Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents

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Unlike natural and adoptive parents, foster parents stand in an unique position to the children under their care because that relationship is designed to be a very temporary one. The purpose of the foster care system is to provide a child with a stable, non-institutionalized environment when that child’s biological parents cannot properly minister to her physical, emotional, and financial needs.

Most children enter the foster care system through voluntary placement by their natural parents. The natural families of foster children usually consist of poor minority group members and single parents. Generally, physical or mental illness, marital difficulties, or financial problems trouble the child’s biological parents when they place the child with the foster care agency. In the typical foster care arrangement, the foster care agency then places the child in the home of a couple that is not related to her. These people become the child’s foster parents.

Foster parents are state-licensed service providers. Under a boarding home agreement, the state pays foster families a monthly stipend. Usually, these payments only cover the cost of the child’s food, clothing, medical and dental care, and other incidental expenses. Indeed, couples generally do not realize any monetary profit as foster parents. The reward that foster parents derive from their services is satisfaction—satisfaction in knowing that they are nurturing a needy child in a healthy and supportive familial environment.

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1 Child Welfare League of America, Standards for Foster Family Service 8 (1975). See also A. Gruber, Children in Foster Care: Destitute, Neglected, . . . Betrayed 15 (1978) (function of the foster family is not to provide a permanent home for the foster child).


3 Although some children enter the foster care system by court order, the majority of children become enrolled in foster care programs through voluntary placement agreements executed by their parents. Dobbs, supra note 2, at 1-2; Mnookin, Foster Care—In Whose Best Interests?, 43 Harv. Educ. Rev. 599, 600-01 (1973); Musewicz, The Failure of Foster Care: Federal Statutory Reform and the Child’s Right to Permanence, 54 S. Cal. L. Rev. 633, 639 (1981).

4 Dobbs, supra note 2, at 4 (“Pervasive poverty, minority group membership, and one-parent families are characteristics frequently associated with natural families of foster children.”). One study discovered that a high number of children in foster care are from black or Puerto Rican homes headed by single mothers with incomes falling below the poverty level. S. Jenkins & E. Norman, Filial Deprivation and Foster Care 2 (1972).

5 Dobbs, supra note 2, at 5.

6 “Foster care agencies are public or state-chartered private institutions operated under state guidelines.” Note, Constitutional Protection of Long-Term Foster Families, supra note 2, at 1192.

7 In the majority of states, foster parents must sign a boarding home agreement when the state places a child in their home. Festinger, Placement Agreements with Boarding Homes: A Survey, 53 Child Welfare 643 (1974).

8 Dobbs, supra note 2, at 5.


10 The people who become foster parents do so primarily because of their love of children and their compassion for those in need. Sometimes, persons become foster parents because they wish to
While the foster parents are ministering to the child's physical and emotional needs, the task of the foster care agency is to help the biological parents rectify the difficulties that precipitated the child's removal. Once the natural parents can resume caring for their child, the agency terminates the foster family relationship and returns the child to her natural home. Thus, the primary goal of the foster care program is to reunite the child with her rehabilitated natural parents.

Although this system contemplates only short-term care, children often spend unusually long periods of time with their foster parents. Most of the approximately 500,000 children in the foster care system can expect to remain in that system for at least two and a half years. However, while foster care placements often last for several years, state courts and legislatures have accorded few legal protections to foster parents.

Courts have confronted two issues arising from long-term foster care: (1) what is the tort liability of foster parents when their foster child sues them for negligence? and (2) what are the rights of foster parents when the state foster care agency attempts to remove the foster child from the foster home? These two issues present the most pressing legal concerns of foster parents today.

This note argues that a careful analysis of these issues demonstrates the need to provide certain statutory safeguards for foster parents. Part I of this note examines the case law on the tort liability of foster parents...
and proposes that state legislatures should provide liability insurance to foster parents in order to safeguard the interests of both foster parents and foster children. Part II discusses the statutory rights that foster parents possess when the child welfare agency attempts to terminate the foster family relationship. This section suggests that the State of New York's removal system, with certain modifications, should serve as a basic paradigm. The note concludes that successful resolutions to the current issues confronting foster parents must come from legislative bodies; courts cannot properly resolve the problems plaguing the present foster care system.

I. The Tort Liability of Foster Parents

Few jurisdictions have considered whether foster parents can be held liable for the torts of their foster children. Most of these jurisdictions have analyzed the issue solely through their courts. Those courts have analyzed foster parent liability in terms of whether the foster parent stood in loco parentis to the child when the child committed the tort.

At common law, the in loco parentis doctrine applied to an individual who had assumed all the rights, duties, and responsibilities of a parent. In the context of liability for negligent conduct, courts must decide whether a foster parent stands in loco parentis to her foster child in order to determine whether the foster parent can assert parental immunity as a defense.

The parental immunity doctrine, which first appeared in Anglo-American law in the 1891 case of Hewlett v. George, holds that a parent is immune from tort actions brought by an unemancipated minor child. In the last half century, the doctrine of parent-child tort immunity has

17 A number of writers have asserted that structuring protections and rights for the various participants in the foster care system is within the province of the judiciary. Musewicz, supra note 3; Note, The Due Process Rights of Foster Parents, 50 BROOKLYN L. REV. 483 (1984); Note, Constitutional Protection of Long-Term Foster Families, supra note 2; Note, Foster Parents' Emerging Due Process Rights in Pennsylvania, supra note 2; Note, Children in the Foster Family: What Constitutional Rights and Procedural Protections are Accorded?, 15 HOUSE L. REV. 948 (1978); Note, Foster Parents Have No Liberty Interest in Foster Children, 49 MISS. L.J. 518 (1978).

