

Foster Parents as State Actors in Section 1983 Actions: What *Rayburn v. Hogue* Missed

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Introduction

Consider the situation of June, a nine-year-old girl whose parents neglect her. The State's Department of Family Services takes custody of June and places her in a foster home. To make matters worse, June's foster parents abuse her during her stay in foster care. June wants to file a complaint against the foster parents and the state agency. However, the Eleventh Amendment and state immunity statutes insulate the State and its employees from liability under state tort law.¹ So, June's prospect for recovery under state law looks bleak.

Alternatively, June and her parents might seek redress under 42 U.S.C. § 1983.² Section 1983 prohibits the government from violating an individual's constitutional rights and provides people, like June, with a remedy against

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¹ U. S. CONST. amend. XI; *see, e.g.*, *Rayburn v. Hogue*, 241 F.3d 1341, 1346 (11th Cir. 2001); *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000). When attached to federal claims, federal courts may dismiss state law claims because of procedural issues, such as supplemental jurisdiction. *See Hutchinson v. Spink*, 126 F.3d 895, 902 (7th Cir. 1997); *Lintz v. Skipski*, 807 F. Supp. 1299, 1302 (W.D. Mich. 1992), *aff'd*, 25 F.3d 304 (6th Cir. 1994).

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

the State.³ However, in order for June to hold her foster parents and state caseworkers liable under § 1983, June must show that they acted under the authority of the State.⁴ June must also show that the defendants violated one of her constitutional rights or another federally secured right.⁵

June faces two major obstacles to recovery under § 1983. First, courts have been reluctant to find that foster parents acted under authority of the State for purposes of § 1983.⁶ Second, some courts hold that qualified immunity applies to certain people involved in foster care.⁷ This Note

³ *Id.*; see *Suter v. Artist M.*, 503 U.S. 347, 365 (1992); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 363-64 (1974); *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961) (outlining purposes of § 1983); 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LITIGATION: THE LAW OF SECTION 1983 § 1:4 (4th ed. 2001); Dennis A. Bjorklund, Comment, *Crossing DeShaney: Can the Gap Be Closed Between Child Abuse in the Home and the State's Duty to Protect?*, 75 IOWA L. REV. 791, 817 (1990).

⁴ See § 1983; see, e.g., *Rayburn*, 241 F.3d at 1347-48; *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 476-79 (4th Cir. 1989); *Lintz*, 807 F. Supp. at 1304-06.

⁵ See § 1983; see, e.g., *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475-77 (6th Cir. 1990); *Hernandez v. Hines*, 159 F. Supp. 2d 378, 384 (N.D. Tex. 2001); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 881-92 (E.D. Va. 1991).

⁶ See, e.g., *Rayburn*, 241 F.3d at 1348; *Milburn*, 871 F.2d at 479; *Walker v. Johnson*, 891 F. Supp. 1040, 1051 (M.D. Pa. 1995); *Pfoltzer*, 775 F. Supp. at 891.

⁷ *Lintz v. Skipski*, 815 F.3d 304, 307 (6th Cir. 1994). *But see* *K.H. v. Morgan*, 914 F.2d 846, 853-54 (7th Cir. 1990) (finding that child welfare workers were immune from damages liability but not entitled to absolute immunity). Under qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see *Thomas A. Eaton & Michael Wells, Governmental Inaction as a Constitutional Tort, DeShaney and Its Aftermath*, 66 WASH. L. REV. 107, 131 (1991). When the court grants qualified immunity to a defendant, the action against the defendant is not actionable because the plaintiff cannot sue the defendant. Although the defendant has the burden to present this defense, it is the plaintiff's burden to show that qualified immunity does not protect the defendant from liability. In the context of § 1983, the defendants assert qualified immunity as a shield to civil liability in that particular cause of action; some of them succeed. See *Stevens v. Umsted*, 131 F.3d 697, 707

addresses the first of these two barriers: courts' reluctance to find that foster parents are state actors under § 1983. A recent example of this judicial reluctance is the Eleventh Circuit's decision in *Rayburn v. Hogue*.⁸ In *Rayburn*, two brothers allegedly suffered mistreatment while in their foster home.⁹ On appeal before the Eleventh Circuit, they were unable to sue their foster parents under § 1983.¹⁰ The court held that the foster parents' conduct was not attributable to the State.¹¹ Accordingly, the plaintiffs' § 1983 claim failed.¹²

This Note argues that the Eleventh Circuit erred in failing to find that foster parents act under the authority of the State for purposes of § 1983. First, a symbiotic relationship exists between the State and the foster parents because they rely on each other in rendering foster care. Second, the court should have held that by placing children in foster care, the State assumes an affirmative duty to protect foster children. Third, the court failed to consider the concept of entwinement between the State and foster parents. The finding of an affirmative duty or entwinement would each support finding a symbiotic relationship. Fourth, public policy considerations weigh in favor of finding that foster parents are state actors under § 1983.

Part I of this Note provides an overview of the foster care system and the legal background of pursuing a § 1983 cause of action. Part II summarizes *Rayburn*. Finally, Part III analyzes the shortcomings of the Eleventh Circuit's decision in *Rayburn* and explains why courts should find that foster parents are state actors for purposes of § 1983.

(7th Cir. 1997); *Eugene D. v. Karman*, 889 F.2d 701, 711 (6th Cir. 1990). *But see* *Snell v. Tunnell*, 920 F.2d 673, 675-76, 701 (10th Cir. 1990) (finding that qualified immunity did not apply to county employees and attorney because their actions were based on known false information). Sometimes the court did not reach the immunity issues because the court decided that the plaintiff did not satisfy the prerequisites of their § 1983 claims. *See, e.g., Rayburn*, 241 F.3d at 1348-49.

⁸ 241 F.3d 1341 (11th Cir. 2001).

⁹ *Id.* at 1343-46.

¹⁰ *Id.* at 1349.

¹¹ *See id.*

¹² *See id.*

I. Overview of Foster Parent Liability Under § 1983

The goal of the foster care system is to provide care for children whose families are unable to provide them with adequate care.¹³ However, the foster care system often fails children by subjecting them to a worse environment than they faced with their biological parents.¹⁴ Consequently, foster children have turned to the courts to assert their rights.¹⁵

A. The Foster Care System

Foster care is part of the state child welfare system, which seeks to prevent child abuse and neglect by removing children from unsafe or abusive homes.¹⁶ Foster care systems are expensive to run and no state system is model.¹⁷ Foster

¹³Vincent S. Nadile, Note, *Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents*, 62 NOTRE DAME L. REV. 221, 221 (1987); see Roger J. R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. L. ISSUES 1, 5 (1995) (noting child protection programs try to prevent child abuse and neglect); Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113, 120-21 (1990) (inferring that State removes children to provide them with a safe environment to live in).

¹⁴See, e.g., *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 290 (8th Cir. 1993) (foster child died under foster care); *Miracle v. Spooner*, 978 F. Supp. 1161, 1164-65 (N.D. Ga. 1997) (one foster child died as a result of foster parent's beating and another foster child suffered abuse); *Lewis v. Neal*, 905 F. Supp. 228, 230 (E.D. Pa. 1995) (foster child beaten to death in foster home).

¹⁵See, e.g., *Rayburn*, 241 F.3d 1341, 1346; *Nicini v. Morra*, 212 F.3d 798, 804 (3d Cir. 2000); *K.H. v. Morgan*, 914 F.2d 846, 847-48 (7th Cir. 1990); see also NAHMOD, *supra* note 3, at § 1:4.

¹⁶See LELA B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* 48 (1996); Levesque, *supra* note 13, at 5; Oren, *supra* note 13, at 120-21; see, e.g., *K.H.*, 914 F.2d at 848 (removal of child because of parental neglect); *Miracle*, 978 F. Supp. at 1163-64 (removal of children because of neglect by parents); *Lintz v. Skipski*, 807 F. Supp. 1299, 1301 (W.D. Mich. 1992) (removal of children because of neglect by natural mother); cf. Mark Levine, Comment, *The Need for the "Special Relationship" Doctrine in the Child Protection Context: DeShaney v. Winnebago*, 56 BROOKLYN L. REV. 329, 331 (1990) (noting that State monopolizes its child protective services).

¹⁷See IRA M. SCHWARTZ & GIDEON FISHMAN, *KIDS RAISED BY THE GOVERNMENT* 117 (1999); Oren, *supra* note 13, at 122.

care is intended to be temporary and aims at reuniting foster children with their parents.¹⁸ Although states seek to reunite children with their natural parents, some children remain in foster care for long periods of time and are subject to multiple placements with different foster parents.¹⁹

The number of foster children continues to increase.²⁰ In 2001, about 565,000 children lived with foster parents, a slight increase from 556,000 in 2000.²¹ Studies show that foster children lack healthy development.²² Moreover, the more placements foster children are subject to, the more likely

¹⁸See Levesque, *supra* note 13, at 5; see also SCHWARTZ & FISHMAN, *supra* note 17, at 72. Despite the foster care system's objective of unification, some foster children are able to live in permanent homes through adoption. See generally SCHWARTZ & FISHMAN, *supra* note 17, at 71-86 (providing statistics of adoption with detailed discussion of Michigan's child welfare system); Douglas E. Abrams & Sarah H. Ramsey, *A Primer on Adoption Law*, 52 JUV. & FAM. CT. J. No. 3, at 23 (2001) (discussing general legal procedures and standards of adoption in the United States).

¹⁹Levesque, *supra* note 13, at 9-10; see LEROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* 139-40 (1997). See generally JENNIFER TOTH, *ORPHANS OF THE LIVING: STORIES OF AMERICA'S CHILDREN IN FOSTER CARE* (1997) (containing five foster children's narratives of their foster care experiences).

²⁰See SCHWARTZ & FISHMAN, *supra* note 17, at 72; Levesque, *supra* note 13, at 9; see also WOMEN'S EDUCATIONAL MEDIA, *ONLINE PRESS KIT: STATISTICS ON FAMILY TYPES IN THE UNITED STATES*, at http://www.womedia.org/press/kits/taf_stats.html (last visited Jan. 3, 2003) (citing CHILDREN'S DEFENSE FUND, *STATE OF AMERICA'S CHILDREN YEARBOOK 2000* (2001) which found that about 547,000 children stayed in foster homes in 1999, a thirty-five percent increase since 1990). But see Press Release, Children's Defense Fund, *The Children's Defense Fund Reviews the State of America's Children and Says It's Time to Do Whatever is Necessary to Leave No Child Behind* (Apr. 17, 2001), available at <http://www.childrensdefense.org/release010417.htm> (last visited Jan. 3, 2003) (noting a decrease in number of children entering foster care but an increase in duration of foster care placements).

²¹CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., *ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM*, available at <http://www.acf.dhhs.gov/programs/cb/dis/afcars/cwstats.html> (last visited Jan. 3, 2003).

