Mental Health Care for Children: Before and During State Custody

The Honorable K. Edward Greene

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ARTICLE

MENTAL HEALTH CARE FOR CHILDREN: BEFORE AND DURING STATE CUSTODY

THE HONORABLE K. EDWARD GREENE*

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[In the end, children may be traumatized as much or more by the failure of agencies that are supposed to help than by the problems that brought them to the attention of public child wel-

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fare agencies in the first place.¹

Children are by their nature in a developmental phase of their lives and their exposure to traumatic experience can have an indelible effect upon their emotional and psychological development and cause more lasting damage than many strictly physical injuries.²

I. INTRODUCTION

As our society increasingly confronts the issues of protecting children from parents, protecting society from children, and protecting families, we have emphasized protecting the rights of children in court³ and maintaining familial bonds.⁴ This Article also suggests the need to attend more carefully to the care of children after they are removed from their homes. Specifically, it will address the state's obligation to provide mental health care to children in the home and to those removed from the home and in state custody.

The issue of providing mental health care for children is indeed a vast one. The number of children actually in state custody⁵ amounts to a significant percentage of all persons in state custody.⁶ As of January 12, 1990, a congressional committee estimated that approximately 500,000 children were in “out-of-home placement”

¹. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AM., H.R. REP. Nos. 101-395, 101st Cong., 2nd Sess. 40 (1990) [hereinafter DISCARDED CHILDREN].
⁴. E.g., 42 U.S.C. § 671(a)(15) (1988)(requiring the state to make reasonable efforts to keep the family intact or to reunify the family after removing the child).
⁵. For purposes of this Article, the following terms are defined: “children in state custody” includes: children in foster care, children placed by the juvenile justice system, and children in mental health institutions; “children in foster care” includes: abused, neglected and dependent children; “children in custody by virtue of the juvenile justice system” includes: children who have committed delinquent acts and in some instances children who act in an undisciplined manner; “children in mental health hospitals” includes: children who have been involuntarily placed or those whose parents consented to their placement.
⁶. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 174, chart 307 (107th ed. 1987) (503,601 state and federal prisoners); Id. at 100, chart 159 (220,700 mental health inpatients); Id. at 99, chart 158 (132,235 in-state facilities for the mentally retarded).
in the United States and that by 1995, the number would increase to 850,000 children.\(^7\) In 1988, approximately 340,000 children were in foster care, increasing from 276,300 in 1985.\(^8\) There is some evidence that the average length of stay in foster homes is increasing,\(^9\) with 39% of the children placed in foster care remaining there for more than two years.\(^10\) In 1987, the United States had 91,646 youths in public and private detention facilities, an increase from 71,922 in 1979.\(^11\) "The 1987 youth[-]in[-]custody population represents some 353 youths per 100,000 juveniles in the population, an increase of 41% from 251 juveniles per 100,000 in 1979 . . . ."\(^12\) At the end of 1987, 54,716 children under age 18 were in residential care facilities and receiving treatment for emotional problems. This was a 60% increase from 34,060 children in 1983. Additionally, the congressional committee estimated that "about 2 million children receive mental health treatment in out-patient settings."\(^13\)

In addition to statistics revealing the number of children in out-of-home settings, statistics also indicate inadequate services for children in custody. When existing, the services are generally "ineffective, inappropriate, or inefficient."\(^14\) Specifically, mental

\(^7\) "Out-of-home placement" includes children placed because of foster care, juvenile justice and mental health. DISCARDED CHILDREN, supra note 1, at 14-15.

\(^8\) Id. at 5. There were 8,589 children "who were in county department custody or placement responsibility" during fiscal year 1989. NORTH CAROLINA SOCIAL SERVS., ANNUAL PROGRAM REPORT (1988-89) 22 [hereinafter PROGRAM REPORT].

\(^9\) DISCARDED CHILDREN, supra note 1, at 18.

\(^10\) Id. at 6. The number of children in more than two years of foster care was 2,933, an increase from 2,761 children during fiscal year 1988. PROGRAM REPORT, supra note 8, at 25.

\(^11\) DISCARDED CHILDREN, supra note 1, at 20. The fiscal year 1987-88 had an average daily population of 106.5 children detained in eleven juvenile detention facilities within the state. NORTH CAROLINA DIV. OF YOUTH SERVS. ANNUAL REPORT (1988-89). The fiscal year 1988-89 had an average population of 711 children in five training schools. Id. The total number of beds in the eleven juvenile detention centers was 161 for fiscal year 1987-88, and the total number of beds in the five training schools for the fiscal year 1988-89 was 602. Id. The average length of stay in North Carolina training schools is 8.4 months. Letter from Jack Bartle, North Carolina Div. of Youth Servs. to K. Edward Greene, J. (Feb. 23, 1990).

\(^12\) DISCARDED CHILDREN, supra note 1, at 20.

\(^13\) Id. at 22.

\(^14\) Id. at 45. "The range of services [is] frequently unavailable, there is very little coordination among the systems that are mandated to serve our children and there is usually no plan to determine which agencies should be responsible for serving a particular child. Consequently, our children are unserved, underserved or served inappropriately." Id. (quoting Fine, Glenda, Testimony at Hearing, "Children's Mental Health: Promising Responses to Neglected Problems," SE-
health services, which are in great demand, are woefully inadequate, uncoordinated and fragmented. A major impediment to delivery of needed services to these children is a lack of sufficient funding. States and counties bear the brunt of the cost of funding the care of children in out-of-home settings. However, since 1935, the federal government has been responsible for a large portion of the cost of this care. Although increasing with the number of

15. Id. at 22. "[Seven and a half] million American children . . . are believed to suffer from a mental health problem severe enough to require mental health treatment." Id.

16. Id. at 48-49. "An estimated 70% to 80% of emotionally disturbed children receive inappropriate mental health services or no services at all. . . . In short, there seems to be no type of children's mental health services that is in adequate supply." Id. "Treatment is the only justification for depriving someone of liberty that has not been convicted of a crime . . . ." and therefore the state "must actually provide the promised treatment." Lambert, Children In Institutions, IX Youth Law News 10, 14 (1988).

17. Discarded Children, supra note 1, at 62. "Structure, 'turf' issues and categorical program design were cited repeatedly as principal barriers to delivering needed services to troubled children and families. . . . 'As a result of [the] specialization of services and training, each program or agency tends to view the client in terms of services or training provided by that agency and to ignore other problems that are contributing to the behavior that has the youth involved with the agency to begin with.'" Id. (quoting Earnest, Edward E., Testimony at Hearing, "Youth and the Justice System: Can We Intervene Earlier?," Select Comm. on Children, Youth and Families, U.S. House of Representatives, New Orleans, La., May 18, 1984).

18. N.C. Gen. Stat. § 108A-87(a) (1989). "The non-federal share of the annual cost of each public assistance and social services program and related administrative costs may be divided between the State and counties as determined by the General Assembly and in a manner consistent with federal laws and regulations." Id.

19. The Social Security Act (SSA) provides for social services block grants from the federal government to the states to pay for such activities as child day-care, protective services for children and adults, and home care services for the elderly and handicapped. 42 U.S.C.A § 1397-1397f (West Supp. 1990). The SSA also authorizes block grants to community mental health centers for the provision of mental health services, including the chronically mentally ill, severely emotionally disturbed children and adolescents. 42 U.S.C.A. § 620 (West Supp. 1990). Sixty-eight percent of the money goes for block grants to states for prevention, treatment and rehabilitation programs and activities to address alcohol and drug abuse. See also Discarded Children, supra note 1 app. IV, at 159-92 (general discussion of federal programs affecting children in state care). See Medical Diagnosis as a Gateway to the Child Welfare System: A Legal Review of Physicians,
children in care, expenditures for care have failed to keep pace. Statistics also expose the need for services to children in out-of-home settings, especially mental health care services. Estimates show that 7.5 million children in the United States suffer with mental problems severe enough to require treatment. Of children placed outside their homes, “30% have marked or severe emotional problems” and some estimates are as high as 70%. According to the Child Welfare League of America, “the pervasive presence of emotional disorders [is] the most serious unmet health problem” of children in placement.

II. HISTORICAL OVERVIEW

Historically, children come into state custody for one of two reasons: to protect the child from her parents and to protect others from the child’s activities.

England first developed society’s duty to protect children when the courts formulated the parens patriae doctrine. This doctrine originally protected incompetent adults and later, children. English courts, contrary to previous social norms which left care of children to the sole discretion of parents, determined that the King had the authority and indeed the duty to provide protection to children. Initially, the Crown did not provide care at its own ex-
pense because the courts exercised the doctrine only when the child had an estate to pay for the cost of care. Later, the courts abandoned the estate requirement, and the Crown intervened when the child had no estate. For many years, expenditures for the benefit of children in governmental custody was minimal. Once removed from their parents, children frequently were placed in apprenticeships, in which a child had a master of sorts who contracted with the state to provide child care and training in a trade at no cost to the state. In limited instances, when a child was too young, or physically or mentally handicapped, the government made grants to persons who cared for the child. In 1785, the North Carolina Legislature authorized counties to construct poorhouses which were later used to house children in the same buildings as vagrants, prostitutes, and insane and mentally retarded persons. The legislature authorized counties to levy taxes to pay for the poorhouses. With the adoption of its constitution in 1868, the State of North Carolina assumed a duty to provide care for the "poor, the unfortunate and the orphan." The constitution directed that the "General Assembly . . . appoint and define the duties of a Board of Public Charities, to whom shall be entrusted the supervision of all charitable and penal State institutions." Consistent with the history of the state's reluctance to expend monies on care of children in its custody, the constitution directed the General Assembly and the Board of Public Charities to ensure "that all penal and charitable institutions should be made as

Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C.L. REV. 293, 295 (1972) [hereinafter Thomas I]. See Medical Diagnosis, supra note 19.


28. In re Spence, 2 Ph. 247, 41 Eng. Rep. 937 (1847). See also Fraser, supra note 27.


30. Id. at 751.

31. Id. at 751-52.

32. N.C. CONST. art. XI, § 7 (1868). "Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and a Christian State . . . ." Id. See also N.C. CONST. art. XI, § 4 (1970)(contains essentially the same language).