18 See, e.g., Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947) ("The term 'in loco parentis,' according to its generally accepted common-law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption [and] embodies the two ideas of assuming the parental status and discharging the parental duties."); In re Adoption of Crystal D.R., 331 Pa. Super. 501, 503, 480 A.2d 1146, 1148 (1984) (In order to assume the status of in loco parentis, a person must assume "rights and liabilities . . . exactly the same as between parent and child.").

19 68 Miss. 703, 9 So. 885 (1891) (sometimes cited as Hewellette v. George) (daughter brought an action against mother for false imprisonment).

20 In creating this exception to general tort liability, the Mississippi Supreme Court in Hewlett cited no authority for its holding. Instead, the court relied exclusively on what it considered necessary public policy—the preservation of the family relationship. Tennessee adopted the rationale of the Hewlett court and became the second state to create parental immunity in McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (minor child brought an action against father and stepmother for cruel and inhuman treatment). The third state to adopt parental immunity was Washington in Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (daughter brought an action against father for rape). Hewlett, McKelvey, and Roller, all decided around the turn of the century, have become dubiously known as the "great trilogy." See, e.g., Comment, Tort Actions Between Members of the Family—Husband and Wife—Parent and Child, 26 MO. L. REV. 152, 182 (1961) ("The Hewellette [sic], McKelvey and Roller
been severely criticized\textsuperscript{21} and even abolished in some jurisdictions.\textsuperscript{22} Many states, however, still recognize the general rule or some variation of it.\textsuperscript{23} In those jurisdictions that still uphold some form of the doctrine, cases constitute the great trilogy upon which the American rule of parent-child tort immunity is based.

The parental immunity doctrine is based on the reluctance of courts to interfere with the familial relationship. Historically, courts have advanced several policy reasons in support of parental immunity: (1) the rule is necessary for the protection of domestic harmony; (2) the rule prevents fraud and collusion among family members attempting to collect on liability insurance policies; (3) any change in the rule would adversely interfere with parental care and discipline; and (4) depletion of family resources in favor of the injured child would occur at the expense of the other children in the household. \textit{See generally} Hollister, \textit{Parent-Child Immunity: A Doctrine in Search of a Justification}, 50 Fordham L. Rev. 489 (1982); Ingram & Barder, \textit{The Decline of the Doctrine of Parent-Child Tort Immunity}, 68 Ill. B.J. 596 (1980).

21 State courts and legal scholars have advanced a number of arguments that question the soundness of the parental immunity rule. First, it is doubtful that the rule promotes familial tranquility. To preclude a child’s suit for injuries in the name of domestic tranquility is to assert “that an uncompensated tort makes for peace in the family.” W. Prosser, \textit{HANDBOOK OF THE LAW OF TORTS} § 122, at 866 (4th ed. 1971). If a child must resort to court action to receive compensation for injuries inflicted by her parent, the domestic peace was probably irreparably damaged long before commencement of the suit. Thus, allowing the child to sue for redress of her injuries would not significantly further disrupt the familial relationship. Indeed, the act or omission on which the child’s suit is based should be viewed as the disquieting matter, and not the suit itself. \textit{See, e.g.}, Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975).

Second, while the possibility of fraud or collusion on the part of the family in order to collect insurance proceeds exists, concern for the child’s welfare is an important reason to allow suit. \textit{See, e.g.}, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967). In addition, “the possibility that some litigants in a particular class may be guilty of fraud or collusion does not require the courts to deny relief to everyone in the class, many of whom are admittedly deserving.” Hollister, \textit{supra} note 20, at 501.

Third, the contention that parental authority and discretion would be undermined without the rule is a rather tenuous argument. This is demonstrated by the existence of a widely held exception to the doctrine—the liability of parents to their children for intentional torts. \textit{Id.} at 505. No evidence suggests that the abrogation of the immunity for intentional torts has produced any loss of parental authority. \textit{Id.}

Finally, it is also unconvincing to argue that compensating an injured child would invariably result in a depletion of family resources to the detriment of the child’s innocent siblings. Courts have often directed parents to pay an award to one child without exhibiting a similar concern for the financial well-being of the child’s siblings. For example, courts have traditionally permitted children to sue their parents in the property and contract areas. \textit{See, e.g.}, Nocktonick v. Nocktonick, 227 Kan. 758, 611 P.2d 135 (1980); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1950); King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938).


according in loco parentis status to a foster parent entitles the foster parent to invoke the parental immunity shield when sued by her foster child.

A. Jurisdictions Granting In Loco Parentis Status to Foster Parents

Minnesota was the first state to consider the issue of foster parent tort liability and grant in loco parentis status to foster parents. In Miller v. Pelzer, the foster daughter entered the foster parents’ home shortly after her birth. She remained in the home for twenty-five years until she married. Upon learning that she was a foster child, she filed suit against her foster parents for fraud and deceit. The Supreme Court of Minnesota dismissed the foster child’s complaint. The court decided that the family relation that existed was “for all practical purposes . . . just as sacred as if plaintiff had been the natural daughter.”