²²Sheryl Dicker & Elysa Gordon, *Safeguarding Foster Children's Rights to Health Services*, 20 CHILD. LEGAL RTS. J. 45, 46 (2000).

they are to run away.²³ Subsequently, negative effects of foster care might extend to foster children's future relationships with their families.²⁴

Courts have identified some of foster children's rights by comparing foster children with other groups of people over whom the State has custody.²⁵ Based on this reasoning, both the United States Supreme Court and the Eleventh Circuit have found that foster children have a right to the basic needs that foster parents provide for, such as food and clothing.²⁶ Furthermore, these cases support the proposition that foster children have the right to a safe environment.²⁷ Some courts have extended this notion to foster children's right to safety.²⁸

²³ Cf. Carrie Che-Man Fung, *Foster Care Runaways: From Legislation to Progress Towards Self-Sufficiency*, 20 CHILD. LEGAL RTS. J. 33, 36 (2000) (finding "significant" correlation between number of placements to number of runaways in study showing that 133 non-runaway foster children were subject to 962 placements while 78 runaways experienced 947 placements). These foster children are more likely to receive less education and employment opportunities. *Id.* at 38.

²⁴ See TOTH, *supra* note 19, at 309 (noting small percentage of foster children who form healthy families, high divorce rate among foster children, and foster children's distant relationships with their own children).

²⁵ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *Taylor v. Ledbetter*, 818 F.2d 791, 795, 797 (11th Cir. 1987); see also Peter J. Schmiedel et al., *Rights of Abused and Neglected Children to Safe and Adequate Foster Care under the Guarantees of the Fourteenth Amendment*, 20 CHILD. LEGAL RTS. J. 14, 20-24 (2000); Brendan P. Kearse, Article, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 391 (1996). Foster children might be able to argue for the right to medical health care pursuant to state law. See Dicker & Gordon, *supra* note 22, at 47-49 (explaining foster children's right to health services).

²⁶ See *DeShaney*, 489 U.S. at 209; *Taylor*, 818 F.2d at 795, 797.

²⁷ See *DeShaney*, 489 U.S. at 209; *Taylor*, 818 F.2d at 795, 797. But see *K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990) (noting that foster children do not have a clearly established right to stable foster-home environment, and citing another circuit that outright rejected such a possibility).

²⁸ See *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 892 (10th Cir. 1992); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Hernandez v. Hines*, No. 3-99-CV-1654-P, 2001 U.S. Dist. LEXIS

For example, the Seventh Circuit articulated a specific right of foster children to have the State remove them from foster parents whom state agents know to be abusive.²⁹

B. Section 1983

1. Elements of a § 1983 Claim

Section 1983 is a federal civil rights statute that foster children have used to seek civil remedy.³⁰ It protects individuals from government action that infringes upon their constitutional and federal statutory rights.³¹ To state a § 1983 cause of action, a plaintiff must satisfy two elements.³² First, the plaintiff must allege that the defendant violated one of the plaintiff's constitutional or other federal rights.³³ For instance, plaintiffs have used § 1983 to enforce their rights under the Due Process Clause of the Fourteenth Amendment.³⁴ The Fourteenth Amendment ensures that states cannot take away a

4155, at *12 (N.D. Tex. Mar. 29, 2001) (finding that children's constitutional right to safety resulted in state obligation, commencing when State seizes custody of foster children and lasting throughout period of foster care); LaShawn A. v. Dixon, 762 F. Supp. 959, 991-94 (D.D.C. 1991); *see also* Oren, *supra* note 13, at 137; Bjorklund, *supra* note 3, at 815 (arguing for children's liberty interest in safety); Terrence J. Dee, Note, *Foster Parent Liability Under Section 1983: Foster Parents' Liability as State Actors for Abuse to Foster Children*, 69 WASH. U. L.Q. 1201, 1212-15 (1991) (analogizing foster children's situation to those of prisoners and institutionalized mental patients); Julie A. Quigley, Case Comment, *Murphy ex rel. K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990), 25 SUFFOLK U. L. REV. 789, 793 (1991).

²⁹ *K.H.*, 914 F.2d at 853.

³⁰ *See, e.g.*, *Rayburn v. Hogue*, 241 F.3d 1341, 1346 (11th Cir. 2001); *Nicini v. Morra*, 212 F.3d 798, 804 (3d Cir. 2000); *Yvonne L.*, 959 F.2d at 885; *Taylor*, 818 F.2d at 792-93; *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 136-37 (2d Cir. 1981).

³¹ *See* 42 U.S.C. § 1983 (1994 & Supp. IV 1998); *see also* NAHMOD, *supra* note 3, at § 2:4; Bjorklund, *supra* note 3, at 817.

³² *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931 (1982).

³³ § 1983; *see Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 49; *Lugar*, 457 U.S. at 931; *see also Donlan*, 58 F. Supp. 2d at 609.

³⁴ *See, e.g., Nicini*, 212 F.3d at 806; *Taylor*, 818 F.2d at 794; *Miracle v. Spooner*, 978 F. Supp. 1161, 1163, 1168-69 (N.D. Ga. 1997); *Lewis v. Neal*, 905 F. Supp. 228, 231 (E.D. Pa. 1995).

citizen's life, liberty, or property without due process of law.³⁵ Furthermore, and critical to foster children seeking redress under § 1983, the Supreme Court has ruled that individuals under state custody have certain substantive due process rights under the Fourteenth Amendment.³⁶

Second, because § 1983 protects individuals against government action, the plaintiff must show that the defendant acted under the color of law.³⁷ The plaintiff can accomplish this by showing that the defendant acted under the authority of the government; in other words, that the private conduct was "fairly attributable to the state."³⁸ The color of law requirement is also referred to as a requirement of state action.³⁹

There are two types of state action: direct and indirect.⁴⁰ Direct state action involves government conduct.⁴¹

³⁵U.S. CONST. amend. XIV, § 1.

³⁶Substantive due process deals with a state policy, which need to be both fair and supportive of a legitimate governmental objective. BLACK'S LAW DICTIONARY 517 (7th ed. 1999). The Supreme Court found that mentally retarded patients in state institutions were entitled to a right to safe condition and freedom from bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). Other than the Fourteenth Amendment, the Supreme Court acknowledged that the State's failure to render care to inmates could result in unnecessary suffering, thus a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

³⁷§ 1983. When a person acts under color of law, that person acts as a state actor. *See West v. Atkins*, 487 U.S. 42, 49 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982); *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000).

³⁸*Lugar*, 457 U.S. at 937; *see Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (citing *Civil Rights Cases*, 109 U.S. 3 (1883)); *Rayburn*, 241 F.3d at 1347-48; *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 476-79 (4th Cir. 1989).

³⁹*United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *Yeo v. Town of Lexington*, 131 F.3d 241, 248 n.3 (1st Cir. 1997); *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928 n.8, 929 (1982).

⁴⁰*Lawson v. Liburdi*, 114 F. Supp. 2d 31, 38-39 (D.R.I. 2000); *see Barrios-Velasquez v. Asociacion de Empleanos*, 84 F.3d 487, 491-92 (1st Cir. 1996).

⁴¹*See Barrios-Velasquez*, 84 F.3d at 491-92 (implying that governmental agency's actions could qualify for direct state actions); *Lawson*, 114 F.

Indirect state action involves private parties whose actions are connected to the State.⁴² When foster children bring actions against the State, they allege indirect government action.⁴³ That is, foster children claim that the private parties', i.e., the foster parents', actions connect to the State. An indirect connection, however, is not automatically present as a result of an employment or contractual relationship between the State and a private party.⁴⁴ Hence, private parties in those situations need to be clothed with state authority in order for plaintiffs to pursue state action claims.⁴⁵

There are three tests for determining whether a private entity acted under the color of law pursuant to § 1983: the public function test, the state compulsion test, and the

Supp. 2d at 38; *see also Lugar*, 457 U.S. at 935 n.18, 936-37 (stating that state employment could suffice state action requirement). *But cf. Barrios-Velasquez*, 84 F.3d at 492 (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), that agency names do not automatically establish direct state actions).

⁴²*See, e.g., Kia P. v. McIntyre*, 235 F.3d 749, 753-54 (2d Cir. 2000); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 96-97 (3d Cir. 1984); *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 18-20 (2d Cir. 1979); *Estate of Adam Earp*, No. 96-7141, 1997 U.S. Dist. LEXIS 6702, at *5 (E.D. Pa. May 7, 1997) (holding that private foster care agency was state actor because by rendering its service, it carried out state's responsibility for providing safety to foster children).

⁴³*See Rayburn v. Hogue*, 241 F.3d 1341, 1346 (11th Cir. 2001) (foster children sued the State for failing to supervise foster care as a result of foster parents' punishment and another foster child's abuse of the foster children); *K.H. v. Morgan*, 914 F.2d 846, 847-48 (7th Cir. 1990) (foster child sued the State due to foster child's abuse by foster parents); *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 475 (4th Cir. 1989) (foster child sued the State for negligence based on foster parent's physical abuse of the foster child).

⁴⁴*See Rayburn*, 241 F.3d at 1347-48 (rejecting district court holding that foster parents' employment relationship with the State was sufficient to constitute state action); *Milburn*, 871 F.2d at 477 (finding that a contract without specifics on foster homes and conduct for foster parents was insufficient to prove state action).

⁴⁵*See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961)); *West v. Atkins*, 487 U.S. 42, 49 (1988); *Rayburn*, 241 F.3d at 1347-48; *see also Dee, supra* note 28, at 1217.

nexus/symbiotic relationship test.⁴⁶ The public function test requires the plaintiff to show that the private party assumed a role that traditionally belongs solely to the State.⁴⁷ For instance, a private company became a state actor when it prohibited distribution of religious literature in a company town.⁴⁸ Despite being under the company's management, the company town functioned like other towns; thus, the company might violate the Constitution if it sought to regulate speech activities in the company town.⁴⁹ Additional examples of functions that are traditionally exclusive to the State include operating highways, holding elections, and declaring eminent domain.⁵⁰

The state compulsion test requires that the State creates, coerces, or significantly encourages the challenged activity to the extent that the decision is deemed to be the

⁴⁶See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-57 (1999); *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982); see, e.g., *Rayburn*, 241 F.3d at 1347; *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). Satisfaction of one of the state action tests is sufficient for a court to find state action. NAHMOD, *supra* note 3, at § 2:16; see *Lugar*, 457 U.S. at 941; *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 739 (W.D. Mich. 2000). Although some courts state that there are four tests in the inquiry, the criteria are the same as those of the three tests. See generally *Lugar*, 457 U.S. at 939; *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (explaining and analyzing four common tests of state action); KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 7-11 (1998) (explaining joint actions, symbiotic relationship, and public function tests in addition to state encouragement test, which is not commonly applied in § 1983 actions).

⁴⁷*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991); *West*, 487 U.S. at 56 (1988); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Gallagher*, 49 F.3d at 1456; *Perez v. Sugarman*, 499 F.2d 761, 765 (2d Cir. 1974).