33. Id.
nearly self-supporting as is consistent with the purposes of their creation.” 34 Approximately fifty years later, the General Assembly established a county-administered system of welfare supervised by a renamed “State Board of Charities and Public Welfare.” 35 In 1919, the State Board of Charities and Public Welfare established a separate “Division of Child Welfare . . . to encourage better services to children through county departments . . . .” 36 While placement of children in poorhouses continued into the twentieth century, there was a movement after 1868 to place children in private state-subsidized orphanages. 37 In 1923, the General Assembly first authorized counties to pay public assistance to widowed, divorced, or deserted mothers who had children younger than age fourteen in the home. 38 The cost of care was to be paid one-half by the state and one-half by the county. 39

The North Carolina General Assembly’s decision in 1937 to accept federal grants provided by the federal Social Security Act of 1935 made available additional funding for children at home. 40 Under federal and state legislation, the federal government, the state and the county each provided one-third of the funding. 41 As the programs developed over the years, state and federal funding and services were also provided to children in out-of-home settings. The settings in time included more foster home placements and less placements in orphanages. 42 In 1980, pursuant to Social Security Act amendments, benefits to children outside the home were conditioned on the state’s reasonable efforts to keep families together and reasonable efforts to reunite families after a child was removed. 43

Protecting society from children’s crimes was partly based on

34. Id. § 11.
35. 1919 N.C. Sess. Laws ch. 46, § 1. See also Thomas II, supra note 29, at 754.
37. Id.
38. 1923 N.C. Sess. Laws ch. 260. See also Thomas II, supra note 29, at 761 (authorized assistance was up to $15.00 per month for one child).
41. Thomas II, supra note 29, at 763.
42. Id. at 766. “More than half the children receiving services in 1952 lived in their own homes or with relatives.” Id.
the *parens patriae* doctrine.\textsuperscript{44} Common law treated children aged seven years and older who committed crimes as adults.\textsuperscript{45} However, beginning with the creation of a “House of Refuge” in New York in 1824,\textsuperscript{46} and extending to the enactment of the Illinois Juvenile Court Act in 1899,\textsuperscript{47} children who committed crimes were not to be punished but instead were to be reformed and trained in the “habits of industry”.\textsuperscript{48} The most often asserted basis for this state action was the doctrine of *parens patriae*.\textsuperscript{49} Another basis was the 1868 North Carolina Constitution, which expressly authorized “the erection of houses of correction where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed.”\textsuperscript{50} The courts defined a “house of correction [as a place designed] for the reformation of youthful criminals, those who have not yet become hardened in crime.”\textsuperscript{51}

\textsuperscript{44} “[T]he distinction between neglected children and delinquent children, which is of great importance in the twentieth century, had virtually no meaning in the nineteenth-century predelinquency system.” Fox, *Juvenile Justice Reform: An Historical Prospective*, 22 STAN. L. REV. 1187, 1192 (1970) [hereinafter Fox].

\textsuperscript{45} State v. Burnett, 179 N.C. 735, 743, 102 S.E. 711, 715 (1920). “At common law, there is a conclusive presumption that a child under 7 years of age is incapable of committing crime . . . .” \textit{Id}.

\textsuperscript{46} “The central provision of the act of incorporation [creating the New York House of Refuge] granted to the Managers . . . discretion to receive and take into the House of Refuge . . . all such children as shall be taken up or committed as vagrants, or convicted of criminal offenses . . . .” Fox, supra note 44, at 1190 (quoting Act of Mar. 29, 1824, ch. 126, \textsection 4, N.Y. Laws III.).

\textsuperscript{47} “Traditional juvenile court history has interpreted [the Illinois Juvenile Court Act] as declaring that children were to be protected and not punished for their misdeeds . . . .” \textit{Id}. at 1212. See also Burnett, 179 N.C. at 743, 102 S.E. at 715 (declaring that the 1919 North Carolina General Assembly action creating a juvenile court in North Carolina was constitutional).

\textsuperscript{48} \textit{In re Watson}, 157 N.C. 340, 352, 72 S.E. 1049, 1053 (1911)(the court declared the Legislature’s establishment of the Stonewall Jackson Training School constitutional, and that the Legislature “has power to provide for the reformation of boys who are entering upon a career of wickedness, by proscribing measures for committing them to reformatory institution”). The court concluded that providing a “place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime” is a “wise” policy. \textit{Id}. at 354, 72 S.E. at 1054.

\textsuperscript{49} “[T]o this end, may not the natural parent, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae* or common guardian of the community?” \textit{Id}. at 354, 72 S.E. at 1054.

\textsuperscript{50} N.C. COST. art. XI, \textsection 4 (1868).

\textsuperscript{51} \textit{In re Watson}, 157 N.C. at 351, 72 S.E. at 1052.

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III. Duty To Provide Care

Answering the question of whether the state or its agencies have any duty to provide mental health care to children at home, children in foster homes, children in mental health institutions, or children committed for delinquent acts, requires review of several possible sources. Potential bases for deciding that a duty exists include the federal Constitution, the state constitution, federal statute, state statute and common law. Another potential basis is the state's duty to care for prisoners confined in penal institutions and pretrial detainees. These duties may be analogized to the state's duties to care for children. ²

A. Persons Confined in Penal Institutions

The state cannot deny prison inmates the protections of the federal Constitution's eighth and fourteenth amendments. ³

Federal Constitution—Eighth Amendment: The eighth amendment generally vests in inmates the right to be free of "unnecessary and wanton infliction of pain" or punishments which are incompatible with "'evolving standards of decency'" that mark the progress of a maturing society. ⁴ This amendment proscribes "cruel and unusual punishments," and requires that inmates must receive care for "serious medical needs." ⁵ In Estelle v. Gamble, the Supreme Court resolved the unsettled standard of care to which inmates are entitled as "some" care or "adequate" care. ⁶ At

⁵ See Comment, The Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pre-trial Detainees, 42 U. CHI. L. REV. 705, 713-16 (1975)(suggesting that prior to Estelle, the majority view enti-
several points in the opinion the Court defined "adequate" care as actual care mandated by the Constitution. Other courts have interpreted the constitutional language to require the state to furnish "adequate" medical care to its prisoners. Anything less than "adequate" medical care could "result in pain and suffering which . . . would serve [no] penological purpose" and would be inconsistent with the clear language of Estelle. Nonetheless, the "acts or omissions [must be] sufficiently harmful to evidence deliberate indifference to serious medical needs." 

Neglected prisoners only to "some" care, which represented less care than that required under either an "adequate" or "reasonable" care standard).

58. Only claims "by a prisoner that he has not received adequate medical treatment [as a consequence of deliberate indifference] states a violation of the Eighth Amendment . . . [s]imilarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain.'" Estelle, 429 U.S. at 105.

59. "[F]ailure to provide adequate treatment is a violation of the eighth amendment when it results from 'deliberate indifference to a prisoner's serious illness or injury.'" Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979)(quoting Estelle, 429 U.S. at 105). The state has an affirmative obligation under the eighth amendment "to provide persons in its custody with a medical care system that meets minimal standards of adequacy." Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir. 1987), cert. denied, 484 U.S. 935 (1987). The state must " 'make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates.'" Ramos v. Lamb, 639 F.2d 559, 574 (10th Cir. 1981), cert. denied, 450 U.S. 1041 (1981)(quoting Battle v. Anderson, 376 F. Supp. 402, 424 (E.D. Okla. 1974)). Medical care cannot fall "below some minimally adequate level." Hamm v. DeKalb County, 774 F.2d 1567, 1573 (11th Cir. 1985), cert. denied, 475 U.S. 1096 (1986). "'[A]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety.'" Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1563 (D. Idaho 1984)(quoting Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981)). But see Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977)(holding that the eighth amendment and Estelle require "the provision of reasonable medical care, as needed." Id.).

60. Estelle, 429 U.S. at 103.

61. Id. at 106.

62. Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976). Estelle was a § 1983 action and some courts have questioned whether the deliberate indifference standard was required because it was a § 1983 action or because it was an action for violation of the eighth amendment.

Although the constitutional standard for adequate health care has not been fully spelled out, the Supreme Court has held in the context of
gence or inadvertence by prison officials or their agents in responding to an inmate’s medical needs is not a violation of the inmate’s eighth amendment rights. However, express intent to inflict harm is not required to prove deliberate indifference. Generally, state actions or inactions that are obdurate or wanton in nature “characterize the prohibited conduct by the Cruel and Unusual Punishments Clause . . . .” While deliberate indifference has no precise formula, it occurs “when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.” A pattern of medical neglect can support a showing

a § 1983 action for damages and injunctive relief that only ‘deliberate indifference to serious medical needs’ of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment. Ramos, 639 F.2d at 575 (quoting Estelle, 429 U.S. at 106). But see Parratt v. Taylor, 451 U.S. 527 (1981)(“Section 1983, unlike its criminal counterpart . . . has never been found by this court to contain a state-of-mind requirement.” Id. at 534.).

63. Estelle, 429 U.S. at 106; Meriwether, 821 F.2d at 411; Inmates v. Pierce, 612 F.2d at 762; Ramos, 639 F.2d at 566. “[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or ‘gross negligence,’ is enough to trigger the protection of the due process clause.” Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986). In the context of the fourteenth amendment, “no procedure for compensation is constitutionally required” for negligent acts of the state. Id. at 333 (quoting Parratt, 451 U.S. at 548 (Powell, J., concurring). Some courts held that gross negligence creates a strong presumption of deliberate indifference. See Doe v. New York City Dep’t of Social Servs., 649 F.2d 134, 143 (2d Cir. 1981); see also Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 793 (11th Cir. 1987).

64. Whitley v. Albers, 475 U.S. 312, 319 (1986); Estelle, 429 U.S. at 104 (prison doctor’s indifference to prisoner’s needs qualifies as “deliberate indifference”); see Id. at 166 n.13 (Stevens, J., dissenting)(rejecting any indication by the majority that “intent is a necessary element of an Eighth Amendment violation . . . .” Id.).


66. Ramos, 639 F.2d at 575.

In class actions challenging the entire system of health care, deliberate indifference to inmates’ health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff . . . or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care. Id. “Where prison authorities deny reasonable requests for medical treatment . . .
of deliberate indifference,\textsuperscript{67} as well as a government official’s failure to perform specific federal or state statutory duties.\textsuperscript{68}

The Court does not require treatment for all inmate medical needs, only for needs that are serious.\textsuperscript{69} Again, there is no precise definition of a serious medical need. However, courts have determined that the term “serious” includes medical needs that have “been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor’s attention.”\textsuperscript{70} Clearly, “[when] denial or delay [of medical treatment] causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious.”\textsuperscript{71} Generally, adequate care for serious illness or injury does not include rehabilitative care.\textsuperscript{72}

While the \textit{Estelle} opinion addressed an inmate’s need for medical treatment for physical ailments, the courts have extended eighth amendment guarantees to include psychological and psychiatric care,\textsuperscript{73} since the failure to provide such care could seriously and such denial exposes the inmate ‘to undue suffering or the threat of tangible residual injury’ . . . deliberate indifference is manifest.” Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987)(quoting Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976). When “knowledge of the need for medical care [is accompanied by the] . . . intentional refusal to provide that care,” deliberate indifference is present “if necessary medical treatment [is] . . . delayed for non-medical reasons, a case of deliberate indifference has been made out.” Ancata v. Prison Health Servs., 769 F.2d 700, 704 (11th Cir. 1985).

67. Examples include intentional denial of access to medical care or interference with prescribed treatment. Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977), aff’d, 652 F.2d 54 (2d Cir. 1981).


70. Monmouth County, 834 F.2d at 347 (citation omitted).

71. \textit{Id.}

72. Comment, supra note 57, at 719.

73. Waldrop v. Evans, 681 F. Supp. 840, 847 (M.D. Ga. 1988), aff’d, 871 F.2d 1030, \textit{reh’g} denied, 880 F.2d 421 (1989). “We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.” \textit{Bourring}, 551 F.2d at 47. “Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a ‘serious medical need’ under the \textit{Estelle} formulation.” \textit{Meriwether}, 821 F.2d at 413; \textit{Inmates v. Pierce}, 612 F.2d at 763. “ ‘Modern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy.’” \textit{Balla}, 595 F. Supp. at 1577 (quot-
jeopardize an inmate's health.