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The pioneer of the trend to carve out exceptions to the parental immunity rule was Wisconsin in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). In Goller, a foster son sued his foster father for injuries he sustained while riding on a farm tractor that the foster parent owned and operated. The Wisconsin Supreme Court abrogated parental immunity in negligence cases except in two situations: (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child, and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. Several states have adopted this general approach: Arizona (Sandoval v. Sandoval, 128 Ariz. 11, 628 P.2d 800 (1981)); Iowa (Wagner v. Smith, 340 N.W.2d 255 (Iowa 1983)); Kentucky (Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970)); Michigan (Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972)); New Jersey (Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974)); and Texas (Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971)).


24 159 Minn. 375, 199 N.W. 97 (1924).
25 Id. at 376, 199 N.W. at 97.
26 Id. at 379, 199 N.W. at 98.
27 Id. at 377, 199 N.W. at 97.
rental immunity, which Minnesota law then recognized, because they stood in loco parentis to their foster child.

The only other jurisdiction that has granted in loco parentis status to foster parents is Wisconsin. In Goller v. White, the Supreme Court of Wisconsin affirmed the trial court's conclusion that a foster father stood in loco parentis to his foster child. Curiously, the court did not discuss those factors which led it to conclude that the foster parent was entitled to in loco parentis status, thereby allowing him to invoke the parental immunity rule. The court, however, then abolished the immunity rule except in cases involving the exercise of parental control and authority or the exercise of parental discretion with regard to food and care.

The Goller court did not consider any of the factors that distinguish a foster family from a traditional family. The court could have noted that while a natural family is biologically created, the foster family has its origins in state statutes. One other important distinction is that, unlike a biological family, a foster family is not intended to be a permanent living construct. Finally, the court should have observed that foster parents do not assume all the rights and obligations of natural parents; indeed, while foster parents are responsible for the everyday care of the child, legal custody remains with the child welfare agency that initially placed the child in the foster home. If the Goller court had carefully considered these factors, it might have decided to deny in loco parentis status to foster parents.

Moreover, in deciding Goller, the Supreme Court of Wisconsin did not consider any of the public policy reasons for according special protections to foster parents. The court should have considered the uniqueness of and necessity for the child welfare services that foster parents provide. Although the task of fashioning protections for foster parents

28 At the time this case was decided, Minnesota recognized the parental immunity doctrine. See Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908). Minnesota has since abrogated parental immunity. Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980). Though the judicially created parental immunity doctrine has been abolished in Minnesota, foster parents in that state receive statutory protections. See infra note 68 and accompanying text.
29 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
30 Id. at 409, 122 N.W.2d at 196.
31 See supra note 23. The Supreme Court of Wisconsin in Goller did not elaborate on how its holding should be applied. Wisconsin courts, however, have subsequently interpreted the "parental control and authority" exception to encompass those actions that are undertaken for the purpose of disciplining a child. See Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972). This approach accords with the traditional view that parents are permitted to use reasonable force to discipline their children. See, e.g., Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). Also, Wisconsin courts have interpreted the "parental discretion" exception to include the parents' right to raise and educate their children in accordance with their own beliefs and values. See, e.g., Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968).
32 See supra text accompanying notes 1-12.
35 See Dobbs, supra note 2, at 5.
36 The Goller court merely concluded that because the gravamen of the foster child's complaint alleged negligent parental supervision (a cause of action not precluded by either judicially created exception), the foster parent could be held liable. Goller, 20 Wis. 2d at 413, 122 N.W.2d at 198.
is more properly delegated to the legislative domain, the court in its opinion could have alerted the legislature to the need for statutory safeguards for foster parents. However, nowhere in its opinion did the Goller court state that the Wisconsin state legislature should insulate foster parents from any negligence claims brought by, or on behalf of, the foster children entrusted to their care.

B. Jurisdictions Denying In Loco Parentis Status to Foster Parents

Courts in New York and Michigan have held that foster parents do not stand in loco parentis to the children under their care and, thus, are not entitled to claim parental immunity as a defense in a foster child’s negligence suit against them. New York confronted the issue in Andrews v. County of Otsego. In Andrews, a foster child sustained an eye injury while in the care of his foster parents. The child’s natural mother brought an action on behalf of the child against the foster parents alleging negligent supervision. The foster parents countered that, because under New York law a child could not sue a natural parent for negligent supervision, they, as foster parents, should be granted the same immunity.

The Supreme Court of New York in Andrews held that a foster child could sue a foster parent for negligent supervision. The court gave four rationales for its decision. First, the court emphasized the distinctions between the foster family and the natural family. The court observed that foster parents are only paid contract service providers. Indeed, foster parent status can only arise out of a contract with the state. The court reasoned that, in sharp contrast to natural parents, this contractual relationship wholly dictates the duties that foster parents owe to their foster children; such duties do not derive from any emotional attachments.

Second, the court noted that the foster family relationship is designed to be temporary. Foster parents, therefore, do not assume all the legal obligations of natural parents. Although foster parents provide for the child’s daily care, the welfare agency retains legal custody. Accordingly, the agency—and not the foster parent—stands in loco parentis to the child.