⁴⁸*Marsh v. Alabama*, 326 U.S. 501, 509 (1946); see also *Lee v. Katz*, 276 U.S. 550, 557 (9th Cir. 2002) (finding that private company was a state actor when it regulated speech in a public forum).

⁴⁹*Marsh*, 326 U.S. at 507-08.

⁵⁰*Id.* at 507; *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1990) (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) and *Jackson*, 419 U.S. at 352).

State's.⁵¹ For example, a warehouse stored a person's property under the government's arrangement. The warehouse operators threatened the property owner that it would sell some of her property if she did not settle her account.⁵² The Court found no state action because the State did not compel the sale, but only informed the property owner of the possibility of the sale of her belongings.⁵³

Sometimes known as the joint action test, the nexus/symbiotic relationship test requires a sufficiently close connection between the government and the challenged conduct.⁵⁴ The Supreme Court articulated the standard for nexus in *Burton v. Wilmington Parking Authority*.⁵⁵ The Court found that state action existed when "[t]he State has so far insinuated itself into a position of interdependence with

⁵¹ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Flagg Bros.*, 436 U.S. at 164-65; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

⁵² *Flagg Bros.*, 436 U.S. at 153.

⁵³ *See id.* at 166.

⁵⁴ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995); *see Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). The nexus test might be interpreted to encompass the joint action theory, which requires the private party and the State to have willfully participated in a joint action that violated an individual's constitutional right. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Gallagher*, 49 F.3d at 1453-55; *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Courts find for joint action under various criteria. *See Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) (finding that joint action did not exist because State did not coerce foster parents into committing challenged action); *BLUM & URBONYA*, *supra* note 46, at 7-8 (noting the Supreme Court's decisions in *Dennis*, in which the Court found that a private party acts as a state actor when the private party conspires with a state actor in alleged conspiracy, and in *Adickes*, in which the Court found that when a person acts as the State's agent, a court may determine that person and the State acted jointly). For example, a court found that joint action existed because the State created a policy and the private party took advantage of that policy. *Lugar*, 457 U.S. at 941-42 (1982).

⁵⁵ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

the private party] that it must be recognized as a joint participant in the challenged activity.”⁵⁶

Proving the existence of a symbiotic relationship between the State and the private party satisfies the nexus test.⁵⁷ For example, a symbiotic relationship existed between a bondsman and the State because the bondsman’s livelihood depended on the bail system and the State ran the criminal justice system with the bondsman’s help.⁵⁸ The connection between the bondsman and the State showed that they relied on each other in maintaining the bail system.⁵⁹ The *Burton* majority considered several factors in analyzing symbiotic relationships, including the cost and income of the facility where the challenged activity occurred, intended use of the facility, the state agency’s obligations and responsibilities over the facility, and mutual benefits conferred between private parties and the State.⁶⁰ However, the Court emphasized that those factors were not dispositive in every analysis.⁶¹

Burton also articulated the joint action theory in analyzing nexus, which, in contrast to the symbiotic

⁵⁶*Id.*; see also *Gallagher*, 49 F.3d at 1451; *Jackson v. Pantazes*, 810 F.2d 426, 429-30 (4th Cir. 1987); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 80 F. Supp. 2d 729, 738-42 (W.D. Mich. 2000).

⁵⁷See *Rayburn v. Hogue*, 241 F.3d 1341, 1347-48 (11th Cir. 2001).

⁵⁸*Jackson*, 810 F.2d at 430. *Contra* *Dean v. Olibas*, 129 F.3d 1001, 1006 & n.4 (8th Cir. 1997) (holding that bail bondsmen were not state actors and rejecting the *Jackson*’s approach); *Landry v. A-Able Bonding*, 75 F.3d 200, 205 & n.5 (5th Cir. 1996) (same); *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 554-55 (9th Cir. 1974) (same).

⁵⁹See *Jackson*, 810 F.2d at 430.

⁶⁰*Burton*, 365 U.S. at 720-24. In *Milburn v. Anne Arundel County Department of Social Services*, the Fourth Circuit weighed the following factors: specificity of guidelines for the foster home and foster parents in the contract; the State’s responsibilities with regard to foster care; compensation to the foster parents; and the foster parents’ role in making parenting decisions. *Milburn v. Anne Arundel County Dep’t of Soc. Servs.*, 871 F.2d 474, 477 (4th Cir. 1989).

⁶¹See *Burton*, 365 U.S. at 722, 725-26 (“Only by sifting facts and weighing the circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”). *But cf.* *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999) (suggesting that some factors are more significant in symbiotic relationship analysis).

relationship theory, considers the State's involvement in the challenged action instead of its interdependence of the private party.⁶² Under the joint action theory, nexus is present when the State jointly acted or participated in the alleged misconduct.⁶³ For example, the nexus was sufficient when employees of a state facility enforced a policy that prohibited certain activities from occurring within the facility's premises.⁶⁴ According to the court, the employees' actions reflected their role in effecting change to a state-owned property.⁶⁵ However, the nexus was insufficient when the private party did not assert control over the challenged action.⁶⁶

The Court emphasized the joint action theory in *Jackson v. Metropolitan Edison Co.*, finding that extensive regulation and mere approval of private activities by the State did not convert private conduct into state action.⁶⁷ Furthermore, the Court sought to narrow down the state action doctrine articulated in *Burton* in a series of three cases handed down on the same day: *Blum v. Yaretsky*, *Lugar v. Edmondson Oil Co.*, and *Rendell-Baker v. Kohn*.⁶⁸ *Blum* reiterated the joint action theory, and noted that substantial funding of private activity by the State did not constitute state action.⁶⁹ *Lugar* followed *Blum*'s interpretation of the state action doctrine.⁷⁰ Interpreting *Burton*, *Rendell-Baker* limited the symbiotic relationship test as requiring a fiscal relationship between the State and the private actor more than that of

⁶² See *Burton*, 365 U.S. at 725.

⁶³ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

⁶⁴ See *D'Amario v. Providence Civic Ctr. Auth.*, 783 F.2d 1, 3 (1st Cir. 1986).

⁶⁵ *Id.*

⁶⁶ *Darby v. California*, 1 Fed. Appx. 688, 690-91 (9th Cir. 2001).

⁶⁷ *Jackson*, 419 U.S. at 350, 357.

⁶⁸ *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar*, 457 U.S. 922; *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

⁶⁹ *Yaretsky*, 457 U.S. at 1004, 1011.

⁷⁰ *Lugar*, 457 U.S. at 941-42 (finding that the State was a joint participant in the attachment procedure that a private oil company instigated against the petitioner).

contractors performing services for the State.⁷¹ Despite the effect of the three cases on the state action doctrine, the Court has not overturned *Burton*.⁷² The state action doctrine continued to evolve in later cases, as reflected in *National Collegiate Athletic Ass'n v. Tarkanian*, *American Manufacturers Mutual Insurance Co. v. Sullivan*, and most recently, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.⁷³

In *Brentwood Academy*, the Court applied the concept of entwinement, a concept that courts may use in resolving the state action inquiry apart from the traditional three tests.⁷⁴ If a court finds entwinement between the private party and the State, it is likely to find state action.⁷⁵ As with the nexus/symbiotic relationship test, a court determines the

⁷¹ *Rendell-Baker*, 457 U.S. at 843.

⁷² *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 20 (1st Cir. 1999); see *Frazier v. Bd. of Trs.*, 765 F.2d 1278, 1287 (5th Cir. 1985) (noting that *Rendell-Baker* and *Blum* have limited scope of *Burton*'s symbiotic relationship inquiry but maintaining that *Burton* was still valid); see also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (criticizing broadness of symbiotic relationship test and noting that later cases refined *Burton*); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451-52 (10th Cir. 1995) (explaining how courts have limited *Burton* standard). Courts have continued to use the *Burton* framework in analyzing the existence of a symbiotic relationship. See, e.g., *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 803 (3d Cir. 2001); *Perkins*, 196 F.3d at 20-21; *Barrios-Velazquez v. Asociacion de Empleados*, 84 F.3d 487, 494 (1st Cir. 1996).

⁷³ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

⁷⁴ *Brentwood Acad.*, 531 U.S. at 302; see also *Evans v. Newton*, 382 U.S. 296, 301 (1966) (establishing the entwinement concept).

⁷⁵ See *Brentwood Acad.*, 531 U.S. at 301-03 (noting that after deciding on entwinement, courts should consider if any countervailing value, such as public accountability, might lead courts to rule against state action); *Evans*, 382 U.S. at 301. But see *Brentwood Acad.*, 531 U.S. at 305 (Thomas, J., dissenting) (noting Court's lack of state action finding based solely upon entwinement).

existence of entwinement by discerning the facts and circumstances of a given case.⁷⁶

The United States Supreme Court first enunciated the entwinement concept in *Evans v. Newton*.⁷⁷ The case stemmed from a dispute over a piece of land which a former United States Senator devised to the City of Macon, Georgia, in his will.⁷⁸ The Senator wanted the city to build a park on the parcel for the exclusive use of white people.⁷⁹ The Georgia Supreme Court had found that the Senator could devise his property for the use of a designated group of people.⁸⁰ The United States Supreme Court stated that entwinement exists when private conduct is interwoven with government policies or management or when the government heavily involves itself in a private entity's management or control.⁸¹ The Court reversed the state court decision, finding that the park was a central part of the city's activities and that the city's maintenance and funding of the public facility showed the city's entwinement in the park's management and control.⁸²

In *Brentwood Academy*, Brentwood Academy allegedly violated a rule of the Tennessee Secondary School Athletic Association, which organized interscholastic sports.⁸³

⁷⁶ *Brentwood Acad.*, 531 U.S. at 296; *Evans*, 382 U.S. at 299-300 (citing *Burton*, 365 U.S. at 722 (1961)); see *Barrett v. United Hosp.*, 376 F. Supp. 791, 797 (S.D.N.Y. 1974).

⁷⁷ *Evans*, 382 U.S. at 299. The Court again cited the entwinement concept in *Gilmore v. Montgomery*, 417 U.S. 556, 565 (1974).

⁷⁸ *Evans*, 382 U.S. at 297.

⁷⁹ *Id.*

⁸⁰ *Id.* at 298.

⁸¹ *Id.* at 299, 301 (“Conduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraint of the Fourteenth Amendment”); see also *Brentwood Acad.*, 531 U.S. at 296. *But see Brentwood Acad.*, 531 U.S. at 314 (Thomas, J., dissenting) (criticizing majority for defining “entwinement” nor having sufficient precedent to support its decision).

⁸² *Evans*, 382 U.S. at 301-02.

⁸³ *Brentwood Acad.* 531 U.S. at 291-93.

The Sixth Circuit found no state action under *Blum, Lugar, and Rendell-Baker*.⁸⁴ In a 5-4 decision, the majority reversed and found state action under the entwinement concept.⁸⁵ The majority concluded that the State and the association had overlapping identities after considering a number of factors: the prevalence of public schools in the association's membership, participation of public school officials in the association's governing board, the availability of retirement benefits for public school teachers to the association's employees, and the continuation of a close relationship between the State and the association after they separated ties from each other.⁸⁶ *Brentwood Academy* provided an example of applying entwinement in a § 1983 action.