Establishment of an inmate's right to medical care raises another question: whether that right must be balanced against any legitimate interest of the state in not providing such care. Generally, and pursuant to a recent United States Supreme Court opinion, *Turner v. Safley*, prison regulations or practices that burden inmate constitutional rights must be "reasonably related to legitimate penological interests" to survive constitutional scrutiny. This standard of review is applicable even when an inmate claims infringement of a fundamental constitutional right and the state under other circumstances would have been required to satisfy a more rigorous standard of review. Otherwise, the courts "inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem . . . ." In determining the reasonableness of state regulations or practices, courts should consider these factors: 1) existence of logical connections between the practice and the state's goal, 2) existence of accommodations for an inmate's exercise of the right, and 3) the nature of an accommodation's impact on guards, other inmates and "on the allocation of prison resources generally." However, these factors should not be used to determine the state's Eighth Amendment duty to provide medical care to inmates. In *Whitley v. Albers*, the United States Supreme Court extended the deliberate indifference standard of proof adopted in the *Estelle* decision, and noted that "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." Accordingly, the state's responsibility to provide medical care to prisoners exists "without the necessity of balancing competing institutional concerns for the safety of prison staff or

ing *Bowring*, 551 F.2d at 47). "I can deduce no reason in logic or policy for treating mental and physical afflictions" differently from physical injuries and disease. *Robert v. Lane*, 530 F. Supp. 930, 938 (N.D. Ill. 1981). *See also B.H. v. Johnson*, 715 F. Supp. 1389, 1395 (N.D. Ill. 1989)(the Due Process Clause protects against arbitrary intrusions on personal security which includes "both physical and emotional well-being").

74. The "inflexible strict scrutiny analysis . . . would seriously hamper [a prison official's] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89.


76. *Turner*, 482 U.S. at 89.

77. *Id.* at 90.

other inmates," nor does the Turner analysis of the eighth amendment require a balancing of the right to medical care against the cost of that care. Furthermore, the state's affirmative duty to provide medical care pursuant to the eighth amendment cannot be conditioned on the inmate's "ability and/or . . . willingness to pay" for his own care.

Federal Constitution—Fourteenth Amendment: The Due Process Clause of the fourteenth amendment provides both substantive and procedural protections to inmates. An inmate's substan-

79. Id. The Supreme Court balanced institutional concern for safety against prisoner's rights to be free of "cruel and unusual punishments." In Whitley however, the Court was presented not with a medical care issue but with prison violence.

80. Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 344 n.28 (3d. Cir. 1987). In Monmouth the general question was whether the prison had the obligation to pay for an elective abortion desired by some female inmates and specifically whether the cost of the abortion was a factor in determining the reasonableness of the prison denial of the abortion. While Turner provides that one of the factors which determines reasonableness is the impact on prison resources, the Monmouth Court determined that "[u]nder eighth amendment analysis, a prison's financial obligation with respect to the medical needs of its inmates is paramount" and refused to consider the cost factor evaluating the eighth amendment right to an abortion. Id. "The state's interest in limiting the cost of detention . . . will justify neither the complete denial of those necessities nor the provision of those necessities below some minimally adequate level." Hamm v. DeKalb County, 774 F.2d 1567, 1573 (11th Cir. 1985), cert. denied, 475 U.S. 1096 (1986). "[C]osts cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards." Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981). "'Constitutional treatment of human beings confined to penal institutions . . . is not dependent upon the willingness or the financial ability of the state to provide decent penitentiaries.'" Battle v. Anderson, 594 F.2d 786, 792 (10th Cir. 1979)(quoting Gates v. Collier, 407 F. Supp. 1117 (N.D. Fla. 1975). "'Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.'" Mitchell v. Untreiner, 421 F. Supp. 886, 896 (W.D. Fla. 1976)(quoting Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974); see also Missouri v. Jenkins, ___ U.S. ___, 110 S. Ct. 1651, 1666 (1990)(holding a local government may be directed to levy taxes to fund a protection of a constitutional right). But see Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977)(the right to treatment was "limited to that which may be provided upon a reasonable cost . . . ." Id.).

81. Monmouth, 834 F.2d at 351; see also City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983), in which the Supreme Court determined that prison had an obligation for ensuring that adequate funds were provided to meet the medical needs of pre-trial detainees. "The county is responsible for insuring that adequate funds are provided to meet the medical needs of inmates." Id. See also Ancata v. Prison Health Servs., 769 F.2d 700, 705 (11th Cir. 1985).
itive due process rights derive from the Constitution, common law or state law.\(^2\) Even in situations when analysis reveals that the inmate has a liberty interest, and state regulation of that interest is "reasonably related to legitimate penological interests," an inmate cannot be deprived of his liberty interest without procedural due process protection, or a guarantee of fair procedure.\(^3\) In determining whether procedures are fair, the Supreme Court has recognized that "not all situations . . . call for the same type of procedure."\(^4\) The Supreme Court has found some post-deprivation protections sufficient to satisfy procedural due process.\(^5\) Generally, the Court has followed its decision in *Matthews v. Eldridge*,\(^6\) weighing private interests, governmental interests and the value of procedural safeguards to determine what process is due.\(^7\)

82. Washington v. Harper, ___ U.S. ___, 110 S. Ct. 1028, 1036 (1990)(a substantive due process interest is created by constitution); Zinermon v. Burch, ___ U.S. ___, 110 S. Ct. 975, 983 (1990); Hewitt v. Helms, 459 U.S. 460, 472 (1983)(procedural guidelines set forth in state statutes for regulations do not give rise to federal due process protection; however, "repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); Board of Regents v. Roth, 408 U.S. 564, 577 (1972)(state law or regulation gives rise to due process protection only if a person has a "legitimate claim of entitlement" to benefits authorized in state law). "[A] legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing." Eidson v. Pierce, 745 F.2d 453, 459-60 (7th Cir. 1984). "[P]rocedural due process applies to the deprivation of interests encompassed within the fourteenth amendment's protection of liberty and property when a person has acquired specific benefits through state law." Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 798 (11th Cir. 1987).

83. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such interest without *due process of law*." Zinermon, ___ U.S. at ___, 110 S. Ct. at 983 (emphasis in original) (citations omitted); Washington, ___ U.S. at ___, 110 S. Ct. at 1037. The establishment of the substantive right merely places on the state the "burden of justification for every substantive curtailment of the interest [and] implies constitutional recognition of a procedural right to be heard even when a concededly valid government rule infringing that interest is enforced." L. Tribe, AMERICAN CONSTITUTIONAL LAW 682 (2d ed. 1988) [hereinafter L. Tribe] (footnotes omitted).


87. *Id.* (an individual's private interests are weighed against state interests, with due consideration for the effect of physical and administrative burdens and
The eighth amendment provides the primary source of protection for inmates' medical care rights, but it is not the only federal constitutional source of such protection. Because denial of adequate medical care may deprive a person of life itself, such a denial implicates the fourteenth amendment. To support a claim for medical care, the fourteenth amendment may be invoked alone or in conjunction with the eighth amendment. Although the full scope of interest protected by the Due Process Clause is unclear, generally more than a de minimis interference with a person's bodily integrity is a protected interest, as compared to serious injury or illness under the eighth amendment. The "right to personal se-

risk of erroneous deprivation of the individual's interest, as well as the probable value of procedural safeguards). "[Parratt] is not an exception to the Matthews balancing test, but rather an application of that test to the unusual case in which one of the variables in the Matthews equation—the value of pre-deprivation safeguards—is negligible in preventing the kind of deprivation at issue." Zinermon, ___ U.S. at ___, 110 S. Ct. at 985.

88. See Whitley v. Albers, 475 U.S. 312, 327 (1986)(conduct of prison officials violating the fourteenth amendment could also be punishment inconsistent with contemporary standards of decency and therefore violate the eighth amendment); Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972)(denial of medical care claim based solely on the fourteenth amendment); Wells v. Franzen, 777 F.2d 1258, 1261 (7th Cir. 1985)(due process clause of fourteenth amendment provides protection to everyone, including those incarcerated for criminal convictions); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977)(court found that the failure to provide psychological diagnosis and treatment violated both the eighth and fourteenth amendments). The liberty preserved from deprivation without due process includes the right "generally to enjoy those privileges long-recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "Among the historic liberties [recognized at common law] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977).

89. See generally L. Tribe, supra note 83, at 769-84. "[I]ndeed all nine of the Justices as of 1973 had accepted the Court's role in giving the fourteenth amendment due process clause substantive content beyond the Bill of Rights, despite significant disagreements over exactly how the role should be performed." Id. at 777 (footnote omitted).

90.

In applying the criterion of needless severity, the crucial factors to be considered are the presence of physical pain, the creation of anxiety and apprehension of medical or other damage, the permanence of any disfigurement or any ensuing complication, the risk of irreversible injury to health, and the danger to life itself. Id. at 1333.

91. Id. at 1329-37. "Every violation of a person's bodily integrity is an inva-
curity” is considered a primary right of each citizen.92 This right to “personal security . . . consists [of] uninterrupted enjoyment of . . . life . . . limbs . . . body . . . health, and . . . reputation.”93 The state violates this substantive interest when one shows either “active governmental imposition or conscious governmental neglect . . . .”94 However, conscious or deliberate neglect should be distinguished from “passive, incremental coercion [of government] that shapes all of life and for which no one bears precise responsibility.”95 Conscious or deliberate neglect also is different from negligence, since negligent acts of prison officials are insufficient to support claims of substantive due process violations.96 Historically, the fourteenth amendment grants inmates relief only for deliberate actions of governmental officials.97 The Supreme Court has ruled out a fourteenth amendment cause of action for official negligence, but has left open the possibility of relief for “recklessness” or “gross negligence.”98 We can only speculate about whether a claim for failure to provide medical care to an inmate according to the fourteenth amendment requires proof different from that for a claim according to the eighth amendment.99

The Court’s analysis in Turner is inapplicable to determination of an inmate’s right to medical care under the eighth amendment, and neither should the analysis be used to evaluate fourteenth amendment medical care guarantees. In neither instance is there a valid governmental penological interest that must be bal-

92. 1 W. BLACKSTONE, COMMENTARIES 129.
93. Id.
94. L. TRIBE, supra note 83, at 1335 n.39 (emphasis in original).
95. Id. at 1306.
96. Id. at 1335. “There is, of course, a de minimis level of imposition with which the Constitution is not concerned.” Ingraham v. Wright, 430 U.S. 651, 674 (1977).
98. Whitley v. Albers, 475 U.S. 312, 327 (1986)(citation omitted). The Court rejected the deliberate indifference standard for determining whether the state had violated the rights of an institutionalized mentally retarded person. Writing for the majority, Justice Powell did not state standards that should be used, but indicated that the Court should balance “‘the liberty of the individual’” and “‘the demands of an organized society.’” Youngberg v. Romeo, 457 U.S. 307, 320 (1982).
99. See generally Comment, supra note 57.
anced against an inmate’s right to medical care. As noted in the discussion of the eighth amendment, the cost of inmate medical care is not appropriately considered a valid penological interest.