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37 112 Misc. 2d 37, 446 N.Y.S.2d 169 (1982).
38 Id. at 38, 446 N.Y.S.2d at 170.
40 Andrews, 112 Misc. 2d at 39, 446 N.Y.S.2d at 171.
41 Id. at 41, 446 N.Y.S.2d at 172.
42 Id.
43 See id. ("Although a foster parent may develop significant emotional ties with a foster child, the duties owed to the child are ground in a ‘knowingly assumed contractual relation with the State.’") (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977)).
44 Accord Miller v. Davis, 49 Misc. 2d 764, 268 N.Y.S.2d 490 (1966) (To establish that one stands in loco parentis, one must not only provide instruction and care for the general welfare of the child, but one must also assume responsibility for the support of the child.). Cf. In re Adoption of Crystal D.R., 391 Pa. Super. 501, 480 A.2d 1146 (1984) (Foster parents had no standing to file a petition for termination of parental rights because they did not stand in loco parentis to child entrusted to their care.).
Third, the court commented that the objective of the foster family is to facilitate the return of a child to the child’s biological parents.\textsuperscript{45} Indeed, “the natural parent retains a paramount right to raise the child.”\textsuperscript{46}

Finally, the court stated that improper supervision constitutes a basis for termination of the foster family relationship.\textsuperscript{47} Thus, it would be inconsistent to suspend a foster parent’s license for negligent supervision, and yet to deny a foster child a cause of action for injuries sustained as a result of that negligence.\textsuperscript{48}

The Michigan Supreme Court adopted all of these rationales in deciding \textit{Mayberry v. Pryor}.\textsuperscript{49} The issue of foster parent liability in \textit{Mayberry} arose in a suit filed on behalf of Justin Mayberry, a deaf boy who was seriously injured by a German shepherd. Neighbors of the boy’s foster parents owned the dog.\textsuperscript{50} The boy’s natural mother, as conservator of the boy’s estate, commenced an action against his foster parents for negligent supervision.\textsuperscript{51}

The Michigan court ruled that, unlike natural parents, foster parents may not raise the parental immunity shield\textsuperscript{52} when their foster children sue them for negligent supervision.\textsuperscript{53} The court found that the policy rationales underlying the parental immunity doctrine—promotion of domestic harmony, conservation of family resources, and judicial nonintervention in parenting decisions—did not justify extending the defense to foster parents.\textsuperscript{54}

Drawing heavily on the New York Supreme Court’s analysis in \textit{Andrews},\textsuperscript{55} the \textit{Mayberry} court outlined several reasons for denying \textit{in loco parentis} status to foster parents. These reasons included the foster parents’ lack of familial ties to the child, their temporary status as the child’s guardians, their compensation for parenting expenses, and their contractual relationship with the state’s child welfare agency.\textsuperscript{56} The court emphasized that the function of foster care is not to construct a “new ‘family’ unit” or to promote permanent emotional bonds between foster parents and children.\textsuperscript{57} In the court’s opinion, these factors militated

\textsuperscript{45} \textit{Andrews}, 112 Misc. 2d at 43, 446 N.Y.S.2d at 173.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.} at 44, 446 N.Y.S.2d at 174.\textsuperscript{48} \textit{Id.}
\textsuperscript{49} 422 Mich. 579, 374 N.W.2d 683 (1985).
\textsuperscript{50} \textit{Id.} at 582, 374 N.W.2d at 684.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} In \textit{Plumley v. Klein}, 388 Mich. 1, 199 N.W.2d 169 (1972), the Michigan Supreme Court embraced the approach of the Wisconsin Supreme Court in \textit{Goller v. White}, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Accordingly, the Michigan court retained parental immunity for only two situations: Where the negligence involves an exercise of reasonable parental authority over the child, or an exercise of reasonable parental discretion regarding food, housing, clothing, health services, or other care. \textit{See supra} note 31. Under Michigan law, negligent supervision falls within the first exception.
\textsuperscript{53} \textit{Mayberry}, 422 Mich. at 592-93, 374 N.W.2d at 688-89.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} Indeed, the \textit{Mayberry} court quoted the \textit{Andrews} decision at great length. \textit{Id.} at 589-91, 374 N.W.2d at 687-88.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
against according foster parents the special protections that in loco parentis status provides.

C. Balancing the Interests of Foster Parents and Foster Children: The Statutory Approach

A disturbing aspect of both the Andrews and the Maybeny opinions is that the courts in both cases failed to consider the possible detrimental effects of imposing liability on foster parents. Failing to protect foster parents from negligence suits brought by their foster children may discourage many individuals from becoming foster parents. This fear of liability may be a pressing concern for many foster parents because most of them are from modest socioeconomic classes. Thus, failing to provide a liability safeguard for foster parents could have a devastating effect on a child welfare agency's ability to secure an adequate number of homes for children requiring foster care. Considering that the number of foster children has increased dramatically in recent years, this potential problem may become especially significant.

On the other hand, granting in loco parentis status to foster parents so that they may claim parental immunity would be inappropriate for all the reasons that the Andrews and Mayberry courts cited. In addition, although foster care placements may last for several years, the foster family relationship does not confer the same rights and liabilities as does the relationship between natural parent and child. Rather, the foster family relationship is designed to be a subordinate one, supervised by a child welfare agency. To grant in loco parentis status to foster parents would give them effectively the same legal status as the child's natural parents. Such action would make foster parents rivals, and not supporters, of the child's natural parents, a result that is antithetical to the express purposes of the foster care system. Moreover, as the Maybeny court commented, the recent judicial trend is toward limiting the applicability of the parental immunity doctrine. This trend favors denying foster parents in loco parentis status so that they cannot invoke the seemingly anachronistic defense of parental immunity.

58 See Kern v. Steele County, 322 N.W.2d 187, 190 (Minn. 1982) (Wahl, J., dissenting) ("If foster parents are excluded from a county's liability policy, individuals may be reluctant to volunteer their services."). Cf. Headrick v. Parker, No. 224 (Tenn. Feb. 24, 1986) (LEXIS, State library, Tenn file) (The court rejected defendants' argument that any decision that fails to protect them from liability would discourage others from serving as foster parents.).