2. The Dilemma of Foster Care Provider Liability Under § 1983

Lower federal courts have reached different conclusions as to whether foster care providers are state actors for purposes of § 1983.⁸⁷ This inconsistency is primarily due to the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*.⁸⁸ In *DeShaney*, the state court granted custody of Joshua DeShaney to his biological father, Randy DeShaney.⁸⁹ When Joshua was in his father's custody, the State learned that his father was abusing him but failed to investigate upon his father's denial.⁹⁰ Randy's beating continued until it caused Joshua to suffer

⁸⁴ *Id.* at 294.

⁸⁵ *Id.*

⁸⁶ *Id.* at 298-301.

⁸⁷ Compare *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) (holding foster parent not state actor under § 1983), *Lintz v. Skipski*, 807 F. Supp. 1299, 1306-07 (W.D. Mich. 1992) (same), and *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 891 (E.D. Va. 1991) (same), with *Donlan v. Ridge*, 58 F. Supp. 2d 604, 610-11 (E.D. Pa. 1999) (holding private foster care agency state actor under § 1983), and *Estate of Adam Earp*, No. 96-7141, 1997 U.S. Dist. LEXIS 6702, at *6 (E.D. Pa. May 17, 1997) (same).

⁸⁸ 489 U.S. 189 (1989).

⁸⁹ *Id.* at 191.

⁹⁰ *Id.*

from a coma and severe brain damage.⁹¹ The father was later tried and convicted of child abuse.⁹² Joshua and his biological mother brought a § 1983 action against Winnebago County, the county Department of Social Services, and the department's employees.⁹³ The district court granted summary judgment in favor of the defendants.⁹⁴ The Seventh Circuit and the Supreme Court affirmed.⁹⁵

The Court did not reach a holding on foster parents' liability because it was not an issue in the case. However, the Court did not foreclose the possibility of finding that foster parents are state actors.⁹⁶ In a footnote, the Court commented that if the State placed Joshua in a foster home, his situation might be similar to that of a prisoner or institutionalized mentally-ill patient.⁹⁷ The Court implied that under such circumstances, the State may be legally responsible for failing to protect foster children from their foster parents' abuse.⁹⁸ Therefore, even though *DeShaney* does not involve liability of the State or foster parents for foster children's injuries, *DeShaney* did not close the door for foster children to seek redress from those who care for them in foster care, including foster parents, under § 1983.

Because the holding in *DeShaney* was limited to cases involving biological parents, lower federal courts have reached different conclusions on the issue of whether foster care providers are state actors. A number of courts have found that foster parents are not state actors.⁹⁹ These courts have adopted a strict application of the state action tests.

⁹¹ *See id.* at 193.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 193-94.

⁹⁵ *Id.* at 203.

⁹⁶ *See id.* at 201 n.9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See, e.g.,* Rayburn v. Hogue, 241 F.3d 1341, 1348 (11th Cir. 2001); Milburn v. Anne Arundel County. Dep't of Soc. Servs., 871 F.2d 474, 479 (4th Cir. 1989); Lintz v. Skipski, 807 F. Supp. 1299, 1306-07 (W.D. Mich. 1992); Pfoltzer v. County of Fairfax, 775 F. Supp. 874, 891 (E.D. Va. 1991).

Milburn v. Anne Arundel County Department of Social Services reflects an example of courts' unwillingness to find foster parents to be state actors.¹⁰⁰ In *Milburn*, the foster child suffered physical injuries from his foster parents after the State put him into foster care.¹⁰¹ After applying the joint action and public function tests, the Fourth Circuit held that foster parents were not state actors.¹⁰² The court concluded that the joint action test failed because the State did not assert coercive power over the foster parents.¹⁰³ Furthermore, the court also concluded that foster parents did not satisfy the public function test because rendering foster care was not a traditionally exclusive function of the State.¹⁰⁴ The court affirmed the dismissal of plaintiff's complaint even though the county department supervised foster children's placements.¹⁰⁵

On the other hand, in *Estate of Adam Earp*, a district court held that a foster care agency satisfied the state action requirement under § 1983 because it agreed to fulfill the State's obligation to protect abused and neglected children.¹⁰⁶ In *Earp*, the State removed a child from his natural parents and placed him in a foster home, where the child died after a fire.¹⁰⁷ The court found that when the foster care agency contracted with the State, § 1983 liability attached to the agency.¹⁰⁸

The court analogized the foster care agency's situation to that of a doctor who provided care for prison inmates.¹⁰⁹ As the doctor was a state actor because of the services rendered

¹⁰⁰ *Milburn*, 871 F.2d 474.

¹⁰¹ *See id.* at 475.

¹⁰² *Id.* at 479.

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 474, 477; *cf.* *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (holding that licensed private physician who contracted with county to conduct psychiatric examinations on detainees was state actor in § 1983 action).

¹⁰⁶ *Estate of Adam Earp*, No. 96-7141, 1997 U.S. Dist. LEXIS 6702, at *5 (E.D. Pa. May 7, 1997).

¹⁰⁷ *Id.* at *2.

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Id.* at *5-6.

and agreement with the State, a foster care agency that contracted with the State and provided services on the State's behalf should also be a state actor.¹¹⁰ When the State took the child from his home, it became responsible for ensuring him a safe environment to live in.¹¹¹ Similar to the physician treating prisoners, the foster care agency took upon itself to fulfill a government obligation.¹¹² Thus, both the physician and foster care agency "functioned within the State system."¹¹³ The court in *Earp* acknowledged that it had previously ruled that foster care agencies and foster parents were not state actors.¹¹⁴ It found that foster care agencies were distinguishable from foster parents for § 1983 purposes because the State performs an exclusive prerogative in forcibly removing children from their homes.¹¹⁵ According to the court, the State had also contracted out its § 1983 liability when it allowed foster care agencies to care for those children and placed them in foster homes.¹¹⁶

Donlan v. Ridge shares a similar factual background as *Earp*.¹¹⁷ In *Donlan*, the same court applied *Earp*'s analysis and found the foster care agency subject to § 1983 liability.¹¹⁸ The analyses in *Earp* and *Donlan* appear to be applicable to foster parents if the foster parents' situations are sufficiently analogous to the foster care agencies in those cases, such as involuntary seizure of the children's custody by the State. Additionally, foster parents are analogous to physicians treating inmates because pursuant to a contract with the State, both provide care for people who are in the State's custody. Therefore, courts could apply *Earp* and *Donlan*'s reasoning in cases against foster parents.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *6.

¹¹² *Id.*

¹¹³ *Id.* at *5-6.

¹¹⁴ *Id.* at *2 n.1.

¹¹⁵ *Id.* at *5.

¹¹⁶ *Id.*

¹¹⁷ *Donlan v. Ridge*, 58 F. Supp. 2d 604, 606 (E.D. Pa. 1999).

¹¹⁸ *Id.* at 610-11.

3. Section 1983 Actions Brought by Foster Children

a. Establishing a Constitutional Violation: Substantive Due Process

Courts have recognized that foster children have a liberty interest in safety as well as other substantive due process rights under the Fourteenth Amendment.¹¹⁹ For example, the Sixth Circuit has recognized children's right to be free from unnecessary harm in foster homes.¹²⁰ More recently, a court recognized that foster children have a substantive due process right to basic needs.¹²¹ The court analogized the case to other cases that relied on the Supreme Court's recognition of substantive due process rights of institutionalized mentally-ill patients.¹²²

In *DeShaney*, however, the Supreme Court found that a State did not violate an individual's substantive due process rights by failing to protect a person from private violence.¹²³ Because Joshua's father was not a state actor, the Court concluded that the county defendants did not deprive Joshua of his due process rights.¹²⁴ Importantly, the Court pointed out the distinction between a biological parent such as Randy DeShaney and that of parents in a foster home and noted that

¹¹⁹See *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (finding that right to personal security is a "historic liberty interest"); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994); *K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990); cf. *Quigley*, *supra* note 28, at 793 (noting that some courts have acknowledged foster children's right to be free from infliction of unnecessary harm in foster care).

¹²⁰*Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990).

¹²¹*Hernandez v. Hines*, 159 F. Supp. 2d 378, 385 (N.D. Tex. 2001); cf. *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (finding that foster children's substantive due process right to safety is clearly established).

¹²²*Hernandez*, 159 F. Supp. 2d at 384 (citing *Youngberg v. Romeo*, 457 U.S. 307, 316, 324 (1982)).

¹²³*DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989).

¹²⁴See *id.* at 201. Violation of a state statute alone is insufficient to establish a violation of a constitutional right. *Donlan v. Ridge*, 58 F. Supp. 2d 604, 608 (E.D. Pa. 1999).

its decision might be different if the State had placed Joshua in a foster home.¹²⁵

b. Establishing State Action: The Affirmative Duty Distinction

DeShaney set forth the affirmative duty distinction from the traditional color of law analysis.¹²⁶ The Court reasoned that under certain circumstances, such as holding individuals in custody, the State has an affirmative duty of care and protection from danger.¹²⁷ Under the Due Process Clause of the Fourteenth Amendment, such affirmative duty exists when the State “creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been.”¹²⁸ If such duty exists, yet the State fails to fulfill it, a § 1983 action might be available.¹²⁹ Affirmative duty arises from a special relationship between the State and particular individuals, which exists due to state-imposed restraints on the individuals’ freedom.¹³⁰ In determining the existence of a special relationship in the foster care context, courts give special weight to the State’s custody of foster children.¹³¹

¹²⁵ *DeShaney*, 489 U.S. at 201 & n.9.

¹²⁶ *See DeShaney*, 489 U.S. at 198-200.

¹²⁷ *Id.* at 198.

¹²⁸ *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002) (quoting *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993)).

¹²⁹ *See, e.g., Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Miracle v. Spooner*, 978 F. Supp. 1161, 1171 (N.D. Ga. 1997); *Lewis v. Neal*, 905 F. Supp. 228, 233 (E.D. Pa. 1995).

¹³⁰ *See DeShaney*, 489 U.S. at 200. The Court referenced two groups of individuals to whom the State has an affirmative duty when it holds them in its custody: involuntarily committed mental patients and incarcerated prisoners. *Id.* at 198-99.