North Carolina Constitution - Article I Section 19: Article I, § 19 of the North Carolina Constitution is known as the “law of the land” provision and provides that no person shall be “deprived of his life, liberty, or property, but by the law of the land . . . .” North Carolina courts have interpreted this clause as equivalent to the “due process clause” of the federal Constitution. However, exegesis of the federal Due Process Clause, while persuasive, is not binding on North Carolina courts when they construe the “law of the land” clause. No North Carolina appellate opinions have discussed inmate rights to medical care in relation to this clause.

North Carolina Constitution—Article I, Section 27: Article I, § 27 of the North Carolina Constitution prohibits the infliction of “cruel or unusual punishments.” Again, no appellate cases discuss inmate rights to medical care in relation to this provision.

Federal Statutes: Pursuant to federal statute, the Federal Bureau of Prisons must “provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States.” This statutory duty requires provision of necessary medical care.

North Carolina Statutes: The North Carolina General Assembly, consistent with the mandate of article XI, § 2 of the North Carolina Constitution, enacted law providing that all persons committed to the North Carolina Department of Corrections “shall receive a physical and mental examination by a health care professional . . . as soon as practical after admission . . . .” Also, that

100. Legitimate penological interests recognized by the Supreme Court include “deterrence of crime, rehabilitation of prisoners, and institutional security.” O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).
105. N.C. CONST. art. I, § 27.
108. N.C. CONST. art. XI, § 2: “The object of punishments being not only to satisfy justice, but also to reform the offender . . . .” (emphasis added).
"treatment to control and rehabilitate criminal" defendants must be provided by the Department of Corrections. Regulations promulgated pursuant to these statutes require adequate mental health treatment for all inmates.

Common Law: At common law the state had a duty to provide medical care to inmates on the theory that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." The common law did not require proof of deliberate indifference for recovery for injuries, because arguably proof of negligence was sufficient for recovery in a tort action.

B. Persons Confined in Mental Institutions

Federal Constitution—Fourteenth Amendment: Pursuant to the Due Process Clause of the fourteenth amendment, patients involuntarily confined in mental institutions are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." At minimum, the state has a duty to provide mental patients the same "adequate food, shelter, clothing, and medical care," as provided to inmates by the eighth amendment.

In Youngberg v. Romeo, the Supreme Court determined that Romeo, a profoundly retarded thirty-three year old man who was confined in a mental health institution, was entitled to "minimally adequate training" in addition to basic medical care pursuant to

112. Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926); see also Muniz v. United States, 280 F. Supp. 542 (S.D.N.Y. 1968)(sheriff had a duty to exercise reasonable care to protect a prisoner from a known danger which the sheriff could reasonably anticipate).
113. Restatement (Second) of Torts § 323 (1965)(one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion). See also generally W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984)[hereinafter Prosser and Keeton](discussion of actions of the state which may give rise to liability under the common law of tort).
114. Youngberg v. Romeo, 457 U.S. 307, 324 (1982). The Court rejected use of the eighth amendment to establish a standard of liability for failure to protect a profoundly retarded and involuntarily committed individual. Id. at 325.
115. Id. at 322.
116. Id. at 324.
the Due Process Clause of the fourteenth amendment.\textsuperscript{117} The majority defined "minimally adequate training" as "such training as [is] reasonable in light of [the individual's] liberty interests in safety and freedom from unreasonable restraints."\textsuperscript{118}

The majority in \textit{Youngberg} did not address treatment rights of all persons in mental institutions. Instead, it confined its discussions to specific facts relating solely to the treatment rights of severely retarded persons restrained to protect themselves and others from harm. However, the \textit{Youngberg} majority's specific analysis of Romeo's interests in safety and freedom from restraints is appropriate for generally evaluating a civilly-committed mental health patient's right to treatment. In \textit{Youngberg}, the Court balanced Romeo's fundamental right to personal security against legitimate governmental interests.\textsuperscript{119} In balancing legitimate state in-

\textsuperscript{117} \textit{Id.} at 322. The Court's use of the word "training" is consistent with the words "habilitation" and "treatment." The Court approved the lower court's opinion language:

[T]he plaintiff has a constitutional right to minimally adequate care and treatment"... [i]n the circumstances presented in this case, and on the basis of the record developed to date, we agree with [Chief Judge Seitz's] view and conclude that respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. In view of the kind of treatment sought by respondent and the evidence of record, we need go no further in this case. \textit{Id.} at 319 (quoting Romeo v. Youngberg, 644 F.2d 147, 176 (3d Cir. 1980). The Court noted that the term "habilitation... refers to 'training and development of needed skills.'" \textit{Id.} at 438. Accordingly, this Article uses the terms "training," "treatment" and "habilitation" interchangeably. "Training" is: "an organized system of instruction." \textit{Taber's Cyclopedic Medical Dictionary} 1889 (16th ed. 1989) [hereinafter \textit{MEDICAL DICTIONARY}]. "Treatment" is defined: "[1] [m]edical, surgical, dental, or psychiatric management of a patient, [2] [a]ny specific procedure used for the cure or the amelioration of a disease or pathological condition." \textit{Id.} at 1897. "Habilitation" is: "[t]he process of education or training persons with disadvantage or disability to improve their ability to function in society." \textit{Id.} at 773. Admittedly, the definitions of "treatment," "habilitation" and "training" differ, but the words are interchangeable within the context of Due Process Clause entitlements.

\textsuperscript{118} \textit{Youngberg}, 457 U.S. at 322. Restraints were placed on the detainee "to protect [the detainee] and others in the hospital, some of whom were in traction or were being treated intravenously." \textit{Id.} at 310-11.

\textsuperscript{119} \textit{Id.} at 320-21. "Where certain 'fundamental rights' are involved... legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." Roe v. Wade, 410 U.S. 113, 155, \textit{reh'g denied}, 410 U.S. 959 (1973).
terests against individual liberty interests, courts often use either the compelling or substantial interest test, thereby denying protection to individual liberty interests only when state interests are compelling or substantial. The Youngberg court rejected both the compelling and substantial interest standards of review and without articulating a new standard, the Court balanced Romeo's interest in safety and freedom from restraints against the state's interests in protecting others from Romeo and Romeo from himself. A civilly-committed mental patient's right to treatment likewise requires a balancing of the patient's liberty interests in life and health against legitimate governmental interests. Because the cost of providing such care is generally not recognized as a legitimate governmental interest, the cost of care does not outweigh protection of a patient's life and health. According to the Youngberg analysis, a civilly-committed mentally ill patient generally would be entitled to adequate mental health treatment except in the rare instances in which provision of care would interfere with the state's obligation to protect the patient and others from harm.

Furthermore, when the statutory purpose of confinement is treatment, the Due Process Clause requires, consistent with Jackson v. Indiana, that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." The due process right to treatment recognized by the Court in the Jackson decision is also the apparent basis for the parens patriae theory of treatment advocated by a Fifth Circuit court in Donaldson v. O'Connor. The Supreme Court vacated the Fifth Circuit court's opinion in O'Connor v.

120. See Roe, 410 U.S. at 155.
121. Youngberg, 457 U.S. at 322.
122. E.g. Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977)(a constitutional mandate cannot be frustrated by a lack of funds).
124. Id. at 738. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971). See also Youngberg, 457 U.S. at 327 (Blackmun, J., concurring).
125. "If the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose,' and the constitutional rule of Jackson is violated." Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1974), cert. granted, 419 U.S. 894 vacated, 422 U.S. 563 (1975).
Donaldson,\textsuperscript{126} deciding the case on a different basis.\textsuperscript{127} The Fifth Circuit court's rationale that confined mental patients have a right to medical treatment is consistent with the Youngberg and Jackson decisions and supports other court decisions determining that treatment is a right when a purpose of confinement is treatment.\textsuperscript{128}

A remaining question is whether rehabilitative care is part of the fourteenth amendment's mandate. Rehabilitative care generally includes "treatment and education . . . [leading to the] attainment of maximum function . . . . [An] individual who is recovering from a mental disorder is . . . in need of rehabilitative support."\textsuperscript{129} In most situations, it is very difficult to "locate the point at which treatment is no longer designed to combat the psychological roots of the disease, but rather is intended to rehabilitate."\textsuperscript{130} The thinness of the line between remedial and rehabilitative care creates a valid argument for recognizing a state's duty to provide rehabilitative care, although the precise nature of such a duty is unclear. Consistent with the rehabilitative care concept, the Fifth Circuit court in Donaldson and other courts have determined that a mental patient has a right to treatment so that the patient has "a reasonable opportunity to be cured or to improve his mental condition."\textsuperscript{131} However, since some mentally retarded persons have

\textsuperscript{126} 422 U.S. 563 (1975).
\textsuperscript{127} Id.; but see a concurring opinion rejecting the lower court's determination that there was constitutional right to treatment. Id. at 580 (Burger, C.J., concurring).
\textsuperscript{129} MEDICAL DICTIONARY, supra note 117, at 1578.
\textsuperscript{130} Comment, supra note 57, at 720.
\textsuperscript{131} Donaldson v. O'Conner, 493 F.2d 507, 520 (5th cir. 1974), cert. granted, 419 U.S. 894, vacated, 422 U.S. 563 (1975). See also Clark, 794 F.2d at 98 (Becker, J., concurring): "It might be argued . . . that the involuntarily civilly committed have a right to as much habilitation as their capacity will allow"; Scott ex rel. Weinbraub v. Plante, 691 F.2d 634 (3d Cir. 1982)(jury question as to whether patient received adequate treatment); see also Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981)(consent decree). In Willie M., petitioners and the State entered into a consent agreement dated September 1980, in which the State agreed to provide care to North Carolina citizens under age eighteen who: (a) now will or in the future suffer from serious emotional, mental or neurological handicaps, which handicaps have been accompanied by a behavior which is characterized as violent or assaultive; and (b) are, or will be in the future, involuntarily institutionalized or otherwise placed
no realistic hope of a cure, the state can hardly be expected to provide a cure to all persons. Consistent with the more expansive protections of the Due Process Clause, the state should provide care suitable to the specific needs of each patient in custody, to afford him or her a reasonable opportunity to reach maximum recovery. Providing such care is also consistent with the philosophy of parens patriae, which requires the state to take action that is in the best interest of the person in custody. To require such rehabilitative care is consistent with Youngberg, a decision in which the Court confined the restrictive definition of "minimally adequate training" to the facts of that case. The Youngberg court actually conceded that the Due Process Clause entitles a per-

in residential programs; and (c) for whom the defendants have not provided appropriate treatment and educational programs.

Id. at 57. The agreed treatment was:

[P]laintiff shall be provided habilitation, including medical treatment, education, training and care, suited to his needs, which affords him a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capabilities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency. . . . [d]efendants do not guarantee each plaintiff a 'cure,' but do guarantee each plaintiff a program of habilitation which is a good faith effort to accomplish the goals set forth herein.

