the intended beneficiaries of the federal adoption and welfare statutes, are precluded from enforcing their rights under those statutes.[132] Thus, Judge Hogan determined that under the AACWA the District had created obligations "sufficiently specific and definite" to be within 'the competence of the judiciary to enforce,[133] and determined that the District had violated its statutory duties.[134]

However, finding only statutory liability limits the court to granting conditional relief.[135] In *Rosado v. Wyman*,[136] the Supreme Court considered the appropriate form of relief when a state fails to comply with federally imposed conditions on state participation in a cooperative federalism program such as the AACWA.[137] The Supreme Court held that in such circumstances plaintiffs are entitled to declaratory relief and an appropriate injunction by the district court that would prevent the state's acceptance of federal monies if the state did not comply with the statutory conditions within a reasonable period of time.[138] Of course, as the *Lynch* court noted, this relief is limited to an order compelling state officials to forego funds appropriated by Congress if the state fails to meet the federal statutory requirements.[139]

Thus, the relief to which the *LaShawn* plaintiffs are limited under *Rosado* could easily result in an ineffective remedial measure if the District

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129. *See* 42 U.S.C. §§ 627(a), 671(a)(16), 675(5) (1988 and Supp. I 1989) (outlining case plan and periodic review procedures).

130. *Lynch*, 550 F. Supp. at 336-37. Counsel for the *Lynch* plaintiffs established that approximately twenty percent of the children in the class did not receive case plans, that of the children who did have written case plans, thirty-seven percent of those plans were incomplete, that the goals of the case plans were not met in seventeen percent of the cases, and that seventeen percent did not receive periodic timely reviews. *Id. See also* L.J. v. Massinga, 838 F.2d 118, 120-22 (4th Cir. 1988) (finding evidence sufficient to establish system-wide problems in foster-care programs for purposes of entering injunctive relief against defendants), *cert. denied*, 488 U.S. 1018 (1989); Causwell v. Califano, 583 F.2d 9, 18 (1st Cir. 1978) (granting injunctive relief for federal government's alleged failure to comply with provision of Social Security Act); Barnett v. Califano, 580 F.2d 28, 31 (2d Cir. 1978) (stating district court correctly certified class of Supplemental Security Income disability claimants).

131. L. J. v. Massinga, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989).

132. LaShawn v. Dixon, 762 F. Supp. 959, 989 (D.D.C. 1991).

133. *Id.* at 989.

134. *Id.* at 990.

135. *Id.* at 990.

136. 397 U.S. 397 (1970).

137. Lynch v. King, 550 F. Supp. 325, 343 (D. Mass. 1982), *aff'd sub nom.* Lynch v. Dukakis, 719 F.2d 507 (1st Cir. 1983).

138. *Id.* at 343 (quoting Rosado v. Wyman, 397 U.S. 397, 420 (1970)).

139. *Id.* at 327 (quoted in *Lashawn* 762 F. Supp. 859, 990 (D.D.C. 1991)).

chose to give up federal subsidies in order to relieve itself of the burden of complying with the federal regulations.[140] Furthermore, if the District gave up federal funding under the AACWA, the courts would have no basis for enforcing any injunction it might order.[141] In one fell swoop, the District could eliminate both the plaintiffs' right to claim relief under section 1983 and the federal monies flowing to the District under the AACWA. This action would also eliminate any hope of achieving an adequate foster care program in the District of Columbia. While political pressures would make it extremely difficult for a state to forego federal aid under the AACWA, the finding of a constitutional violation would prevent any possibility that the District might try to avoid liability by foregoing federal funding. Thus, in addition to deciding plaintiff's statutory claims, Judge Hogan also reached the plaintiff's constitutional claim, reasoning that a finding that the District had violated the children's constitutional interests would insure affirmative relief.[142]

The *LaShawn* court is the first court to determine conclusively that a municipality violated child welfare recipients' constitutional rights by the inadequate implementation of a welfare program.[143] In *LaShawn*, the plaintiffs' principle constitutional claim under the Due Process Clause of the Fifth Amendment alleged that the District had violated the children's right not to be harmed while in state custody.[144] To establish a constitutional violation under section 1983, the plaintiffs must prove that the alleged unconstitutional action amounts to a practice or custom of the District's government, and that a causal link exists between the practice or custom and the alleged harm.[145] To apply this standard, the court first must determine whether the District's actions or nonactions are unconstitutional.[146] Judge Hogan determined that the District's actions were unconstitutional[147]

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140. LaShawn v. Dixon, 762 F. Supp. 959, 991 (D.D.C. 1991).