¹³¹ *See Miracle*, 978 F. Supp. at 1168-70, 1176 (concluding that foster care amounted to involuntary custody because State selected foster homes for foster children); Beth A. Diebel, Note, Mark G. v. Sabol: *Substantive Due Process Rights, A Possibility for Foster Care Children in New York*, 64 ALB. L. REV. 823, 841, 844 (2000) (arguing that custody in foster care situations leads to responsibility on the State’s part and hence special relationship). *But cf.* Amy Sinden, Comment, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227, 249-59 (1990) (commenting that custody without more

The Court's reasoning in *DeShaney* suggests that the State has an affirmative duty to protect foster children when it places them with foster parents.¹³² When a plaintiff shows that a special relationship exists between the state agency and foster children, the State has an obligation to protect the individual from harm.¹³³ In foster care situations, arguably, when the State places foster children into foster care, it deprives them of their liberty. Therefore, the State arguably has an affirmative duty to protect foster children from harm.¹³⁴

Cases such as *Lewis v. Neal* and *Taylor v. Ledbetter* demonstrate courts' willingness to emphasize the affirmative duty distinction in the state action analysis. In *Lewis v. Neal*, Theresa Daniels died after her foster mother's nephew beat her.¹³⁵ The Administrator of Theresa's estate filed a § 1983 action against the foster parent and others.¹³⁶ The City of Philadelphia and the Philadelphia Department of Human Services filed a motion for judgment on the pleadings.¹³⁷

The district court partially granted and partially denied the motion.¹³⁸ The court reasoned that a special relationship

specific definition is not meaningful factor in deciding rights and duties of those who care for foster children).

¹³²See Sinden, *supra* note 131, at 228-29; see also Eaton & Wells, *supra* note 7, at 122; cf. *Taylor*, 818 F.2d at 797 (finding that the law needs to protect foster children, who are at their foster parents' mercy); *Lewis*, 905 F. Supp. at 232 (finding that the State has responsibility for foster children's safety as foster children rely on the State to fulfill their basic needs).

¹³³Cf. Levine, *supra* note 16, at 351-57 (proposing four-step test to determine existence of special relationship).

¹³⁴See Sinden, *supra* note 131, at 228-29; see also *DeShaney*, 489 U.S. at 198-200; *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982); cf. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (finding government responsible for providing prisoners with medical care).

¹³⁵*Lewis*, 905 F. Supp. at 230.

¹³⁶*Id.* at 230 & n.1.

¹³⁷*Id.* at 230.

¹³⁸*Id.* The district court granted the city department's motion for judgment on the pleadings as to claims based on a respondent superior theory. *Id.* at 233. *But see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 669 (1978) (holding that litigants may not pursue § 1983 claims under respondeat superior theory).

existed between Theresa and the city because foster children relied on the city department for care.¹³⁹ Because the city department maintained control of Theresa, it had some responsibility for her safety and general well-being.¹⁴⁰ Therefore, the plaintiff's § 1983 action survived.¹⁴¹

Furthermore, in *Taylor v. Ledbetter*, a foster mother allegedly physically abused her foster child, Kathy Jo Taylor.¹⁴² The district court dismissed the complaint for failure to state a claim.¹⁴³ On appeal, the Eleventh Circuit affirmed in part and reversed in part the district court's decision.¹⁴⁴ Similar to the footnote in *DeShaney*, the court analogized foster children's situation to that of prisoners and institutionalized mentally ill patients.¹⁴⁵

The court found that foster children may pursue § 1983 actions when the State violates their Fourteenth Amendment rights.¹⁴⁶ More interestingly, in dictum the court acknowledged that defenseless children deserve protection from the law because they are susceptible to abuse.¹⁴⁷ *Taylor* reflects the court's awareness of foster children's predicament. This is important because foster children's plight provides the link to the State's obligation to protect them.

Lewis and *Taylor* demonstrate two different approaches to the affirmative duty distinction. Under *Lewis*'s approach, state responsibility stems from foster children's reliance on the government for care.¹⁴⁸ Under *Taylor*, foster children's entitlement to safety results in the State's

¹³⁹ *Lewis*, 905 F. Supp. at 232.

¹⁴⁰ *Id.* (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)).

¹⁴¹ *Id.* at 233.

¹⁴² *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987).

¹⁴³ *Id.* at 793.

¹⁴⁴ *Id.* at 800. Although the court affirmed dismissal on due process violation for failure to mandate federal statutes, the court reversed the dismissals of claims under the entitlement to benefits and the deliberate indifference theories. *Id.*

¹⁴⁵ *Id.* at 795-96.

¹⁴⁶ *Id.* at 797.

¹⁴⁷ *See id.*

¹⁴⁸ *Lewis v. Neal*, 905 F. Supp. 228, 232 (E.D. Pa. 1995).

responsibility for the children.¹⁴⁹ Although affirmative duty analysis usually does not come into play when courts apply the state action tests, courts have not been prohibited from applying the analysis in resolving the state action inquiry. *Rayburn* is an appropriate case for the courts to act upon its concerns for foster children and apply these principles.

II. *Rayburn v. Hogue*

Rayburn v. Hogue is a recent § 1983 foster care abuse case that focuses on the state action inquiry.¹⁵⁰ It presented an opportunity for the Eleventh Circuit to interpret *DeShaney* in the context of the foster care relationship. However, the Eleventh Circuit refused to hold that § 1983 protected foster children from abuse suffered in the foster home.¹⁵¹

A. *Facts and Procedure*

In October 1995, the Carroll County Department of Family and Children's Services ("state agency") took custody of Brandon and Tyler Rayburn from their mother and eventually placed them in Skip and Dee Hogue's home.¹⁵² The Hogues were contract foster parents with the State.¹⁵³ They also hosted other foster children in addition to the Rayburn children.¹⁵⁴

Wendy Ann Rayburn, the children's natural mother, alleged that her children were abused in the foster home.¹⁵⁵ The state agency investigated Ms. Rayburn's allegation and concluded that there was no substantial evidence of physical

¹⁴⁹ *Taylor*, 818 F.2d at 797.

¹⁵⁰ *See Rayburn v. Hogue*, 241 F. 3d 1341, 1346 (11th Cir. 2001).

¹⁵¹ *See id.* at 1348.

¹⁵² *Id.* at 1343. The court also granted the state agency temporary legal custody of the Rayburn children. *Id.* A third child, Cameron Rayburn, also stayed with the Hogues but was soon removed at Dee Hogue's request. *Id.*

¹⁵³ *Id.* at 1343 n.4. The State promulgated guidelines of foster care. *Id.*

¹⁵⁴ *See id.* at 1343.

¹⁵⁵ *Id.* at 1343-44.

abuse.¹⁵⁶ Brandon later attempted to run away but returned to his foster home.¹⁵⁷ Soon after this incident, Ms. Rayburn again alleged abuse in the foster home.¹⁵⁸ The state agency, however, failed to investigate her second allegation.¹⁵⁹ In addition to Ms. Rayburn's allegations, another foster child and Brandon told Ms. Hogue about the possible abuse of his brother, Tyler, by a third foster child.¹⁶⁰ Ms. Hogue accused them of lying.¹⁶¹

In January 1996, Ms. Rayburn regained physical custody of her children while the State retained legal custody.¹⁶² Soon thereafter, a caseworker took Tyler for an examination where doctors found evidence of sexual abuse.¹⁶³ However, the state agency's investigation concluded that the Hogues did not participate in the abuse.¹⁶⁴

Brandon and Tyler brought a § 1983 action against the state agency, the caseworkers involved, and the Hogues.¹⁶⁵ The district court granted the defendants' motion for summary judgment on all causes of action except on the substantive due process claim against the Hogues.¹⁶⁶ Because there was a sufficient nexus between the State and the Hogues, the district court found that the Hogues acted under color of law for

¹⁵⁶ *Id.* at 1344.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Specifically, Ms. Rayburn alleged psychological and sexual abuse at the Hogues' home. *Id.*

¹⁵⁹ *Id.* at 1345.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1345-46.

¹⁶⁴ *Id.* at 1346.

¹⁶⁵ *Id.* In the complaint, the five causes of action were based on: (1) § 1983 for violation of substantive due process rights under the Fifth and Fourteenth Amendments; (2) § 1983 for violation of procedural due process rights under the Fifth and Fourteenth Amendments; (3) the Hogues' breach of contract with the state agency to render foster care; (4) negligence; and (5) intentional infliction of emotional distress, assault and battery. *Id.* The plaintiffs named nine officers and employees of the state agency, the Hogues and two other individuals as defendants. *Id.*

¹⁶⁶ *Id.*

§ 1983 purposes.¹⁶⁷ The court noted that Georgia state law considered foster parents state employees.¹⁶⁸ Accordingly, this employment relationship satisfied the color of law requirement.¹⁶⁹

B. Holding and Rationale

On appeal, the Eleventh Circuit reversed the district court and held that the Hogues did not act under color of law.¹⁷⁰ The court applied three tests in determining whether state action existed in the case.¹⁷¹ First, it agreed with the lower court's finding that the Hogues were not state actors under the state compulsion test.¹⁷² The court reasoned that the State did not encourage or coerce the alleged misconduct by the foster parents.¹⁷³ Second, the court found that the public function test failed because foster care did not traditionally belong solely to the State.¹⁷⁴

Third, the circuit court considered the nexus/joint action test.¹⁷⁵ The court explained that to satisfy that test the State must have a symbiotic relationship with the private parties.¹⁷⁶ According to the court, this meant that the State must have jointly participated in the behavior that the plaintiffs alleged.¹⁷⁷ In this case, the court determined that the behavior was child abuse.¹⁷⁸ Because the court did not find a strong nexus between the State and the alleged child abuse, the

¹⁶⁷Rayburn v. Farnesi, 70 F. Supp. 2d 1334, 1344 (N.D. Ga. 1999), *rev'd*, Rayburn v. Hogue, 241 F.3d 1341 (11th Cir. 2001). The district court found that there was a genuine issue of fact on the Hogues' actual knowledge of abuse. *Id.* at 1345.

¹⁶⁸*Id.*

¹⁶⁹*Id.* at 1344.

¹⁷⁰*See Rayburn*, 241 F.3d at 1348.

¹⁷¹*Id.* at 1347.

¹⁷²*Id.*

¹⁷³*Id.* at 1348.

¹⁷⁴*Id.*

¹⁷⁵*Id.*

¹⁷⁶*Id.* at 1348. Although the court labeled the third test the nexus/joint action test, the court defined the test in the language of the symbiotic relationship test. *Id.*

¹⁷⁷*See id.* at 1348.

¹⁷⁸*Id.*

court did not attribute the Hagues' conduct to the State.¹⁷⁹ Without a symbiotic relationship, the nexus/joint action test failed.¹⁸⁰ Furthermore, the Eleventh Circuit reasoned that a foster parent did not become a state actor merely because the State regulated foster care.¹⁸¹

Finally, the court analyzed part of the Georgia Torts Claims Act.¹⁸² Under the Georgia Tort Claims Act, foster parents are immune from liability for torts that they commit within the scope of their employment with the State.¹⁸³ Although foster parents are included in the state immunity statute, the court found that the relationship between foster parents' immunity and the alleged abuse was too remote to constitute a symbiotic relationship.¹⁸⁴ Therefore, the court rejected the lower court's finding that Georgia's statutory provision for foster parents' immunity as state employees rendered them state actors.¹⁸⁵ By rejecting all theories of state action that the district court analyzed, the court found that the Hagues did not act under color of law.¹⁸⁶ Therefore, the court dismissed the Rayburns' § 1983 claim.¹⁸⁷

III. Analysis

The Eleventh Circuit erred in failing to find state action in *Rayburn* for four reasons. First, the court failed to recognize a symbiotic relationship between foster parents and the State. Second, the court faulted in not considering the

¹⁷⁹ See *id.* at 1349. The circuit court agreed with the district court that the plaintiff did not succeed in proving the state compulsion test or the public function test. *Id.* at 1347.