Id. at 58. But see Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987), reh'g denied, 815 F.2d 1034 (5th Cir. 1987)(the Due Process Clause does not require a state to "provide treatment designed to improve a mentally retarded individual's condition"); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1250 (2d Cir. 1984)(a state is not required to grant a benefit of "optimal treatment"); Society for Good Will to Retarded Children, Inc. v. Cuomo, 718 F. Supp. 139, 141 (E.D.N.Y. 1989)(a patient is entitled to treatment necessary "to prevent client deterioration. . . ." Id.).


133. A treatment plan must be prepared for each person civilly committed to a mental health institution and must contain "specific goals that the patient must achieve to attain, maintain, and/or re-establish emotional and/or physical health as well as maximum growth and adaptive capabilities." See JOINT COMM’N ON ACCREDITATION OF HEALTH CARE ORGS., CONSOL. STANDARDS MANUAL § PM27, at 94 (1989).


135. Youngberg, 457 U.S. at 322.
son to more than the adequate care required by the eighth amend-
ment and includes treatment "reasonable in light of [a patient's] liberty interests...." While all courts have not agreed that the Due Process Clause requires rehabilitative care, most agree that civilly-committed mental patients are entitled to minimum care ensuring that physical and mental conditions do not deteriorate below levels existing at admission.

As for the degree of culpability giving rise to state liability, the Youngberg court rejected the deliberate indifference standard of Estelle, but did not indicate what standard would trigger Due Process Clause protections.

Constitution—North Carolina: No cases have construed article I, § 19 of the North Carolina Constitution while considering the rights of individuals in mental institutions, although the provision applies to such individuals. As in cases of inmate entitlement to medical care, North Carolina courts are guided, but not bound, by the United States Supreme Court's interpretation of the four-
teenth amendment.

Statutory Law—North Carolina: The North Carolina General Assembly has mandated that each patient admitted to a mental institution has a "right to treatment, including access to medical

136. Id. A person's health and well-being is generally recognized as a "liberty interest," and a civilly-committed person is clearly entitled to treatment more expa-
nsive than that accorded by the eighth amendment.


139. In the context of a prison setting, the court also reserved judgment on whether "'something less than intentional conduct . . . . is enough to trigger the protections of the Due Process Clause.'" Whitley v. Albers, 475 U.S. 312, 327 (1986)(quoting Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986). "The profes-
sional judgment standard enunciated in Youngberg is essentially the same as the 'deliberate indifference' standard as adopted in Doe v. New York City Depart-

care and habilitation . . . [including] the right to an individualized written treatment or habilitation plan setting forth a program to maximize development or restoration of [the patient's] capabilities." 141

Common Law: Under the general principles of tort law, a civilly-committed patient arguably is entitled to medical care from the state. 142 Furthermore, statutes creating a duty to provide care could give rise to a tort action for violation of the statutory duty. 143

C. Pretrial Detainees

Because pretrial detainees have not been adjudicated guilty of a crime, they are not entitled to eighth amendment protections. 144 However, the Due Process Clause of the fourteenth amendment requires the state to provide medical care to detainees to the extent the eighth amendment guarantees medical care to persons convicted of crimes. 145 Accordingly, detainees showing deliberate indif-

142. "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965). See also Id. § 324:
One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused by him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge. Id. See generally PROSSER AND KEETON, supra note 113, § 56.
144. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977); but see Id. at 685 (White, J., dissenting)(arguing that the eighth amendment applies to any cruel and unusual punishment, not just punishment resulting from conviction for crime). In Bell v. Wolfish, the Court stated that "the Due Process Clause rather than the eighth amendment" was appropriately considered in determining the rights of pretrial detainees. The Court noted that while convicted inmates may be punished when the punishment is not "'cruel and unusual,'" the due process clause prohibits punishment of pretrial detainees. 441 U.S. 520, 535 n.16 (1979).
145. "[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983). "'[I]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted.'" Inmates of Allegany County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979)(quoting Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976). In Revere, police officers injured Revere while apprehending him, and the question was whether Revere had a constitutional right to
ference to the detainee's serious medical needs, including his or her psychological and psychiatric needs, are entitled to relief. For inmates, the standard of deliberate indifference applies to claims alleging action that violates either the eighth amendment or fourteenth amendment. For pretrial detainees, as for confined mental patients, the Supreme Court has left unanswered the question of the degree of culpability necessary to establish deprivation of constitutional rights guaranteed by the Due Process Clause. However, if a pretrial detainee shows interference with a liberty interest, such as the state's failure to provide medical care, the state then has the burden of justifying the failure to provide such care.

Pretrial detainees also are entitled to protection according to common law and the North Carolina "law of the land" clause.

D. Children Not in Custody

Federal Constitution: The Supreme Court has interpreted the medical care for these injuries. *City of Revere*, 463 U.S. 239 (1983).

146. Whitley v. Albers, 475 U.S. 312, 327 (1986); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989); but see City of Canton v. Harris, 489 U.S. 378, ___ n.8 (1989): "[T]his Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case—a denial of the due process right to medical care while in detention—is established." *Id.*

147. "[S]omething less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protection of the Due Process Clause." Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986). See Whitley, 475 U.S. at 327; *City of Canton*, 489 U.S. at ___ n.8 (the Court again refused to resolve the Revere decision question as to whether there must be a proof of deliberate indifference to the plaintiff's rights or whether something less, such as gross negligence, would be sufficient).

148. Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978); Bell, 441 U.S. 520 (1979) (a court must determine whether a condition imposed upon a pretrial detainee in state custody "is reasonably related to a legitimate governmental objective" and if not, whether the action amounts to "punishment" and thereby violates the due process clause. *Id.* at 539). Also, the Court notes that the government has two legitimate interests in detaining a person prior to trial, which are: (1) the need to secure detainee's presence at the trial and (2) the government's need to "manage the facility in which the individual is detained." *Id.* at 540.

149. County commissioners have a duty to provide medical attention to persons committed to jail "as the result of a preliminary trial, or upon a final judgment on his conviction of a violation of law." Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 294 (1926).

fourteenth amendment's Due Process Clause as a limit on the state's power to act and "not as a guarantee of certain minimal levels of safety and security." According to the Due Process Clause does not "impose an affirmative obligation on the State to ensure that [an individual's interest in life, liberty or property] . . . do not come to harm by other means."

151. DeShaney, 489 U.S. 189, ____ (1989). "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." Harris v. McRae, 448 U.S. 297, 317-18 (1980). "As a general matter, a State is under no constitutional duty to provide substantive services for those within its border." Youngberg v. Romeo, 457 U.S. 307, 317 (1982). The Supreme Court rejected the ideal commonwealth described by Plato where no parent would know his own child and children would be raised by the state to develop an ideal citizen. Meyer v. Nebraska, 262 U.S. 390, 401 (1923). The Court said that:

although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly would be affirmed that any legislature could impose such restrictions against the people of a state without doing violence to both letter and spirit of the Constitution.

Id. at 402. "Though this Court has the power to insure that no state agency improperly interfere in . . . family life . . . it does not have the power to enforce the laudable sociological view of the importance of the family held by plaintiffs and their next friends." Black v. Beame, 419 F. Supp. 599, 607 (S.D.N.Y. 1976)(emphasis in original), aff'd, 550 F.2d 815 (2d Cir. 1977).

152. DeShaney, 489 U.S. 189, ____ (1989). Some authors have suggested that it is not that the government does not have such a duty, but that from a practicable point of view, court enforceability of such a duty is unlikely. Id. Government has "an affirmative obligation somehow to provide at least a minimally decent subsistence with respect to the most basic human needs [and that the failure to do so] . . . can be as deadly as the most pointed of governmental acts." L. Tribe, supra note 83, at 1336 (footnote omitted). However, Tribe notes that the difficulty of enforcement of such an obligation in the courts would be insurmountable, and the expense huge. Therefore:

[T]he affirmative governmental duty to meet basic human needs cannot always be enforced directly—apart from such special situations as that of the prisoner in Estelle v. Gamble, as to whom it was easy to fix blame on the government for the deprivation experienced. Instead, it will usually be necessary to reflect affirmative duties less directly—through governmental obligations to provide various procedural safeguards when the deprivation of welfare, wages, or household goods is involved; governmental responsibility to determine eligibility for welfare and other basic services in terms of need rather than through such unrelated criteria as duration of residence or composition of family; and governmental duties to determine need with substantial accuracy . . . a government which
long recognized a family's constitutional rights to function without interference from the state. 153 Of course, this right is not absolute and must be weighed against legitimate state interests. 154 However, if the "[S]tate takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 155 Thus, government liability arises only when the state acts or fails to act in the face of a constitutional or statutory obligation to act. 156

An oft-raised question is whether harm to persons in state custody was caused by the state or by private persons. 157 "To constitute state action, 'the deprivation must be caused by the exercise [or the failure to exercise] . . . some right or privilege created by the State . . . or by a person for whom the State is responsible. . . .'" 158 When the state has an affirmative obligation to provide cer-

...
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Constitution—North Carolina: The "law of the land" clause in article I, § 19 of the North Carolina Constitution also has been interpreted to require state action for violation of its provisions, although the clause does not contain the "state action" language of the fourteenth amendment.

Outside the constitutions, state or federal statutes may create state duties or affirmative obligations to provide care or protection to those not in custody. When a statute's essential purpose is to

lenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" . . . [second, whether the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State, [and third, whether] the private entity has exercised powers that are "traditionally the exclusive prerogative of the State."


159. Id. at 1009 (when the state had an affirmative obligation to provide medical care to prisoner, a doctor contracting with the state to provide that medical care is a state actor). Id. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney, 489 U.S. 189, ___ (1989). When the state affirmatively exercises its power to restrain one's liberty, that action is state action mandating compliance with the relevant constitutional provisions. Deshaney, 489 U.S. 189, ___ (1989).

160. "In distinguishing between state and private action, 'the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" Gaston Bd. of Realtors, Inc. v. Harrison, 64 N.C. App. 29, 32, 306 S.E.2d 809, 811, rev'd on other grounds, 311 N.C. 230, 316 S.E.2d 59 (1984)(quoting Jackson, 419 U.S., at 351.).

161. Id. at 36, 306 S.E.2d at 813. The "law of the land" language and the phrase "by the state" is absent from the equal protection clause of N.C. Constitution article I, § 19 and in the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. Id. (Johnson, J., dissenting).

However, my research has disclosed no prior North Carolina decision in which Art. I, § 19 has been interpreted to bind private citizens in their relations with one another . . . [m]oreover, in the case of private associations, such an interpretation would give rise to serious constitutional questions regarding freedom of association under the First and Fourteenth Amendments to the United States Constitution.