141. *Id.* at 990.

142. *Id.* at 991.

143. *Id.*

144. *Id.*

145. *See id.*

146. *LaShawn*, 762 F. Supp. at 991.

147. *See id.* at 990-98 (outlining facts in *LaShawn* supporting reasoning why District's actions were unconstitutional). Judge Hogan determined that the plaintiffs had a liberty interest in safe conditions while in state custody. *Id.* at 992. This liberty interest gives the children a right to "reasonably safe placements in which they will not be harmed." *Id.* This right extends not only to safety from physical harm, but to safety from psychological and emotional harm as well. *Id. See* Carey v. Piphus, 435 U.S. 247, 263-64 (1978) (holding that mental and emotional distress is cognizable injury under section 1983). Judge Hogan determined that the standard for determining whether the plaintiff's rights were violated is whether the state exercised professional judgment in choosing what action to undertake. *LaShawn*, 762 F. Supp. at 994. Thus, Judge Hogan concluded that the Constitution places a duty upon state agencies to exercise professional judgement in carrying out their responsibilities. *Id.* at 995. Judge Hogan went on to hold that "[t]he facts of this case establish beyond any doubt that defendants have failed to protect these plaintiffs from harm. . ." *Id.* at 996. Judge Hogan found the evidence presented in *Lashawn* to be "nothing less than outrageous" and held that the District

and that a causal link existed between the faulty implementation of its foster care program and the children's injuries.[148]

Holding the District statutorily and constitutionally liable, Judge Hogan ordered a status conference to determine the appropriate relief in *LaShawn*.[149] Prior to the conference, both parties were to prepare a joint proposed schedule for resolving the remedial stage of *LaShawn*.[150] From this status conference emerged the final order endorsed by Judge Hogan: A document prepared by counsel for both the plaintiffs and the defendants.[151]

An order such as that issuing from the *LaShawn* decision is well within the equitable power of the court, and is exactly the kind of relief that courts have upheld in other cases in which the plaintiffs allege constitutional violations.[152] The Supreme Court has enunciated three principles to guide district courts in exercising their equitable powers to redress violations of federal law. First, when there is a constitutional violation of federal law, the plaintiff's remedy is determined by the nature and scope of the constitutional violation, and must be related to "the condition" alleged to offend the Constitution.[153] Second, the equitable decree must also be limited to remedial purposes.[154] Third, the remedy must take into account the interest of state and local authorities in administrative autonomy, as long as that interest is consistent with the Constitution.[155] Within these guidelines, the court's equitable powers are broad,[156] enabling the court to tailor remedial measures to fit the needs unique to litigation such as *LaShawn*.

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of Columbia had deprived the children in the District's foster care of their constitutionally protected liberty interest under section 1983. *Id.* at 998.

148. *Lashawn*, 762 F. Supp. at 997.

149. *Id.* at 998.

150. *Id.*

151. Proposed Final Order, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1990) (No. 89-1754).

152. *See* L.J. v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988) (affirming that present or former foster care children in Baltimore were entitled to preliminary injunction to redress deficiencies in administration of foster children program), *cert. denied*, 488 U.S. 1018 (1989); Lynch v. Dukakis, 719 F.2d 504, 514-15 (1st Cir. 1983) (affirming preliminary injunction requiring Massachusetts Department of Social Services to provide each foster child with case plan and to provide periodic review of each child's case); *but see* Artist M. v. Johnson, 917 F.2d 980, 991 (7th Cir. 1990) (affirming preliminary injunction requiring assignment of case workers to wards of juvenile court within three days), *rev'd sub nom.* Suter v. Artist M. 112 S. Ct. 1360 (1992).

153. Milliken v. Bradley, 433 U.S. 267, 267 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 738 (1974)).

154. *Milliken*, 433 U.S. at 280; *Milliken*, 418 U.S. 717, 738 (1974).

155. *Milliken*, 433 U.S. at 281.

156. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (stating in school desegregation case that once plaintiff proves violation of rights scope of district court's equitable powers to remedy past wrongs is broad). The *Swann* Court went on to state that

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather

The *LaShawn* order is illustrative of a district court's equitable power. Because the plaintiffs and defendants worked together to produce a mutually agreeable document designed to cure prospectively the District's foster care woes, the order is comprehensive and thorough in scope. The eighty-four page order establishes the procedures and provides the funding necessary to bring the District into compliance with the federal statutes.[157] Judge Hogan's order allows the District, with the assistance of a manager chosen jointly by plaintiffs and defendants, to work on prospective compliance with the federal regulations. Though *LaShawn*'s final order appears extraordinarily inclusive, enforcement issues still plague the effectiveness of the order even if one ignores the District's appeal.

Indicative of these enforcement concerns is Judge Urbina's order in *District of Columbia v. Jerry M.*[158] Judge Urbina held the District in contempt for defying a five-year-old court order to provide neighborhood shelters and foster care for young defendants and criminals who do not need to be locked up in the city's overburdened juvenile detention centers.[159]

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than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

Id.

157. *See* Proposed Final Order, LaShawn A. v. Dixon, 762 F. Supp. 959 (D.C. 1990) (No. 89-1754) (fashioning relief designed to enable District to comply with federal statutes). The order is extraordinarily inclusive and is aimed at ameliorating the District's foster care problems in as painless a way as possible. The outline of the order is as follows:

I. Named Plaintiffs
II. Protective Services
III. Services to Children and Families
IV. Emergency Case
V. General Assistance
VI. Placement of Children
VII. Planning
VIII. Adoption
IX. Supervision of Placement
X. Case Review System
XI. Caseloads
XII. Staffing
XIII. Worker Qualifications
XIV. Training
XV. Resource Development Office
XVI. Contract Review
XVII. Information System
XVIII. Financial Development
XIX. Special Corrective Action
XX. Monitoring and Implementation
XXI. Definitions
XXII. Reservations of Defendants' Appeal Rights

Id. at ii-vi.

158. 571 A.2d 178 (D.C. 1990).

159. District of Columbia v. Jerry M., 571 A.2d 178, 192 (D.C. 1990).

Calling the contempt order "meaningless without coercion,"[160] Urbina appointed a special master to come up with a plan, including a budget, to provide for the juvenile shelters and appropriate foster care.[161] Additionally, Judge Urbina granted the special master the authority to implement the plan if the District ignores the judicial order to do so.[162] In that event, the special master would be able to sign contracts, buy land, and obtain licenses in the city's name, according to Urbina's decision.[163]

Orders such as Judge Urbina's order in the *Jerry M.* lawsuit have prompted the *LaShawn* defendants to assert that the judicial branch should refrain from intruding into the daily affairs of government agencies, and that the District itself has the expertise to manage its own affairs.[164] The state's reasoning in *LaShawn* resembles many school boards' positions in educational malpractice cases. In a typical educational malpractice case, the state generally argues that the judiciary should not intervene in a state's administration of its educational system. Although the *LaShawn* defendants conceivably could find parallels to their laissez faire foster care analysis in the educational malpractice cases, the malpractice cases are easily distinguished from the welfare cases.

The *LaShawn* defendants argue that the judiciary should refrain from entering the administrative realm of foster care agencies. However, the implementation of an adequate foster care program is vastly different than the administration of a school system. In contrast to the emerging judicial interest in facilitating foster care programs, courts historically have been reluctant to intervene in a state's educational system.[165] In educational malpractice cases, the courts generally look to moral, preventative, economic, and administrative factors and conclude that the judiciary is an inappropriate forum to test the efficacy of educational programs and pedagogical methods.[166] The courts continue their analysis by stating that

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160. Alison Howard, *Judge Faults D.C. Youth Detention*, WASH. POST, Oct. 1, 1991, at B1.

161. Memorandum Order J at 82-96, Jerry M. v. District of Columbia, 571 A.2d 178 (D.C. 1990) (No. 1519-85).

162. *Id.*

163. *Id.*

164. See Thompson, *Foster Care Ruling Appealed*, *supra* note 115, at B1 (discussing District's reasons for appeal of *LaShawn*).

165. *See, e.g.*, Swidryk v. St. Michael's Medical Ctr., 493 A.2d 641, 642 (N.J. Super. Ct. Law Div. 1985) (holding that there is no cause of action for educational malpractice either on tort or contract theory); D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554, 556 (Alaska 1981) (holding that action for damages may not be maintained against school district for negligent classification, placement, or teaching of student); Donahue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 876 (N.Y. App. Div. 1978) (holding that New York courts do not recognize cause of action for educational malpractice), *aff'd* 391 N.E. 2d 1352 (1979).