¹⁸⁰ See *id.* at 1348.

¹⁸¹ *Id.* at 1348.

¹⁸² *Id.*

¹⁸³ See GA. CODE ANN. § 50-21-22(7) & § 50-21-25(a) (2002).

¹⁸⁴ *Rayburn*, 241 F.3d at 1348.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at 1349. The court of appeals only discussed these three theories because they were the only ones that the district court applied. *Id.* at 1349 n.11; see *Rayburn v. Farnesi*, 70 F. Supp. 2d 1334, 1344 (N.D. Ga. 1999), *rev'd*, *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001).

¹⁸⁷ See *Rayburn*, 241 F.3d at 1349.

State's affirmative duty to protect foster children as a factor in finding a symbiotic relationship. Third, the court could have applied the concept of entwinement in its state action analysis. Fourth, the court ignored public policy of reforming the foster care system.

A. The Court Erred in Failing to Recognize a Symbiotic Relationship Between Foster Parents and the State

1. Improper Application of the *Burton* Symbiotic Relationship Standard

In *Rayburn*, the Eleventh Circuit incorrectly concentrated on the relationship between the State and the challenged action, rather than the State's relationship with the private parties.¹⁸⁸ Relying on *American Manufacturers Mutual Insurance Co. v. Sullivan*, the *Rayburn* court identified child abuse as the challenged action and found that the State did not actively participate with the Hogues in punishing and observing the abuse of the children.¹⁸⁹ Because the State provides foster care to stop and prevent future abuse and neglect, the *Rayburn* court noted that it is hardly plausible that the State would have a positive relation to the very things that it seeks to avoid.¹⁹⁰

The *Rayburn* court failed to follow *Burton*'s emphasis on the interdependence between the State and the private party and on the use of all facts and circumstances in the symbiotic relationship analysis.¹⁹¹ The inquiry into a symbiotic relationship focuses on the relationship between the State and the private party, on a case-by-case basis.¹⁹² There are a

¹⁸⁸ See *id.* at 1348.

¹⁸⁹ See *id.* (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)).

¹⁹⁰ *Id.*

¹⁹¹ See *id.* at 1348-49; see also *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961); *Massey v. Bd. of Trs.*, 4 Fed. Appx. 611, 612-14 (10th Cir. 2001); *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18, 21 (1st Cir. 1999); *BLUM & URBONYA*, *supra* note 46, at 8.

¹⁹² *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995); see *Moose Lodge No. 107 v. Irvis*, 407

number of factors that courts have considered when conducting symbiotic relationship analyses, such as the importance of the facility where the challenged activity occurred, mutual financial benefits between the private actor and the State, and specificity of the foster care contracts.¹⁹³ A symbiotic relationship exists when the conduct of the State and that of the private party are so intertwined that each of the two entities depends on the other.¹⁹⁴ Because of the interdependence between the State and the private party, the challenged activity of the private entity is attributable to the State as if the State jointly engaged in it.¹⁹⁵

In *Rayburn*, because the court failed to conduct a proper inquiry into the symbiotic relationship, the court erred in concluding that the Hogues did not act under color of law. Had the *Rayburn* court considered the interdependence between the State and the foster parents, it should have come to a different conclusion. Through legislative act, the State committed itself to provide foster care to the State's children.¹⁹⁶ The State relied on private entities, such as foster parents, to provide foster care.¹⁹⁷ Thus, foster parents are an important component of the child welfare system. Because of foster parents' significant participation in the state-established

U.S. 163, 175 (1972); *Burton*, 365 U.S. at 725-26; *Massey*, 4 Fed. Appx. at 612-14; *Perkins*, 196 F.3d at 18, 21 (1st Cir. 1999); BLUM & URBONYA, *supra* note 46, at 8.

¹⁹³ See *Burton*, 365 U.S. at 725-26; *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 477 (4th Cir. 1989); see *supra* note 60 and accompanying text (describing the factors that *Burton* and *Milburn* applied).

¹⁹⁴ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 360 (1974); *Burton*, 365 U.S. at 725 ("The State has so far insinuated itself into a position of interdependence with [private entity] Eagle that it must be recognized as a joint participant in the challenged activity."); *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 740 (W.D. Mich. 2000).

¹⁹⁵ See *Burton*, 365 U.S. at 725; *Gallagher*, 49 F.3d at 1451; *Cmtys. for Equity*, 80 F. Supp. 2d at 739-40.

¹⁹⁶ See GA. CODE ANN. § 49-5-8(a) (2002).

¹⁹⁷ See, e.g., *Rayburn v. Hogue*, 241 F.3d 1341, 1343 (11th Cir. 2001); *K.H. v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990); *Hernandez v. Hines*, 159 F.Supp. 2d 378, 381 (N.D. Tex. 2001); *Lewis v. Neal*, 905 F. Supp. 228, 230 (E.D. Pa. 1995). In all of these cases, after the states obtained custody of the children, they placed the children into foster homes.

system, the relationship between the foster parents and the State helps to establish state action.¹⁹⁸

Other factors in *Rayburn* also support a finding of a symbiotic relationship. In *Rayburn*, the State financed the foster care system.¹⁹⁹ By outsourcing foster care to private individuals, the State reserved financial resources by not having to build and operate its own facilities.²⁰⁰ Moreover, under Georgia law, the State licensed and regulated foster homes and maintained control of foster care by investigating allegations of mistreatment.²⁰¹ Most importantly, forcible removal of children from their homes is an exclusive prerogative of the State.²⁰² As it performs this exclusive public function, the State contracts with foster parents for the day-to-day care of the children of whom they seize custody. While the State relies on the foster parents to provide care, through this agreement, the State “has effectively contracted its § 1983 liability out of existence.”²⁰³

Additionally, the First Circuit has noted that courts may consider sovereign immunity from liability for private party’s conduct when determining whether a symbiotic

¹⁹⁸*Cf.* *Perez v. Sugarman*, 499 F.2d 761, 766 (2d Cir. 1974).

¹⁹⁹*Rayburn*, 241 F.3d at 1343 n.4; *see* *Blum v. Yaretsky*, 457 U.S. 991, 1027 (1982) (Brennan, J., dissenting) (finding that government funding was a factor favoring interdependence between the State and private actor); *Rendall-Baker v. Kohn*, 457 U.S. 830, 844 (1982) (Marshall, J., dissenting) (considering the State’s substantial funding as a factor in favor of finding nexus). *But see Yaretsky*, 457 U.S. at 1011 (finding that substantial funding alone did not constitute state action).

²⁰⁰*Cf. Yaretsky*, 457 U.S. at 1016 (Brennan, J., dissenting) (finding that the State’s implementation of a cost-efficient program contributed to a finding of state action).

²⁰¹*See Rayburn*, 241 F.3d at 1343 n.4, 1344; *see Yaretsky*, 457 U.S. at 1027 (Brennan, J., dissenting) (finding that pervasive regulation by the State favored interdependence between the State and private actor); *Rendall-Baker*, 457 U.S. at 844 (Marshall, J., dissenting) (considering the State’s heavy regulation as a factor favoring state action). *But see Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (finding that detailed and extensive regulation alone did not constitute state action).

²⁰²*Estate of Earp*, No. 96-7141, 1997 U.S. Dist. LEXIS 6702, at *5 (E.D. Pa. May 7, 1997).

²⁰³*Id.*

relationship exists.²⁰⁴ Georgia considered foster parents state employees.²⁰⁵ Pursuant to its immunity waiver statute, the State was willing to take responsibility for foster parents' misconduct under certain circumstances.²⁰⁶ This allows plaintiffs to sue the State in some situations. Therefore, this factor reflects the State's role in the foster care system and contributes to the symbiotic relationship analysis. Altogether, these facts and circumstances demonstrate that the State was responsible for more than mere financial contribution to foster care and further substantiate the existence of a symbiotic relationship between the State and the foster parents.²⁰⁷

Just as the State relies on foster parents, foster parents depend on the State when they render foster care. Generally, foster care is a method for foster parents to temporarily take care of children. In *Rayburn*, the Hogues must contract with a state agency in order to become foster parents.²⁰⁸ Therefore, contracting with the State was a necessary step that the Hogues took to provide foster care. The foster parents rely on the contract system. Additionally, not only can they care for children, foster parents receive payment for their services and can profit from rendering foster care.²⁰⁹

²⁰⁴ See *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 99 (1st Cir. 1990).

²⁰⁵ GA. CODE ANN. § 50-21-22(7) (2002). Other states concluded differently on foster parents' employment status. See *Hunte v. Blumenthal*, 680 A.2d 1231, 1235-36 (Conn. 1996) (holding that foster parents were state employees because State's obligation to care for and control foster children under the State's statutory scheme conferred the State a right to control foster parents); *Nichol v. Stass*, 735 N.E.2d 582, 586-87, 589 (Ill. 2000) (concluding that foster parents were contractors rather than state employees and were not entitled to sovereign immunity, but foster parents could assert a limited form of parental immunity in negligence claims brought against them); *DeWater v. Washington*, 921 P.2d 1059, 1065 (Wash. 1996) (holding that foster parents are independent contractors for the State).

²⁰⁶ The Georgia legislature enacted the relevant sections of the Georgia Torts Claim Act in 1992. See GA. CODE ANN. §§ 50-21-21 to -25 (2002).

²⁰⁷ BLUM & URBONYA, *supra* note 46, at 9-10.

²⁰⁸ *Rayburn v. Hogue*, 241 F.3d 1341, 1343 nn.3-4 (11th Cir. 2001).

²⁰⁹ *Cf. ASHBY*, *supra* note 19, at 108 (noting that payment for rendering foster care supplemented income of foster parents in 1930s); *COSTIN ET AL.*, *supra* note 16, at 98 (explaining that in 1930s, payment for foster care

Furthermore, some foster parents rely on the State because they cannot adopt children through the adoption system. The intricacies of the adoption system make some individuals ineligible for adoption.²¹⁰ In some situations, people who become foster parents have an increased chance of permanently adopting their foster children.²¹¹ For those who cannot adopt or have children of their own, foster care might be the only opportunity for them to care for children at their homes on a permanent basis. These circumstances represent the significant reliance that exists between foster parents and the State because of the foster care system. Therefore, a symbiotic relationship existed between the State and the foster parents in *Rayburn*.

Critics might argue that finding a symbiotic relationship between the Rayburns and the State would result in courts' abandoning the approach that most courts have applied.²¹² In addition, they may argue that because courts seldom find that a symbiotic relationship exists, the relevant case law might not provide courts with sufficient support for finding state action. It may also be argued that bringing individual lawsuits might not be the most effective means of providing plaintiffs with a remedy and reforming the system.

was treated as income). Although under 26 U.S.C. § 131 (2000), certain foster care payment is not considered gross income for tax purposes, an argument can be made that foster parents could financially gain from rendering foster care.