59 See L. Costin, supra note 9, at 345 (Foster parents tend to have minimal educations and to be from lower socioeconomic groups.); Dobbs, supra note 2, at 5 ("Most foster parents have middle or lower-middle incomes."); Note, Foster Parents' Emerging Due Process Rights in Pennsylvania, supra note 2, at 123 (Foster parents tend to be from "lower-middle class" backgrounds.).


61 See supra text accompanying notes 41-57.

62 See supra note 14 and accompanying text. Neither the Andrews nor the Mayberry court discussed this point.


64 Mayberry, 422 Mich. at 593, 374 N.W.2d at 689.

65 Many critics have argued that the parental immunity doctrine is an anachronistic defense that
The problem remains, though, of providing some type of liability protection for foster parents while also safeguarding the interests of the children entrusted to their care. Oregon has deemed foster parents to be state employees who enjoy immunity from liability for any acts concerning the supervision and care of their foster children. This is an unsatisfactory approach. Although it protects the foster parents from tort liability, it leaves the child uncompensated for her injuries. In essence, this approach merely substitutes state immunity for parental immunity and leaves the problem unsolved.

A more equitable solution to this problem is state-funded liability insurance for foster parents. State legislatures could readily effectuate this proposal. Indeed, because such a resolution requires the implementation of a state-wide insurance program, it could only be attained through the legislative process. Maryland, Minnesota, New Hampshire, and Wisconsin have already embraced this approach. Essentially, these states require the commissioner of human services to supply insurance coverage for any injuries that foster children sustain while in their foster parents' household. This approach, then, simultaneously shields foster parents from economically damaging lawsuits while also providing compensation for the injured child.

However, some aspects of the existing statutory schemes are troubling. A problem with the Minnesota, New Hampshire and Wisconsin statutes is that they do not differentiate between intentionally and negligently inflicted injuries. See supra notes 21-23 and accompanying text. Progressive commentators favor an approach employing the reasonable parent standard. This standard requires parents to act as ordinarily reasonable and prudent parents would act in similar circumstances. See Hollister, supra note 20, at 527; Ingram & Barder, supra note 20, at 601. Currently, only two jurisdictions have embraced this approach: California (Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971)) and Minnesota (Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980)).

See Pickett v. Washington County, 31 Or. App. 1263, 572 P.2d 1070 (1977) (shelter care parents, as county's agents, are generally immune from liability for acts and omissions relating to the supervision, care, and custody of foster children).

Md. Health-Gen. Code Ann. § 6-131 (1982) authorizes the state to provide insurance coverage for foster parents who care for children under foster parent programs. "[T]he liability insurance shall provide coverage for . . . [a]ctions against a foster parent by a natural parent for any accident to the foster child." Id.


The commissioner of human services shall within the appropriation provided purchase and provide insurance to foster parents to cover their liability for: (1) injuries or property damage caused or sustained by foster children in their home; and (2) actions arising out of alienation of affections sustained by the natural parents of a foster child.


The director of the division of human services, department of health and human services, . . . is hereby authorized . . . to enter into a contract with an insurance company to purchase personal liability coverage for individuals providing foster care for children . . .

Wis. Stat. Ann. § 619.01(9) (West Supp. 1986) calls for foster home protection insurance to safeguard "persons who receive a license to operate a foster home . . . against the unique risks . . . to which such persons are exposed." Presumably, this includes coverage for injuries that foster children sustain while under the care of their foster parents.

California has also recognized the need to provide foster families with some type of liability insurance. However, that state's insurance plan only extends coverage to third parties who are injured through the misconduct of foster children. Thus, California's scheme does not insulate foster parents from negligence claims brought by their foster children. Cal. Gov't Code § 23004.4 (West Supp. 1986).
gently inflicted injuries. Only Maryland attempts to distinguish the two types of harms. State-funded liability insurance should not cover injuries that foster parents have intentionally inflicted on their foster children. Foster parents should absorb the costs of their deliberately inflicted harms. To hold otherwise would effectively give foster parents a license to act callously toward the welfare of their foster children. When injuries arise from negligent conduct, however, the state should supply ample liability coverage. In order to meet the needs of both foster parents and the children under their care most effectively, states should enact legislation that provides foster parents with liability insurance.

II. Safeguarding Foster Parents From Capricious State Disruptions of Their Foster Homes

Foster parents also need procedural protections when the child welfare agency attempts to disrupt their foster family relationship. Recently, in Smith v. Organization of Foster Families for Equality and Reform (OFFER), a group of New York City foster parents claimed that they had a liberty interest in their foster families which merited constitutional protection. See supra note 67.


The few courts that have addressed the issue of intentional tort suits against foster parents have allowed foster children to sue their foster parents. Hanson v. Rowe, 18 Ariz. App. 131, 350 P.2d 916 (1972); Vonner v. Department of Pub. Welfare, 273 So.2d 252 (La. 1973); Blanca v. Nassau County, 103 A.D.2d 524, 480 N.Y.S.2d 747 (1984). In such instances, courts have analogized the claims to cases where natural parents engaged in intentional misconduct against their children and were denied the parental immunity shield. Indeed, actions alleging intentional torts were one of the first exceptions carved out of the parental immunity doctrine. See, e.g., W. Prosser, supra note 21, § 122, at 866-67; Hollister, supra note 20, at 498; Note, The Child's Right to "Life, Liberty and the Pursuit of Happiness": Suits by Children Against Parents for Abuse, Neglect and Abandonment, 34 Rutgers L. Rev. 154, 164-65 (1981).