Id. at 36, 306 S.E.2d at 813-14.
protect certain individuals from a specific harm, rather than protecting the general public, a "special duty" may exist which supports a claim against the state for negligence.\textsuperscript{162}

Statutory—North Carolina: In North Carolina, each county director of the Department of Social Services must investigate complaints regarding abused, neglected or dependent children.\textsuperscript{163} "[I]nvestigation and screening of complaints and casework or other counseling services" must be provided "to help the parents . . . to prevent abuse or neglect, to improve the quality of child care . . . and to preserve and stabilize family life."\textsuperscript{164} These services are to be provided only when abuse, neglect or dependency is confirmed and the child remains with its family.\textsuperscript{165} While there are no North Carolina cases defining casework or other counseling services, the North Carolina Division of Social Services emphasizes that the "foremost responsibility" of the Department of Social Services is to "protect the child."\textsuperscript{166} Social workers bear responsibility "not only in the delivery of services but also in coordinating the delivery of specific services by other agencies or private service providers."\textsuperscript{167} Each local social services department must develop a

162. A special duty exists if (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.


164. Id.


166. Id. § 1450.

167. Id. § 1454. See statutes relating to "Entitlement of Indigent Persons to Medical Assistance," 42 U.S.C.A. § 1396d (1983). See also N.C. GEN. STAT. § 108A-54 (1989). Authority suggests that social workers should give "[n]otice to the family concerning the services available within the agency and in the community that might address the family or child's problems." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD WELFARE LEAGUE OF AM., YOUTH LAW CENTER, NATIONAL CENTER FOR YOUTH LAW, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 72 [hereinafter REASONABLE EFFORTS].
clearly-written service or treatment plan for the family, which as-

sesses the family’s strength and includes “what the [social worker] and other persons will do to help the family achieve these goals.”168 The requirement recognizes that a mental health evaluation is a very important part of the assessment process when the process is initiated by a report of abuse, neglect or dependency to the local department.169 However, the “psychiatric/psychological assessment is not for the purpose of treatment,”170 but for assessment alone.

Consistent with a local department’s obligation to provide protective services is the requirement that a district court judge determine and make findings on whether “reasonable efforts have been made to eliminate the need for placement of the juvenile in foster care” prior to issuing an order removing a child from his home.171 While failure to make reasonable efforts is not a ground for refusing to place a child in foster care,172 the statutory language appears to create a state duty to make such efforts. North Carolina statutes do not define “reasonable efforts,” nor does the federal legislation,173 upon which the North Carolina statute is patterned. “Reasonable efforts” have been interpreted as requiring child welfare agencies to establish effective programs of prevention, which should include “treatment for physical or emotional abusers and victims” and “mental health counseling/psychotherapy.”174 ‘Reasonable efforts’ has also been interpreted to include medical and “[f]inancial assistance for certain medical, dental, and pharmaceutical care based upon a needs formula . . . [and] provision of or arrangements for mental health services.”175 However, the state’s

169. Id. § 1460(IV)(A).
170. Id.
172. Id.
173. “[I]n each case, reasonable efforts will be made (A) prior to the placement of the child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.” 42 U.S.C. § 671(15) (1988). “[T]he states may want to consider inclusion of the services listed in 45 C.F.R. 1357.15(e) as they move toward implementing the ‘reasonable efforts’ and service program requirements of the Act.” 48 Fed. Reg. 23, 107 (1983). The services listed are: “individual and family counseling; . . . provision of, or arrangements for, mental health, drug and alcohol abuse counseling . . . .” 45 C.F.R. 1357.15(e)(2) (1989).
obligation to make reasonable efforts apparently arises only after it has been advised of the likelihood of abuse, neglect, or dependency and it confirms the existence of such a condition.

Statutory—Federal: Federal statutes also require reasonable efforts. The state is obligated to make "reasonable efforts . . . to prevent or eliminate the need for removal of the child from his home . . ." as a condition for receipt of federal foster-care subsidies. A child also is entitled to medical assistance.177

E. Children in Detention

The juvenile justice system currently permits detention of children for acts that would be criminal if committed by an adult. These so-called delinquent acts are adjudicated in a manner that does not provide all the procedural due process rights to which an adult offender would be entitled.178 The philosophy of the juvenile justice system is that children need rehabilitation, not punishment, and a civil proceeding accomplishes the goal when criminal responsibility is not determined.179 In this setting, the question is what is the state's duty to provide medical care to detained children.

Federal Constitution—Fourteenth Amendment: In early development of law relating to the state's duty to provide care to children in juvenile detention, some courts developed a "right to treatment" theory based on parens patriae and quid pro quo.180 Under parens patriae theory, courts reasoned that since the juvenile justice system was based on the state's protection and rehabil-

177. See infra, note 264.
178. "[W]e do hold that the hearing must measure up to the essentials of due process and fair treatment." Kent v. United States, 383 U.S. 541, 562 (1966) (citation omitted). A juvenile has some due process rights relating to notice, right to counsel and privilege against self-incrimination. See In re Gault, 387 U.S. 1 (1967).
179. Kent, 383 U.S. at 554.
ition of children, confinement which did not rehabilitate was inconsistent with the Due Process Clause, which mandates that "the nature . . . of commitment . . . bear some reasonable relation to the purpose" for commitment.\textsuperscript{181} Under \textit{quid pro quo} theory, courts reasoned that if juveniles did not receive full due process protections on the grounds that they would be rehabilitated, then juveniles were constitutionally entitled to treatment.\textsuperscript{182}

In 1975, Chief Justice Burger concurred with the Supreme Court's majority opinion, but questioned the validity of both \textit{parens patriae} and \textit{quid pro quo} theories as bases for supporting due process claims.\textsuperscript{183} Other courts also have criticized claims based on these theories because "rehabilitative treatment is not the only legitimate purpose of juvenile confinement,"\textsuperscript{184} and reduced due process rights for juveniles are "constitutionally acceptable . . . [because] . . . there is no legally cognizable \textit{quo} to trigger a compensatory \textit{quid}."\textsuperscript{185}

While these criticisms have merit, they do not require total rejection of the two theories. The existence of alternative legitimate purposes for juvenile confinement, including protecting society, does not nullify the necessity for treatment under the \textit{parens patriae} theory when one purpose\textsuperscript{186} of confinement is juvenile re-

\begin{thebibliography}{99}
\bibitem{182} \textit{See generally} Santana 714 F.2d at 1176.
\bibitem{183} O'Connor v. Donaldson, 422 U.S. 563, 578-88 (1975). Chief Justice Burger opined that treatment was not necessarily required as a condition of a civil commitment since there are other legitimate bases for confinement such as public protection. \textit{Id.} at 581-82. Chief Justice Burger argued that the remedy for reduced procedural safeguards is not to provide treatment, but to determine whether more strict compliance with the procedural due process should be required. \textit{Id.} at 585-88.
\bibitem{184} Santana, 714 F.2d at 1177. "[C]ivil commitment . . . without treatment is not necessarily an impermissible exercise of governmental power." Morales, 562 F.2d at 998. \textit{See generally} Note, \textit{An Examination of Whether Incarcerated Juveniles are Entitled by the Constitution to Rehabilitative Treatment}. 84 \textit{Mich. L. Rev.} 286 (1985) [hereinafter \textit{Rehabilitation of Juveniles}].
\bibitem{185} Santana, 714 F.2d at 1177. "The interest of the individual and of society in the particular situation determine the standards for due process." Morales, 562 F.2d at 998.
\bibitem{186} "It is further intended that institutional programs for delinquents provide appropriate treatment and care according to the needs of the children in care . . . ." N.C. \textit{Gen. Stat.} § 134A-1 (1989). "Where the state, by statute, authorizes confinement for the purpose of care and treatment," treatment is required by the Due Process Clause. \textit{Rehabilitation of Juveniles}, supra note 184, at 298.
\end{thebibliography}
habilitation. Otherwise, the nature of the commitment would not be consistent with the purpose of the commitment, in violation of the Due Process Clause.\(^{187}\) The *quid pro quo* theory likewise cannot be dismissed simply on the grounds that the Supreme Court has found acceptable limited due process rights for juveniles. While the Court has approved of reduced procedural safeguards in juvenile proceedings on several occasions, it generally has done so "because it sought to free the states to pursue the nonpunitive, rehabilitative aims of the juvenile system."\(^{188}\) However, historically, the Supreme Court's remedy for failure to provide necessary treatment has not been to require treatment, thereby creating a new substantive right.\(^{189}\) Instead, the Court's response to juvenile court system failures to provide "solicitous care and regenerative treatment" has been to impose more protective procedural safeguards.\(^{190}\) Accordingly, it appears that the Due Process Clause does not support the *quid pro quo* theory as a basis for treatment.

Beyond the theories of *parens patriae* and *quid pro quo*, the Due Process Clause entitles committed juveniles to the same rights as other civilly-committed persons.\(^{191}\) The Clause entitles juveniles

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187. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972).

188. *Rehabilitation of Juveniles*, supra note 184, at 300. "[W]e are particularly reluctant to say . . . that the [juvenile] system cannot accomplish its rehabilitative goals . . . and we feel that we would be impeding that experimentation by imposing the jury trial." McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

189. "[T]he Supreme Court has never suggested that the states are obligated to provide rehabilitative treatment as the consideration for reduced procedural safeguards." *Rehabilitation of Juveniles*, supra note 184, at 301-02 (emphasis in original).


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

DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, ___ (1989) (citations omitted). "When a person is institutionalized—and wholly dependent on the state . . . a duty to provide certain services and care does exist . . . ." Youngberg v. Romeo, 457 U.S. 307, 317 (1982). Juveniles are entitled to the pro-
to the same expansive rights to rehabilitative care as the rights of
patients committed to mental institutions. Juveniles have rights
to basic medical care, and psychological, psychiatric, and rehabili-
tative treatment for each juvenile’s specific needs, to afford the ju-
venile a reasonable opportunity to reach maximum recovery.

Federal Constitution—Eighth Amendment: Some courts have
applied the more restrictive eighth amendment protections to de-
tained juveniles. Because a juvenile committed for a delinquent
act is not technically guilty of a crime, the eighth amendment argu-
ably does not apply. However, the Supreme Court in Ingra-
ham v. Wright left open the possibility that a juvenile’s confine-
ment might be punishment “sufficiently analogous to criminal
punishments to justify application of the eighth amendment.”

Statutory Law—North Carolina: The North Carolina General
Assembly has provided that after confinement, all delinquent
juveniles must receive “appropriate treatment and care according
to the needs of the children in care.” The treatment is to
include psychological and psychiatric care. Regulations promul-
gated pursuant to the statutes require the treatment services to
“enhance the committed juvenile’s ability to cope in a responsible
manner with community living when released.” Services and
programs designed for these children must “foster the educational,
emotional, and social development of each child” in detention. To meet these goals, regulations require a psychological assessment for each child, and preparation of a treatment plan which addresses the child’s emotional needs. National standards promulgated for juvenile training schools require delivery of psychological and psychiatric services deemed appropriate by a licensed physician.

F. Children in Foster Care

While children in foster care “suffer disproportionately from serious emotional, medical and psychological disabilities,” only recently have courts begun to expand constitutional protections for these children. Foster-care children, in addition to disabilities they experience before separation, also experience the “pain of separation from their family setting no matter how inadequate that setting has been.” Accordingly, their need for medical care is acute. Nonetheless, care provided generally has been woefully inadequate, and a recent study revealed that only “one-fourth of the children who had identifiable emotional or developmental problems had received treatment.”