²¹⁰See generally *Abrams & Ramsey*, *supra* note 18, at 23-43 (reviewing adoption procedures in United States).

²¹¹*Id.* at 26.

²¹²Courts have mostly rejected plaintiff's arguments for the existence of symbiotic relationships between private parties and the states. See *Massey v. Bd. of Trs.*, 4 Fed. Appx. 611, 613-14 (10th Cir. 2001); *Lansing v. City of Memphis*, 202 F.3d 821, 834 (6th Cir. 2000); *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 23 (1st Cir. 1999); *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997); *Barrios-Velazquez v. Asociacion de Empleados*, 84 F.3d 487, 494-95 (1st Cir. 1996); *Lawson v. Liburdi*, 114 F. Supp. 2d 31, 40 (D.R.I. 2000). *But see* *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 740 (W.D. Mich. 2000) (finding that symbiotic relationship existed because of unique and close relationship between State and athletic association).

Although these are valid considerations, that actions under § 1983 are foster children's only venue to recovery outweighs such considerations.²¹³ Foster parents and the State have a functional relationship with each other.²¹⁴ The State delegates the responsibility for rendering a secure shelter and basic care to foster parents. Under the Eleventh Circuit's approach to the symbiotic relationship analysis, courts are more likely to find that foster parents do not act under color of law.²¹⁵ Without broadening the scope of relevant facts and circumstances in the inquiry, foster children will continue to suffer from the state action test's restrictions. Even though they could file § 1983 claims, limitations on the inquiry, such as qualified immunity, virtually close the door of recovery for foster children.

Blum v. Yaretsky, *Lugar v. Edmondson Oil Co.*, and *Rendell-Baker v. Kohr* have sought to narrow the breadth of *Burton* by imposing stricter state action tests. An example of these restrictions is that courts consider the relationship between the State and the challenged activity.²¹⁶ These stricter standards serve as additional hurdles for foster children plaintiffs because they stop courts from hearing plaintiffs' claims, let alone deciding the claims' merits.²¹⁷ In order for the Rayburns' § 1983 claim to be meaningful, the court must widen the scope of review.²¹⁸ By properly applying the

²¹³ See *supra* note 1 and accompanying text.

²¹⁴ *Dee*, *supra* note 28, at 1228.

²¹⁵ Compare *Rayburn v. Hogue*, 241 F.3d 1341, 1348-49 (11th Cir. 2001) (finding that insubstantial connection between State and challenged action did not support finding of state action) with *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 98 (1st Cir. 1990) (finding that financial interest is not dispositive in symbiotic relationship analysis), and *Klavan v. Crozer-Chester Med'l Ctr.*, 60 F. Supp. 2d 436, 443 (E.D. Pa. 1999) (finding that interdependence between state actor and state must be pronounced and that regulation is not pronounced enough).

²¹⁶ See *supra* notes 68-71 (explaining the limits the three cases placed on *Burton's* test).

²¹⁷ See Michael Han, Case Note, *Brentwood Acad. v. Tennessee Secondary School Athletic Association*, 121 S. Ct. 924 (2001), 69 TENN. L. REV. 521, 537 (2002).

²¹⁸ See *Blum v. Yaretsky*, 457 U.S. 991, 1013 (1982) (Brennan, J., dissenting) (noting that indirect state action requires "a realistic and

flexible approach of *Burton*, courts will continue to follow past precedent, instead of abandoning majority courts' approaches.

Indeed, the Supreme Court might have signaled approval for returning to *Burton*'s approach. In *National Collegiate Athletic Ass'n v. Tarkanian*, in a 5-4 decision, the majority considered several factors in concluding that the National Collegiate Athletic Association (NCAA) was not a state actor.²¹⁹ The factors included the relationship between the state university employer and NCAA with respect to NCAA's rulemaking, NCAA's membership, NCAA's investigation and enforcement proceedings, and the state university's possible lack of alternatives to abiding by NCAA's requests.²²⁰ The majority's reasoning shows that the symbiotic relationship analysis need not conform to only factors that involve the challenged activity; in *Tarkanian*, the challenged activity involved the suspension that Tarkanian received from his state university employer.²²¹ Courts may take into account all circumstances of the relationship between the State and the private party. The *Tarkanian* majority effectively put *Burton* back on the table for plaintiffs arguing for state action on a symbiotic relationship theory in § 1983 actions.

2. Failure to Recognize the State's Affirmative Duty to Protect Foster Children

Rayburn was not the first § 1983 case involving foster children that the Eleventh Circuit decided. In *Taylor v. Ledbetter*, the court dealt with a foster child whose foster

delicate appraisal of the State's involvement in the total context of the action taken"); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) ("[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required to determine whether the test is met").

²¹⁹*Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 193, 194 & n.13, 195-99 (1988). The dissent found that state action existed by virtue of Tarkanian's suspension. *Id.* at 199-200 (White, J., dissenting).

²²⁰*Id.*

²²¹*Id.* at 180-81.

parent beat her into a coma.²²² In *Taylor*, the court found that a special relationship existed between the state agency and foster children.²²³ *Taylor*'s analogy between foster children and prisoners and institutionalized mentally-ill patients reflects the court's awareness that the State has a responsibility for foster children once it takes custody of the children from their parents.²²⁴ The State's seizing custody without the parents' voluntary consent produced a serious concern for the court.²²⁵ Prompted by the concern, the court found that a special relationship existed between the State and the child, which led to the conclusion that the State had an affirmative duty to the foster child.²²⁶

The court's concern for foster children seemed to disappear in *Rayburn*. In *Rayburn*, the state agency maintained legal custody of the Rayburn children, even after the juvenile court placed them in the physical custody of their mother.²²⁷ The State's continuous legal custody of the Rayburn children makes its responsibility for their welfare apparent.²²⁸ In *Rayburn*, a special relationship exists between the State and the Rayburn children. As courts have recognized, the State may have an affirmative duty to protect foster children arising from its special relationship with them.²²⁹

In *Rayburn*, the State had an affirmative duty to Brandon and Tyler Rayburn because the State had custody of

²²² *Taylor v. Ledbetter*, 818 F.2d 791, 792 (11th Cir. 1987).

²²³ *See id.* at 797.

²²⁴ *Id.* at 797.

²²⁵ *See id.*

²²⁶ *See id.* at 798-800.

²²⁷ *Rayburn v. Hogue*, 241 F.3d 1341, 1345 (11th Cir. 2001).

²²⁸ *Cf. K.H. v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) ("Once the state assumes custody of a person, it owes him a rudimentary duty of safekeeping no matter how perilous his circumstances when he was free."); Diebel, *supra* note 131, at 844.

²²⁹ *See Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *K.H.*, 914 F.2d 846, 858 (7th Cir. 1990); *Lewis v. Neal*, 905 F. Supp. 228, 231-32 (E.D. Pa. 1995).

the Rayburn children without their mother's consent.²³⁰ The state agency placed the Rayburns in the Hogues' home for care. Because of the placement, in a practical sense, foster parents share custody of the children with the State. Hence, the relationship between the State and foster children feeds into the relationship between the State and the foster parents. In maintaining custody of foster children, the State needs to rely on foster parents to provide the day-to-day care to the children and to fulfill its obligation to protect them. In other words, the State cannot fulfill its affirmative duty without foster parents' assistance.²³¹ Therefore, courts should consider the State's affirmative duty to foster children as a factor of determining whether the State has a symbiotic relationship with the foster parents.

The *Rayburn* court was not required to analyze affirmative duty because the state parties received immunity at the trial level.²³² However, as illustrated in *Donlan v. Ridge*, affirmative duty analysis is applicable to foster care cases that do not involve the State.²³³ As both foster care agencies and foster parents assist the State in taking care of foster children in the State's custody, their situations are analogous enough for the court to apply the affirmative duty distinction. In *Rayburn*, the Eleventh Circuit should have considered it as a factor in finding that a symbiotic relationship existed between the State and the Hogues. Without the Hogues and other foster parents, the State would breach its affirmative duty to

²³⁰ *Rayburn*, 241 F.3d at 1342-43. See Diebel, *supra* note 131, at 841, 844. But cf. *Miracle v. Spooner*, 978 F. Supp. 1161, 1169-70 (N.D. Ga. 1997) (noting that parental consent to custody is irrelevant because foster children will always find foster care involuntary); Sinden, *supra* note 131, at 249-50 (commenting that custody without more specific definition is not meaningful factor in deciding rights and duties of those who care for foster children).

²³¹ See *Estate of Earp*, No. 96-7141, 1997 U.S. Dist. LEXIS 6702, at *5 (E.D. Pa. May 7, 1997).

²³² See *Rayburn*, 241 F.3d at 1346.

²³³ See *Donlan v. Ridge*, 58 F. Supp. 2d 604, 610 (E.D. Pa. 1999) (agreeing with another case's holding that foster care agency was subject to § 1983 liability because the decision was consistent with *DeShaney*'s finding that affirmative duty on the State might arise in a situation "sufficiently analogous to incarceration or institutionalization").

the foster children. The *Rayburn* court missed an opportunity to conduct a comprehensive symbiotic relationship analysis.

3. Failure to Consider the Entwinement Concept in Finding for State Action

In addition to failing to probe into the State's affirmative duty, the *Rayburn* court could have applied the entwinement concept in its decision. The Supreme Court recently reaffirmed the application of this concept in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, despite a strong dissenting opinion.²³⁴ In the 5-4 decision, the majority found that a middle school athletic association was a state actor because of its entwinement with the state board of education and the association's member public schools.²³⁵ The majority analyzed the facts and circumstances of the relationship between the private school and the State.²³⁶

Although *Rayburn* preceded *Brentwood* by four days, entwinement was not a novel concept when the Eleventh Circuit handed down *Rayburn*.²³⁷ *Evans v. Newton*, to which *Brentwood* refers, states the standard for entwinement.²³⁸

²³⁴*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302, 305 (2001).

²³⁵*See id.* at 299-302 (analyzing facts of the cases supporting finding of entwinement).

²³⁶*Id.* at 298-301. *See* text accompanying *supra* note 86 (listing the factors that the majority applied).

²³⁷*See* Megan M. Cooper, Casenote, *Dusting off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to the Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 35 CREIGHTON L. REV. 913, 962, 986, 990 (2002) (arguing that entwinement is not a new concept but a "refashioned" entanglement test that the Court utilized in state action analyses prior to *Rendell-Baker*, *Blum*, and *Lugar*). *But see* Han, *supra* note 217, at 537 (arguing that the Court introduced a new legal theory).