A liberty interest may be defined as the constitutionally protected right of an individual to enjoy those privileges that are essential to the proper functioning of a liberal democratic society. See Bennett v. Jeffreys, 40 N.Y.2d 543, 552 n.2, 355 N.E.2d 277, 285 n.2, 387 N.Y.S.2d 821, 829 n.2 (1976). Examples of constitutionally acknowledged rights are the right to marry (e.g. Griswold v. Connecticut, 381 U.S. 479 (1965)), the right to establish a home and raise children (e.g. Loving v. Virginia, 388 U.S. 1 (1967)), and the right to worship according to the dictates of one's conscience.
The plaintiffs alleged that the New York procedures for removing foster children from foster homes inadequately protected the foster family's liberty interest. The Supreme Court of the United States avoided the question of whether a foster family has a constitutionally protected liberty interest in its integrity by stating that if such an interest did exist, the New York procedures adequately protected it.

Since the OFFER decision, several lower courts have attempted to determine whether a liberty interest is inherent in the foster family relationship. The results have been disparate. For example, in both Kyees v. County Department of Public Welfare and Drummond v. Fulton County Department of Family and Children's Services, the United States Courts of Appeals for the Seventh and Fifth Circuits held that foster parents did not have a constitutionally protected liberty interest in their relationship with their foster children. Accordingly, the state was free to terminate the foster family relationship at any time and for any reason. However, in Brown v. County of San Joaquin, the United States District Court for the Eastern District of California rejected the holdings in Kyees and Drummond.

Additional procedures are discussed in N.Y. Soc. Serv. LAW § 400 (McKinney 1983), and N.Y. Comp. Codes R. & Regs. tit. 18, § 431.10(a) (1983). These procedures become operative when the child welfare agency decides to remove the foster child from her current foster home, either to return her to her natural parents or to transfer her to another foster home. The agency may remove the child at any time "in its discretion" (N.Y. Soc. Serv. LAW § 383 (2) (McKinney 1983)). A written notice must be given to the foster parents at least ten days prior to the removal. If the foster parents desire, they may obtain a "conference" with the official of the agency who authorized the removal. This "conference" is to be held within ten days of the foster parents' request. At this meeting, the agency official tells the foster parents the reasons for the removal and the foster parents may state reasons against it. Although the foster parents may appear with counsel at the conference, it is not a full adversary hearing—the foster parents cannot call or cross-examine witnesses nor may they inspect agency files. During this time, the foster family is entitled to a stay of the removal until the agency renders a written decision. Three days after an adverse decision, however, the agency may remove the child from her foster home, either to return her to her natural parents or to transfer her to another foster home. The agency may remove the child at any time "in its discretion" (N.Y. Soc. Serv. LAW § 383 (2) (McKinney 1983)).

Additionally, in New York City, foster parents are entitled to an adversary hearing before the foster care agency removes the child and transfers her to another foster home under Special Services for Children, Procedure No. 5 (August 5, 1974). This procedure does not apply if the child is returning to her natural parents.

In both Kyees and Drummond, the foster parents had cared for the foster children for approximately two years before the state welfare agencies arbitrarily decided to end the relationships. Kyees, 600 F.2d at 699; Drummond, 563 F.2d at 1203-04.


The New York State removal procedures are discussed in N.Y. Soc. Serv. LAW § 400 (McKinney 1983), and N.Y. Comp. Codes R. & Regs. tit. 18, § 431.10(a) (1983). These procedures become operative when the child welfare agency decides to remove the foster child from her current foster home, either to return her to her natural parents or to transfer her to another foster home. The agency may remove the child at any time "in its discretion" (N.Y. Soc. Serv. LAW § 383 (2) (McKinney 1983)). A written notice must be given to the foster parents at least ten days prior to the removal. If the foster parents desire, they may obtain a "conference" with the official of the agency who authorized the removal. This "conference" is to be held within ten days of the foster parents' request. At this meeting, the agency official tells the foster parents the reasons for the removal and the foster parents may state reasons against it. Although the foster parents may appear with counsel at the conference, it is not a full adversary hearing—the foster parents cannot call or cross-examine witnesses nor may they inspect agency files. During this time, the foster family is entitled to a stay of the removal until the agency renders a written decision. Three days after an adverse decision, however, the agency may remove the child from her foster home, either to return her to her natural parents or to transfer her to another foster home. The agency may remove the child at any time "in its discretion" (N.Y. Soc. Serv. LAW § 383 (2) (McKinney 1983)). A written notice must be given to the foster parents at least ten days prior to the removal. If the foster parents desire, they may obtain a "conference" with the official of the agency who authorized the removal. This "conference" is to be held within ten days of the foster parents' request. At this meeting, the agency official tells the foster parents the reasons for the removal and the foster parents may state reasons against it. Although the foster parents may appear with counsel at the conference, it is not a full adversary hearing—the foster parents cannot call or cross-examine witnesses nor may they inspect agency files. During this time, the foster family is entitled to a stay of the removal until the agency renders a written decision. Three days after an adverse decision, however, the agency may remove the child from her foster home, either to return her to her natural parents or to transfer her to another foster home. The agency may remove the child at any time "in its discretion" (N.Y. Soc. Serv. LAW § 383 (2) (McKinney 1983)).