166. *See, e.g.*, Torres v. Little Flower Children 's Serv., 474 N.E.2d 223, 224 (N.Y. 1984) (stating that as matter of public policy courts would not second-guess professional judgments of public school educators and administrators in selecting programs for particular students); Hunter v. Board of Educ., 439 A.2d 582, 583 (Md. 1982) (stating that cause of action seeking

judicial functions do not include the evaluation of conflicting theories of how best to educate, and also that courts are unable to determine how best to utilize scarce educational resources to achieve these sometimes conflicting objectives.[167] Basically, the courts do not want the responsibility of overseeing the administration of a state's public school system when they have no specialized knowledge that will enable them to resolve effectively the controversies which arise.[168] Judicial activism within the child welfare realm, however, should seek merely to enforce existing statutes and regulations promulgated by the legislature. While there is validity to the argument that courts should refrain from entering the educational sphere, to apply this to enforcement of federal statutes is to extend the analogy too far.

The litigation surrounding both educational malpractice and child welfare claims differs dramatically both in scope and cost. Educational malpractice plaintiffs seek substantial monetary damages for an alleged breach of duty on the part of a school district.[169] The damages are purely pecuniary and the beneficiary is often a single plaintiff.[170] In a situation such as this, the fact that courts refrain from imposing their own judgments upon the school systems is not surprising. The foster care cases, however, are based upon violations of federal statutes and are class actions seeking prospective injunctive relief.[171] All foster care plaintiffs ask is that their city prospectively conform to the federal statutes. Effectuating an order that brings cities into compliance with federal statutes is vastly different than awarding a single plaintiff a large amount of damages. By bringing cities into compliance with the federal statutes, courts choose preventative action over remedial measures. These preventative measures benefit a significant number of individuals, instead of monetarily compensating a sole plaintiff for his loss. Thus, the judicial reluctance to intrude upon educational matters should not extend into child welfare litigation.

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damages for acts of negligence in educational process is precluded by public policy considerations, inherent uncertainty in determining cause and nature of damages, and extreme burden placed on public school system as well as judiciary); Hoffman v. Board of Education, 400 N.E.2d 317, 320 (N.Y. 1979) (stating that courts of New York may not substitute their judgment for professional judgment of educators and government officials actually engaged in complex and delicate process of educating thousands of children); Donohue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 878 (N.Y. 1978) (holding that no cause of action exists for educational malpractice claim).

167. *See supra* note 169 and accompanying text (discussing courts' reluctance to enter educational sphere).

168. *See supra* note 169 and accompanying text (discussing how courts are unable to adequately evaluate educational standards).

169. *See* Doe v. Board of Educ., 453 A.2d 814 (Md. 1982) (stating that court would reject attempt to obtain money damages as result of alleged negligence or educational malpractice in Montgomery County School System); Washington v. City of New York, 442 N.Y.S.2d 20, 21 (N.Y. App. Div. 1981) (holding that monetary damages for educational malpractice are not recoverable).

170. *See supra* note 172 (illustrating damage actions in which intended beneficiary is single plaintiff).

171. *See supra* note 29 (citing cases in which courts held that foster children were entitled to preliminary injunctive relief).

CONCLUSION

In *LaShawn*, Judge Hogan merely stepped in at the plaintiff children's request to enforce federal and local statutes that municipalities like the District of Columbia have largely ignored. The District of Columbia voluntarily chose to comply with the federal statutes providing the guidelines for foster care programs, and courts do have the expertise to judge whether state agencies have complied with these statutes when plaintiffs present convincing evidence to the contrary. Because the enforcement of the foster care statutes is well within the realm of judicial expertise, the appellate process should affirm Judge Hogan's enforcement of the legislative mandates which are designed to protect the health and well-being of American children. While the *LaShawn* decision is but a single step in the battle to improve the foster care system in the United States, it is a well reasoned and innovative solution to the District's foster care welfare woes. The idea that a child embraced within the arms of the state has a constitutional right to adequate foster care potentially can become a catalyst instigating an explosion of judicial involvement which ultimately may help ameliorate the desperate situation in which many of our nation's children find themselves.

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