²³⁸*See* *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966); *see also* *Brentwood Acad.*, 531 U.S. at 296 (quoting *Evans*). *But see* Anthony Ngula Luti, Comment, *When a Door Closes, A Window Opens: Do Today's Private Historically Black Colleges and Universities Run Afoul of Conventional Equal Protection Analysis?*, 42 HOW. L.J. 469, 478 n.51

Under that standard, formally private conduct could be so “entwined with governmental policies” that it becomes “subject to the constitutional limitations placed upon state action.”²³⁹ Between the time of *Evans* and *Rayburn*, the Supreme Court and various circuit courts have acknowledged entwinement as a criterion that courts may consider in a state action inquiry.²⁴⁰

Indeed, the Eleventh Circuit’s citations of *Evans* in some of its cases reflect the court’s knowledge of the concept.²⁴¹ Although these cases did not apply entwinement, and entwinement was not part of *Evans*’s holding, the concept existed and was available to the *Rayburn* court.²⁴² In a recent case, the Second Circuit seemingly applied the entwinement concept in finding that the defendant hospital was a state actor.²⁴³ The court reasoned that the hospital had a social welfare role in helping the city’s child welfare administration with reporting child abuse and neglect, and enforcing child

(1999) (commenting that the *Evans* Court did not elaborate on standards for analyzing entwinement).

²³⁹ *Evans*, 382 U.S. at 299.

²⁴⁰ See *Gilmore v. City of Montgomery*, 417 U.S. 556, 565 (1974); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 134 n.3 (1973) (Stewart, J., concurring); *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 398 (5th Cir. 1980); *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 347 (1st Cir. 1975); *Perez v. Sugarman*, 499 F.2d 761, 764 (2d Cir. 1974).

²⁴¹ See *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1082-83 (11th Cir. 2000) (quoting *Evans*, 382 U.S. at 299, and stating that “Appellants have in no way proven that the students’ private conduct has become so ‘entwined with government policies’ or so ‘impregnated with governmental character’ as to become subject to the constitutional limitations placed on state action”); *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994) (“An entity may, however, become ‘so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.’”); *Duke v. Cleland*, 5 F.3d 1399, 1403 (11th Cir. 1993) (“An entity may, however, become ‘so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.’”).

²⁴² But see *Brentwood Acad.*, 531 U.S. at 305 (Thomas, J., dissenting) (arguing that the Court never fully explained entwinement in previous decisions, nor did the *Brentwood Acad.* majority succeed in doing so).

²⁴³ *Kia P. v. McIntyre*, 235 F.3d 749, 756-57 (2d Cir. 2000).

protection policies.²⁴⁴ When the hospital acted in that capacity, it became a state actor.²⁴⁵ Although the court's conclusion on the state actor issue did not affect the holding of the case, the court nonetheless demonstrated the criteria it looked to in analyzing entwinement.²⁴⁶ The Eleventh Circuit could lead other courts in applying the entwinement concept to foster care cases.

In *Rayburn*, the Eleventh Circuit might have analyzed the case under the entwinement concept. The court could find that the Hogues' rendering of foster care was reflective of government objectiveness because the responsibility for caring for and ensuring the safety of foster children is among the goals that the state-run foster care system seeks to achieve. The Hogues hosted wards of the State on the State's behalf.²⁴⁷ Moreover, the court could find that the government was entwined in the management and control of foster care because they matched foster children with their placements; conducted visits, interviews, and investigations; enforced regulations; and maintained licensing procedure.²⁴⁸ By applying the entwinement analysis, the *Rayburn* court could conclude that the Hogues have overlapping identities with the State and that their roles as foster parents were sufficiently entwined with the State to make them state actors.

The finding of entwinement can serve as an alternative to the more rigid symbiotic relationship test and swing the pendulum towards finding for state action. Entwinement is similar to symbiotic relationship in that they both focus on the facts and circumstances of the given case.²⁴⁹ However, entwinement is broader in scope. It allows courts to engage in a more comprehensive analysis of the facts and circumstances of the particular case, including circumstances that do not

²⁴⁴ *Id.* at 756.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 756-57.

²⁴⁷ See *Rayburn v. Hogue*, 241 F.3d 1341, 1342-43 (11th Cir. 2001).

²⁴⁸ See *id.* at 1343-45.

²⁴⁹ See *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722-25 (1961); *Barrett v. United Hosp.*, 376 F. Supp. 791, 797 (S.D.N.Y. 1974).

necessarily relate to the challenged activity alleged in the § 1983 action.²⁵⁰ Because foster children's § 1983 actions are fact intensive, entwinement provides the flexible approach that is not inherent under a strict symbiotic relationship analysis.²⁵¹ Even though a commentator points out that entwinement may lead to uncertain results in state action analyses,²⁵² flexibility is necessary to ensure that foster children plaintiffs have their day in court.²⁵³ A broadened scope gives courts leeway to choose the approach that better suits the case at issue, depending on the facts of the case. Because cases could significantly vary from each other, courts need more tools for them to render decisions. Without the flexibility, courts may not be able to protect children, and the door will be shut for the plaintiffs.²⁵⁴ Providing an expansive scope for state action analysis probably will not open the floodgate of foster care liability cases because under § 1983, plaintiffs still need to prove unconstitutional violations.²⁵⁵ Therefore, even though entwinement might not be fully established before the *Rayburn* court, it was an available option. The Eleventh Circuit failed the Rayburns by ignoring entwinement's significance.

²⁵⁰ Cf. Michael A. Culpepper, Casenotes, *A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test*, 35 U. RICH. L. REV. 1163, 1183-85 (2002) (arguing that by omitting mentioning the symbiotic relationship and public functions test and creating the entwinement sub-category, the majority avoided applying precedent of those tests and hence reached the result that it desired).

²⁵¹ Cf. Han, *supra* note 217, at 537 (stating that *Brentwood* provides flexibility for plaintiffs to have their day in court).

²⁵² Martin A. Schwartz, *The 2000-2001 Supreme Court Term: Section 1983 Cases*, 18 TOURO L. REV. 57, 62-63 (2001).

²⁵³ Han, *supra* note 217, at 537.

²⁵⁴ *Id.* ("Leaving the court doors open becomes increasingly important as private parties start to maintain services that the state has previously run, such as prisons.").

²⁵⁵ See *supra* notes 33-36 and accompanying text (describing § 1983's requirement of proving unconstitutional violation).

B. The Court Erred in Ignoring Public Policy Mandating That Foster Parents be Considered State Actors

Apart from arguments on symbiotic relationship, public policy supports the notion that foster parents act under color of law. Comments urging reform of the child welfare system underscore the system's inadequate administration.²⁵⁶ There is a general recognition that the system has not fulfilled foster children's needs.²⁵⁷ Despite the State's good intentions, foster care does not guarantee an environment safer than the one from which the State removes foster children.²⁵⁸ Reforming foster care programs might not be adequate to prevent abuse.²⁵⁹ Therefore, alleviating foster children's obstacles in seeking redress from foster parents would help to improve the already impoverished foster care system.²⁶⁰

The problem of foster child abuse may be greater than statistics suggest.²⁶¹ It is not uncommon for foster children to move from one household to another.²⁶² This complicates investigation and abuse reporting.²⁶³ As the *Taylor* court noted, foster children are helpless and their well-being is in the foster parents' hands.²⁶⁴

²⁵⁶ See SCHWARTZ & FISHMAN, *supra* note 17, at 117; Levesque, *supra* note 13, at 3.

²⁵⁷ See ASHBY, *supra* note 19, at 140; COSTIN ET AL., *supra* note 16, at 127; SCHWARTZ & FISHMAN, *supra* note 17, at 15-17.

²⁵⁸ See Kearsse, *supra* note 25, at 385 (1996); see, e.g., Rayburn v. Hogue, 241 F.3d 1341, 1345-46 (11th Cir. 2001) (sexual abuse by another foster child); Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 137 (2d Cir. 1981) (rape and severe beating); Lewis v. Neal, 905 F. Supp. 228, 230 (E.D. Pa. 1995) (beaten to death).

²⁵⁹ See Levine, *supra* note 16, at 374 (noting that mistakes in state agency's work do not come to light until the foster children suffered from abuse).

²⁶⁰ See *supra* notes 16-24 and accompanying text (describing the foster care system).

²⁶¹ Cf. SCHWARTZ & FISHMAN, *supra* note 17, at 88 (pointing out correlation between child abuse and delinquency).

²⁶² See Fung, *supra* note 23, at 36.

²⁶³ See ASHBY, *supra* note 19, at 140.

²⁶⁴ Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1986); see also Bjorklund, *supra* note 3, at 814 (noting that children cannot provide themselves with basic necessities of life); Levine, *supra* note 16, at 349.

The plight of foster children renders it critical that the law protect them, particularly in providing avenues for them to seek legal remedies.²⁶⁵ When the State potentially puts foster children into greater danger than they faced in their biological homes, the legal system needs to pay special attention to their safety. By rendering foster parents state actors, states will have the incentive to implement stricter standards in choosing foster parents because they could be held liable for abuse or neglect.

It might be argued that allowing § 1983 actions like *Rayburn* will bankrupt the child welfare system. The system has scarce resources to disburse for foster children.²⁶⁶ Yet, individual lawsuits seem to be the exclusive channel for foster children to seek monetary damages from foster parents and the State efficiently. Moreover, legal action could positively affect the system.²⁶⁷ An increased likelihood of litigation might prompt the State to use its resources more efficiently. For example, it may spend more money on training to ensure that state agents more thoroughly investigate foster parents' backgrounds and allegations of abuse and neglect. Increased efficiency in the foster care system should in turn benefit foster children, who in the long run, might not need to resort to courts for remedies.

²⁶⁵For instance, in *Rayburn*, rendering that the Hogues satisfied the symbiotic relationship test was the only means to protect the Rayburns in the § 1983 action. *Cf. Rayburn v. Hogue*, 241 F.3d 1341, 1346-48 (11th Cir. 2001) (describing procedural history of Rayburns' case, in which the only motion that survived district court was § 1983 action against foster parents, and stating that only difference between district court decision and appellate court decision was disagreement over symbiotic relationship analysis).

²⁶⁶*Cf. K.H. v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990); SCHWARTZ & FISHMAN, *supra* note 17, at 117.

²⁶⁷*Cf. To the Editors*, N.Y. REV., July 19, 2001 (letter from Marcia Lowry), cited in Sylvia Junn & Jennifer Rodriguez, Comment, *Out on Their Own: California's Foster Youth and the Inequalities of the Independent Living Program*, 6 U.C. DAVIS J. JU V. L & POL'Y 189, 212 (2002) (acknowledging that lawsuits are imperfect but are essential to national foster care reform).

Conclusion

Foster parents' liability in § 1983 actions continues to be unclear. There is, however, one issue that is certain: foster children do not receive the protection that they deserve. *Rayburn v. Hogue* serves as an example in which a court narrowly interprets *DeShaney*. *Burton* and the entwinement concept illustrate the flexibility existing in state action jurisprudence, but *Rayburn* reflects the hesitancy that courts have in applying them in foster care cases. Ultimately, more lenient legal standards for foster children plaintiffs to overcome state action requirements and immunity statutes' restrictions are long overdue.