Foster children are not prisoners who suffer “restrictions imposed by a state criminal justice system” and therefore are not subject to removal from foster care by writ of habeas corpus. Their unique status raises the question of whether the state has a duty to protect children in foster care. Furthermore, the fact

200. Id.
201. N.C. ADMIN. CODE tit. 10, r. 44F.0401 (June 1988).
203. N.C. ADMIN. CODE tit. 10, r. 44F.0403(b)(2)(A) (June 1988).
204. AMERICAN CORRECTIONAL ASS’N, STANDARDS FOR JUVENILE TRAINING SCHOOLS §§ 2.9229, 2.9230, 2.9334 (Supp. 1988).
206. As of publication of Unsafe Havens, there was “but one reported federal case that [had] enforced by injunctive decree a constitutional right of foster children to protection from harm while in foster care.” Id. at 202.
207. Id. at 207 (footnote omitted).
208. Id. at 209 (footnote omitted).
210. “Thus, Lehman is not authority for the proposition that foster children lack a constitutional right to be protected, but only that the federal habeas corpus statute is not the way to assert such a right.” Unsafe Havens, supra note 205, at
that foster children are not institutionalized as prisoners and mental health patients should not determine whether the state has a duty to provide care.\(^{211}\)

Federal Constitution: In *DeShaney v. Winnebago*, \(^{212}\) the Supreme Court stated that if the state takes a person into custody "the Constitution imposes upon it a corresponding duty to assume some responsibility for [that person's] safety and general well-being."\(^{213}\) The state's action in restricting a person's liberty so that the person cannot care for himself gives rise to constitutional protections.\(^{214}\) The *DeShaney* Court specifically excluded the issue of whether a child placed in foster care is entitled to the protections of the Due Process Clause.\(^{215}\) The Court explained that if the state removed the child from "free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."\(^{216}\) However, several courts have recognized foster children's constitutional due process interests both before and since *DeShaney*. In 1981, in *Doe v. New York City Dep't of Social Servs.*, a Second Circuit court allowed a Section 1983 action against the state for harm caused to a child in foster care.\(^{217}\) Unfortunately, the *Doe* court did not identify the source of the child's constitutional right or explain its reasons for extending such protections to foster children. In 1987, an Eleventh Circuit court addressed the issue of constitutional rights of a child removed from the custody of her parents placed in foster care and

\(^{211}\) Foster children, like prisoners, rely on the state for shelter, clothing, food, and freedom from physical abuse or neglect. Although they may not be held in large institutional settings, they are just as dependent on the state for their needs as are prisoners. This similarity is not diminished because the state chooses to act through private agents in the foster care context.

*Id.* at 236.

\(^{212}\) *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, ____ (1989).

\(^{213}\) *Id.* 489 U.S. 189, ____ (1989).

\(^{214}\) *Id.* 489 U.S. 189, ____ (1989).

\(^{215}\) *Id.* 489 U.S. 189, ____ n.9 (1989).

\(^{216}\) *Id.*

\(^{217}\) "When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution." *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).
abused by her foster mother in *Taylor v. Ledbetter.*\(^{218}\) The *Taylor* court determined that since "the child's physical safety was a primary objective in placing the child in the foster home, [its actions] placed an obligation on the State to [e]nsure the continuing safety of that environment [and t]he state's failure to meet that obligation . . . constituted a deprivation of liberty under the fourteenth amendment.'"\(^{219}\) The *Taylor* court analogized the situation of a child placed in foster care to that of a prisoner and determined that similar rules of law apply.\(^{220}\) The courts in both the *Doe* and *Taylor* decisions required that claimants allege and show "that the state officials were deliberately indifferent to the welfare of the child" before they would consider the liability issue.\(^{221}\)

As a result of the *DeShaney* decision, other courts have determined that the state assumes a constitutional obligation to protect children who are removed from their families and placed in foster homes.\(^{222}\) In *B.H. v. Johnson*, an Illinois federal district court de-

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\(^{218}\) 818 F.2d 791 (11th Cir. 1987).

\(^{219}\) *Id.* at 795.

\(^{220}\) Although the contacts between actors in the foster home situation are not as close as in the penal institution the situations are close enough to be held analogous. The lack of proximity in the foster home situation simply suggests that deliberate indifference is not as easily inferred or shown from a failure to act. *Id.* at 796.

\(^{221}\) *Id.* at 797; *Doe*, 649 F.2d at 141; *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (The issue of whether the claimant must show the physical and mental health of the foster child has been seriously impaired remains an open question.). "The extension to the case in which the plaintiff's mental health is seriously impaired by deliberate and unjustified state action is straightforward." *Id.* at 848. The dissent in *K.H. ex rel Murphy* suggest that the standard should be a significant impairment rather than a serious impairment. *Id.* at 859 n.3.

\(^{222}\) By removing children from their parents' custody, making them wards of the state, and placing them in foster care programs, the State of Oregon established a special relationship with these children and thus assumed special constitutional obligations toward them. The State's obligation includes a duty to assist the children to exercise their constitutional rights. *Lipscomb ex rel. DeFehr v. Simmons*, 884 F.2d 1242, 1246 (9th Cir. 1989).

"[A] child who is in the state's custody has a substantive due process right to be free from unreasonable and unnecessary intrusions on both its physical and emotional well-being. Our conclusion is grounded in common sense: A child's physical and emotional well-being are equally important." *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989).
tended in 1989 that foster children have a substantive due process right to "be provided by the state with adequate food, shelter, clothing and medical care and minimally adequate training to secure these basic constitutional rights." In another 1989 case, *Lipscomb v. Simmons*, a Ninth Circuit court determined that "[w]hen a State removes abused and neglected children from their parents' homes, it assumes responsibility for ensuring that their basic needs are met and their fundamental rights respected." Accordingly, these children have the same entitlement to rehabilitative care as persons civilly-committed to mental institutions.

This view is supported by the likelihood that a parent's failure to provide this very care would be considered neglect and result in removal of the child from the home. Surely the state cannot be held to any lesser standard. Furthermore, treatment received by foster children must be consistent with *Jackson*, and bear some reasonable relation to the purpose for custody. Since the purpose of the foster care system is to further the best interest of the child, the treatment foster children receive should be in their best interests. Children already traumatized by their removal from the home are by "nature in a developmental phase of their lives," in need of increased mental health care and "[p]ositive efforts are necessary to prevent stagnation, which, for children, is synonymous with deterioration. . . ."

By extending constitutional protections to children in foster care, courts have rejected as constitutionally immaterial distinctions between foster children and prisoners, and foster children

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223. *B.H.*, 715 F. Supp. at 1396 (footnote omitted). The constitutional right to minimally adequate training does not include the obligation of the state to make efforts to "reunite [the children] with their families, to ensure parental and sibling visitation, stable placement in the least restrictive setting possible, and an adequate number of follow-up case workers." *Id.* at 1396-97.

224. *Lipscomb*, 884 F.2d at 1249. "Like a parent, the State bears the responsibility of protecting the welfare of children in its care." *Id.* at 1247. *See K.H. ex rel Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (Coffey, J., dissenting) (When the state accepts custody of an infant child it accepts the responsibility of providing that child with proper care. This proper care may include counseling and therapy needed for mental and psychological problems. *Id.* at 858, 866.)


226. *See infra*, notes 275-78.


and institutionalized mental patients.\textsuperscript{229} Courts also have refused to extend the rationale of \textit{Ingraham}\textsuperscript{230} to foster children.\textsuperscript{231} In \textit{Ingraham}, the Supreme Court determined that school children receiving corporal punishment were not entitled to the eighth amendment protections, and because other common law remedies existed, they were not entitled to a prior due process hearing.\textsuperscript{232} \textit{Ingraham} is not binding precedent, because foster children are powerless and not under constant public scrutiny, and their plights are not analogous to those of school children.\textsuperscript{233} "Foster children,

\textsuperscript{229} While:

[A] closer relationship exists between superior officers, subordinate officers, and the inmates within a prison than exists between a state agency, the foster parents, and the foster child in a foster care setting ... [this] lack of proximity in the foster home situation simply suggests that deliberate indifference is not as easily inferred or shown from a failure to act.

Taylor v. Ledbetter, 818 F.2d 791, 796 (11th Cir. 1987). Voluntary residents of schools for the mentally retarded are entitled to the same constitutional protections as involuntarily confined prisoners. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1246 (2d Cir. 1984). Regardless of the locus of confinement, [whether in an individual foster home or in some institution] the sole purpose for the state's intervention into the children's lives is protection." \textit{Unsafe Havens, supra} note 205, at 236 (footnote omitted).

[S]ince most children cannot consent to foster care, since few parents truly consent to foster care, since none consent to unsafe care for their children, since safety is too important to be bartered or dependent on the voluntary nature of the service, and since the provision of a service by the state must be administered constitutionally, the constitutional right to safety must follow all children into care regardless of whether or not their placement is voluntary.

\textit{Id.} at 242.

An \textit{infant} foster child of tender years (two and one-half years), whom the state removes from her parents' custody, likewise is unable to 'care for herself and is certainly equally dependent on the state for the fulfillment of her needs for proper development, food, clothing, shelter and proper medical care as is the institutionalized prisoner.

K.H. \textit{ex rel} Murphy v. Morgan, 914 F.2d 846, 856 (7th Cir. 1990) (Coffey, J., dissenting).

\textsuperscript{230} Ingraham v. Wright, 430 U.S. 651 (1976).

\textsuperscript{231} "Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment." \textit{Taylor}, 818 F.2d at 797.

\textsuperscript{232} \textit{Ingraham}, 430 U.S. at 651.

\textsuperscript{233} "For purposes of constitutional protection and judicial intervention, foster children have more of the attributes of prisoners than of school children." \textit{Unsafe Havens, supra} note 205, at 243.
Unlike school children, cannot rely on the watchful eyes of their parents to protect them from abuse; they are in foster care precisely because their parents cannot care for them. 234

The DeShaney decision also leaves open the question of whether the foster parent who harms the child by an act or omission is a private actor or an agent of the state. In West v. Atkins, 235 the Supreme Court held that a private doctor who exercises his professional judgment in rendering medical care to a prison inmate is a state actor. 236 The Court reasoned that the state had a constitutional obligation to provide medical care to prisoners and a contract delegating that responsibility on a private doctor did not relieve the state of its obligation. 237 Therefore, if the state has a constitutional duty to care for foster children, the state's decision to place these children in private foster homes rather than in state institutions does not relieve it of the responsibility to provide care. 238 However, an additional question is whether it matters if the child comes into foster care because the state intervenes or because the parents voluntarily relinquish the child. A Fourth Circuit court, in Milburn v. Ann Arundel County Dep't of Social Servs., 239 determined that when parents voluntarily place their child in foster care, foster parents are not state actors and the state is not liable for harms to the child in foster care. 240 The import of the

Though attendance may not always be voluntary, the public school remains an open institution... and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment. Ingraham, 430 U.S. at 670.