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The plaintiffs in OFFER contended that the New York procedures violated the due process and equal protection clauses of the fourteenth amendment. OFFER, 431 U.S. at 820.

Id. at 847.

600 F.2d 693 (7th Cir. 1979).

563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

In both Kyees and Drummond, the foster parents had cared for the foster children for approximately two years before the state welfare agencies arbitrarily decided to end the relationships. Kyees, 600 F.2d at 699; Drummond, 563 F.2d at 1203-04.

district court asserted that foster parents possess a liberty interest in the
preservation of their foster families. The District Court of Appeal of
Florida reached an interesting result in Berhow v. Crow. In Berhow, the
court held that a couple had a fundamental liberty interest in sustaining
their relationship with one foster child, but did not have a similar consti-
tutional interest in maintaining their relationship with another foster
child. These decisions demonstrate that courts are ambivalent toward
accordng foster parents a liberty interest in preserving their familial re-
lationships with their foster children.

Meanwhile, numerous commentators have argued for definitive judi-
cial solutions to the liberty interest issue. Despite the recent focus on
judicial solutions to this issue, the judiciary is unsuited to fashioning ade-
quate protections on which foster parents may rely when the child wel-
fare agency seeks to discontinue the foster family relationship.

A. Problems Inherent in the Judicial Approach

A major problem with judicial recognition of a foster family liberty
interest is that such a finding would engender a conflict of interest be-
tween the foster family and the natural family. If the courts were to ac-
knowledge a constitutional liberty interest in foster family integrity,
foster parents would be encouraged to consider the relationship with
their foster child a permanent one. Such a result would frustrate the fun-
damental task of foster parents: to provide temporary care for a child
while her biological family is being rehabilitated. Indeed, the purpose
of foster care is to expedite the child's reunion with her natural parents
by providing a healthy familial way station. Recognition of a liberty in-
terest in the foster family relationship would contradict the avowed pur-
purpose of the foster care system.

Even the Supreme Court of the United States in OFFER conceded
that tension exists between a foster family liberty interest and the prof-
essed goals of foster care. Writing for the Court, Justice Brennan ob-
erved that:

[T]he natural parent of a foster child in voluntary placement has an
absolute right to the return of his child in the absence of a court order

84 Id. at 665. In Brown, the child welfare agency placed a black infant, whose mother had aban-
donned her, with a white foster mother. Three years later, the agency removed the child from the
foster home and placed her elsewhere. The agency did not offer the foster mother any reasons for
the removal, nor did it disclose to her the home to which the child had been transferred. Id. at 655-
56.
86 In Berhow, the foster parents had cared for a female child named Dawn for most of her life.
The foster parents wished to adopt Dawn and her sister, Carolyn. The record was unclear as to what
transpired in the life of Carolyn between her birth and the time the foster parents petitioned the
court for her adoption. The court held that the foster parents had a fundamental liberty interest in
preserving their familial relationship with Dawn. In making this determination, the court empha-
sized the amount of time the child had spent in the foster home. The court found, however, that the
foster parents did not have a similar liberty interest in Carolyn. The court reasoned that the foster
parents' relationship with Carolyn was not substantial enough to recognize such an interest. Id. at
372-73.
87 See supra note 17.
88 See supra notes 1-2 and accompanying text.
obtainable only upon compliance with rigorous substantive and procedural safeguards, which reflect the constitutional protection accorded the natural family. . . . Moreover, the natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances. These rights are difficult to reconcile with the liberty interest in the foster family relationship claimed by [the foster parents].

The United States Supreme Court has recognized a liberty interest in preserving the family when the family unit is either: (1) derived from biological ties, or (2) intended to be a permanent living arrangement. The foster family cannot fit into either category. If the Court were to acknowledge a liberty interest in the foster family, it would inevitably infringe upon the substantive liberty it has already recognized in the natural family. Indeed, recognition of a foster family liberty interest would mean that natural parents have no greater right to their children than do foster parents.

Courts have clearly determined that in custody disputes between biological parents and third persons, parents should prevail unless the biological parents are unfit to care for their child. A contrary holding would only discourage natural parents from utilizing foster care services, because they would fear losing their children to foster parents. Because the vast majority of foster care placements are voluntary, courts must be careful not to discourage parents from putting their children in the foster care system in appropriate circumstances. Otherwise, due to this fear of losing their children, a drop in placements may occur and the ability of child welfare agencies to minister to children in need could be severely curtailed.

B. Protecting Foster Parents' Interest in the Foster Family Relationship: The Statutory Approach

Foster parents should be granted safeguards against arbitrary state interference with their foster family relationships. However, attempting to protect the integrity of the foster family by according a liberty interest to the foster family unit would create an irreconcilable conflict with the foster child's natural family. In addition, courts are ill-equipped to structure the procedures necessary to protect foster parents from capri-

89 OFFER, 431 U.S. at 846.
91 For example, while the marriage relationship is not biologically created, the Court considers it a permanent family construct. See Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). In addition, the Court views the adoptive family, another artificially created unit, as a permanent living arrangement. See OFFER, 431 U.S. at 844 n.51.
93 See supra note 3.
94 See supra text accompanying notes 88-93.
cious state-imposed removals of their foster children. Such a task is properly within the domain of a state’s legislature.95

In many ways, the New York State removal procedures should be the paradigm for devising a system that will adequately safeguard foster parents’ interests when the state welfare agency wishes to remove their foster children from their home. These state procedures require the following: (1) that foster families receive written notice of the removal; (2) that the agency conduct a conference, if requested, between the foster parents and the agency, to which the foster parents may bring counsel; (3) that the agency make a decision in writing within five days of the conference; (4) that the agency stay the removal until such decision is rendered; and (5) that the agency conduct a full adversary hearing for the foster parents, subject to judicial review, if the agency recommends removal.96

Clearly, the New York State removal system affords foster parents a number of needed statutory protections. Foster parents under this system are given a sufficient amount of time to present their case for retaining the child. Also, the process assures the parents that a disinterested and unbiased court can review any removal decision they believe is unjustified.

While New York’s procedures are laudable, they are also deficient in several respects. In view of the important role that foster parents play in their foster children’s lives,97 more protections are needed for foster parents.

First, under the New York State system, the letter sent to the foster parents apprising them of the agency’s decision to remove their foster child does not state the reasons for the removal. The New York State removal statute is silent as to why the agency need not explain the reasons for its decision in its letter to the foster family. The foster care agency informs the foster parents of the basis for its decision only at the initial conference.98 While the agency allows the foster parents to have counsel present at this conference, they are usually unable to prepare an adequate defense because of the delay in receiving the reasons for removal. Accordingly, state legislatures should require foster care agencies to inform foster parents of the reasons for removal in their initial notice. In this manner, foster parents can be better prepared to defend their position at the conference.

Second, though New York State law affords foster parents a full adversary review, this hearing is only available after removal.99 In contrast, New York City procedures provide an opportunity for a full adversary hearing before the foster care agency takes the child from her foster par-

96 For an elaboration of these procedures, see supra note 77.
97 Because they often spend several years caring for their foster children, foster parents function as vital surrogate parents. See supra note 14 and accompanying text.
99 Id.
Thus, New York City procedures award foster parents a protective measure that the state provisions do not. All foster parents should be entitled to this additional safeguard.

A mandatory adversary meeting prior to the child's removal from her foster parents advances foster family integrity in two ways. First, it helps to ensure that the state's welfare agency is not treating the foster child like a "ping-pong ball" by arbitrarily shifting her from one foster home to another. At present, this is one of the major problems with the foster care system. Second, it allows the foster parents to keep their foster child in their home until a full adversary review has been completed. Such a scheme would substantially mitigate the chances of foster parents losing their foster children as a result of an erroneous administrative decision.

Most importantly, to be truly protective of foster parents' interests in their foster children, any legislative scheme should enable foster parents to assume full parental rights and duties if the natural parents become unable to care for the child. Such provisions are desperately needed because approximately one fourth of the children currently in foster care are not likely to be reunited with their biological parents. Should return of the child to her natural parents become infeasible, the foster parents should be afforded the opportunity to give their foster child a permanent home.

State child welfare agencies should employ the same criteria for selecting prospective foster parents as they utilize for finding prospective adoptive parents. Currently, only one state, Arizona, has embraced this approach. Several other states merely prefer foster parents if the child becomes freed for adoption. California, Illinois, Missouri, New Jersey, New York, and South Dakota have adopted this position. This approach does not adequately protect foster parents' interests in adoption proceedings because the criteria that child welfare agencies utilize for choosing adoptive homes are ordinarily more demanding than the standards that the agencies employ for selecting foster homes. For example, in making a determination as to whether a couple will be suitable adoptive parents, a child welfare agency will place considerable emphasis on the couple's age, race, ethnicity, and physical characteris-

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100 See Special Services for Children, Procedure No. 5 (August 5, 1974).
101 Indeed, because multiple placement is the rule, little stability exists in the foster care system. See Dobbs, supra note 2, at 6.
102 See M. Jones, supra note 60, at 5-6.
103 Typically, the grounds for termination of parental rights are abandonment, mental illness or retardation, abuse, and permanent neglect. See Dobbs, supra note 2, at 18.
111 See Goldstein, supra note 34, at 648-49.
tics.\textsuperscript{112} Such factors are not used to select foster parents. Thus, after providing shelter, care and affection to children who have remained in their home for lengthy periods of time,\textsuperscript{113} foster parents could lose their foster children to prospective adoptive parents who have no emotional or psychological ties to the youngsters.

Requiring child care agencies to choose foster parents who might later serve as adoptive parents protects the concerns of all interested parties in the foster care system. Such a requirement would protect the interests of the foster child in having guardians who can effectively minister to her emotional and psychological needs.\textsuperscript{114} It would also provide natural parents with the knowledge that their child has been entrusted to surrogate parents who are completely able, if necessary, to assume full parental responsibilities. Finally, such a plan could provide foster parents with the expectation that if the child's reunion with her natural parents becomes impracticable, the integrity of the foster family relationship will be preserved.

III. Conclusion

Tort liability and arbitrary state disruptions of foster family relationships are the two most pressing concerns which foster parents face at present. Currently, very few states have enacted legislation which can address these issues in a meaningful way. Most states which have confronted these issues have attempted to resolve them in the judicial arena. The judiciary, however, is unsuited to fashion adequate safeguards for foster parents. Since foster home programs are the geneses of state statutes, the task of formulating protections for foster families is properly in the legislative forum. Hopefully, all states will recognize the importance of enacting legislative measures that will protect the interests of foster care's most vital resource: Its foster parents.

Vincent S. Nadile

\textsuperscript{113} See supra note 14.
\textsuperscript{114} See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973) (children need to develop close emotional bonds with parental figures for healthy psychological development).