234. Unsafe Havens, supra note 205, at 243 (footnote omitted).
236. Id. at 57.
237. Id. at 56.
238. The state has obligation to protect physical and emotional well-being of children whether they are in state institutions or "have been placed by the state in foster care or other non-state institutions." B.H. v. Johnson, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989). "It should have been obvious from the day Youngberg was decided that a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons. . . ." K.H. ex rel Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (citations omitted).
240. Id. at 476.
Milburn court's decision is limited to situations in which parents voluntarily relinquish their child to the state, because the court emphasized that the state "by the affirmative exercise of its power" 241 had not restrained the child's liberty. However, to relieve the state of a constitutional obligation to provide care to children voluntarily placed in foster homes by their parents is not only illogical, but places a much too restrictive reading on DeShaney. While the placement may be a voluntary parental act, it is far from a voluntary act of the child. "The children themselves have no more choice about placement than an involuntarily[-]committed prisoner or mental patient." 242 Furthermore, the parent's voluntary act is usually little more voluntary than the child's and usually occurs after recognition of an inability to care for the child or as a result of threatened state action to remove the child. "Even in those cases where the consent is genuine, it cannot reasonably be understood to be a voluntary decision to expose a child to unsafe conditions." 243 Courts have determined that "voluntary residents of schools for the mentally retarded cannot be punished and are entitled to rights . . . at least as great as those of prison inmates." 244 Additionally, other courts have determined that voluntarily-rendered services must themselves be administered constitutionally. 245 The language of DeShaney also supports the state's obligation to provide care to all children in foster care, whether voluntarily placed or not. In each instance, the state takes action necessary to assume custody of the child, either by agreeing to place the child in foster care at the parent's request or by initiating the procedures to obtain custody. 246 Either action is a sufficiently affirmative state act to implicate its constitutionally-mandated duties of care. Furthermore, some state statutes require periodic

241. Id.
242. Unsafe Havens, supra note 205, at 239.
243. Id. at 240 (footnote omitted).
244. Id. at 240 (footnote omitted).
246. "[A]lthough there is no recognized affirmative constitutional right to the provision of foster care, the state, having chosen to provide the service, is obligated to administer it constitutionally." Unsafe Havens, supra note 205, at 242 (footnote omitted).
court review of all voluntary placements to ensure that placement is in the best interest of the child and that services are being provided. Accordingly, the better-reasoned analysis identifies foster parents as state actors. However, rejection of such an argument does not necessarily relieve the state of the obligation to protect foster children. Because the children are clearly in state custody, though placed in a foster home, they arguably are protected from harm caused by others while in state custody.

Statutory Law—Federal: As a condition for receiving federal funds, subsection IV-E of the Social Security Act, (hereafter the “Act”) entitled “Federal Payments for Foster Care and Adoption Assistance,” requires the state to provide foster children with “foster care maintenance payments.” The payments include “the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the

247. court is required to review placement of juveniles in foster care pursuant to a:

 voluntary agreement between the juvenile’s parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to: (1) [t]he voluntariness of the placement; (2) [t]he appropriateness of the placement; (3) [w]hether the placement is in the best interest of the juvenile; and (4) [t]he services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.


248. Prison officials may be liable for a violation of prisoner’s civil rights where they are deliberately indifferent to a prisoner’s constitutional rights to be free from sexual attacks by other inmates, if they actually intend to deprive him of that right, or if they act with reckless disregard of this right.


child’s home for visitation.’” A child qualifies for Title IV-E benefits if the child meets the statutory prerequisites. Also as a condition to receiving federal funding, the state must provide certain benefits to foster children not qualifying for Title IV-E benefits. These children are generally eligible for federal benefits pursuant to the “Child Welfare Services Act” or subsection IV-B of the Act. Pursuant to either Title IV-E or Title IV-B, the foster child is entitled to have the state adopt a case plan if the state accepts federal monies under the program. A “case plan” is defined by statute as:

a plan for assuring that the child receives proper care and that

252. The prerequisites include a child who:
(A) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or (B) (i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in § 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such relative and application therefor had been made.
254. An IV-E child in foster care is entitled to the development of a case plan. 42 U.S.C. § 671(16) (1988). A state is entitled to a portion of a federal appropriation pursuant to 42 U.S.C. § 620 only if the state has implemented and is operating “a case review system (as defined in § 675(5) of this title) for each child receiving foster care under the supervision of the State. . . .” 42 U.S.C.A. § 627(a)(2)(B) (West Supp. 1990). “A case review system” is defined as a procedure for assuring that “each child has a case plan designed to achieve placement in the least restrictive (most family-like) setting available and in close proximity to the parents’ home, consistent with the best interest and special needs of the child.” 42 U.S.C. § 675(5)(A) (1988).

Because Title IV-B requires, as a condition of increased funding, implementation of the case review system for each child in state supervised foster care, not only those in federally funded foster care, the substantive rights that arise from the case review requirements should apply regardless of whether federal funds are being paid under Title IV-E to support the child’s placement.

A. ENGLISH, FOSTER CHILDREN IN THE COURTS 616 (1983) [hereinafter ENGLISH]. Case plan requirements apply to more than just Title IV-E eligible children: “[c]hildren in state-supervised foster care who are not IV-E eligible are also included.” Reasonable Efforts, supra note 167, at 61 n.3.

255. “The term ‘proper care’ as used in the Social Security Act has been in-
services are provided to the parents, the child, and foster parents... to improve the conditions in the parents' home, facilitate return of the child to his own home or [to] permanent placement... and address the needs of the child while in foster care...  

The state must develop the plan within sixty days after the state assumes custody and must "achieve a placement in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s), consistent with the best interest and special needs of the child." The plan also must "[describe] the services offered and the services provided to prevent removal of the child from the home and to reunify the family." Arguably, the state actually must provide the plan services to receive federal monies under either Title IV-E or Title IV-B of the Act. In addition to services mandated by the case plan, a state receiving funding under either Title IV-E or Title IV-B must establish and maintain standards for foster family homes, in accord with standards of national organizations, including standards relating to "safety... and protection of civil rights..."


260. ENGLISH, supra note 254, at 616 (suggesting that it is implicit in the Act that services specified in the plan must be actually provided to the child and the child's parents). See Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983)(affirming the district court's action requiring the Department of Social Services to provide a case plan for each child in foster care and prohibiting the Department of Social Services from assigning more than twenty cases per case worker); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989)(denying defendant's motion to dismiss alleged violations of Title IV, parts B and E of the Act).

261. 42 U.S.C. § 671(10) (1988). See STANDARDS FOR HEALTH CARE SERVS., supra note 23 (generally establishing standards requiring a case plan addressing the physical and emotional health needs of each child in foster care, and providing health services necessary and appropriate for the child's physical and mental health needs).
the court affirmed the trial court's refusal to dismiss the complaint of a group of foster children who alleged that they were "victims of physical and sexual abuse as well as medical neglect" as a consequence of state inaction.\textsuperscript{262} The court determined that the Title IV-E and Title IV-B requirements for case plans for all children in foster care and for operation of foster homes in accordance with recognized national standards, "spell out a standard of conduct, and as a corollary[,] rights in plaintiffs, which plaintiffs have alleged have been denied."\textsuperscript{263} The \textit{Massinga} court affirmed the trial court's grant of a preliminary injunction requiring the state to "expand its medical services to foster children ... ."\textsuperscript{264}

The holding of \textit{Massinga} is consistent with the mandates of the Act. National standards for the care of foster children suggest that "a written health plan" be developed after a comprehensive health examination,\textsuperscript{265} and that complete health services, including psychiatric and psychological,\textsuperscript{266} be provided to the child. The Act has created a duty to provide medical care by mandating proper care pursuant to a case plan and by mandating that foster homes be operated in a manner consistent with national standards.

Federal statutes contain an additional provision that requires the state to provide payment for medical services to children in some instances. Subchapter XIX of the Act, entitled "Grants to States for Medical Assistance Programs," authorizes the distribution of federal funds to states which have approved plans to furnish medical assistance to people "whose incomes and resources are insufficient to meet the costs of necessary medical services ... ."\textsuperscript{267} To qualify for federal medical assistance funding, the

\begin{footnotes}
\item[263.] Id. at 123.
\item[264.] Id. at 120.
\item[265.] STANDARDS FOR HEALTH CARE SERVS., supra note 23, at 12.
\item[266.] Id. at 15. "Psychiatric services for diagnosis of the nature and extent of emotional disturbance in children, and where indicated, for consultation on the needs of the emotionally disturbed child should be available to the child welfare agencies." Id. "Psychological testing and projective tests administered by qualified psychologists should be used when needed, as part of the comprehensive mental health assessment, to help establish the child's level of cognitive functioning and to assess the nature and severity of emotional and educational problems." Id.
\end{footnotes}
state must provide federally-mandated benefits to all foster children qualified to receive foster-care reimbursement under subsection IV-E of the Act. Each state has the option, also funded in part by federal monies, of distributing additional benefits to certain individuals, including foster children. The additional benefits include “inpatient psychiatric hospital services for individuals under age 21.” The federal, state and county governments pay the cost of the medical assistance in accordance with a statutory formula. Since North Carolina established a medical assistance

matching funds, approved plan must meet all requirements of 42 U.S.C. § 1396 (1988); see N.C. ADMIN. CODE, tit. 10, r. 50B.0101(j) (June 1988) (children receiving adoption assistance or foster care payments under Title IV-E are entitled to mandatory benefits established by the federal act); see also N.C. ADMIN. CODE, tit. 10, r. 50B.0102(b) (June 1988) (optional federal benefits given to children “under age nineteen who are in the custody of the county DSS or for whom the county DSS has placement responsibility or is assuming full or partial financial responsibility.” Id.


[I]n-patient hospital services (other than services in an institution for mental disease) . . . out-patient hospital services . . . laboratory and x-ray services . . . skill nursing facility services (other than services in an institution for mental disease) for individuals twenty-one years of age or older . . . early and periodic screening and diagnoses of individuals . . . [for persons who] are under the age of twenty-one to ascertain their physical or mental defects, and such health care, treatment and other measures to correct or ameliorate defects in chronic conditions discovered thereby . . . physicians services furnished by a physician . . . whether furnished in the office, the patient’s home, a hospital or a skilled nursing facility, or elsewhere . . . medical and surgical services furnished by a dentist . . . services furnished by a nurse-midwife.


[The] State percentage shall be that percentage bears the same ratio to 45 per centum as a square of the per capita income of such state bears to the square of the per capita income of the continental United States (including Alaska and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more
program consistent with the federal authorization, it has a duty to provide the medical assistance to foster children and the children have standing to enforce the obligation.

Statutory Law—State: North Carolina statutes provide that a child is considered neglected if the child is not provided "necessary medical care or other remedial care recognized under State law . . . ." North Carolina courts have defined a neglected child as one "whose physical, mental or emotional condition has been impaired or is in danger of becoming impaired as a result of the failure of his or her parent to exercise that degree of care consis-

than 83 per centum).

*Id.* The non-federal share of medical assistance:

*May be divided between the State and the counties, in a manner consistent with the provisions of the federal Social Security Act, except that the share required from the counties may not exceed the share required from the state. If a portion of the non-federal share is required from the counties, the boards of county commissioners of the several counties shall levy, impose and collect the taxes required for the special purpose of medical assistance . . . in an amount sufficient to cover each county's share of such assistance.*


273. When a state chooses to participate in the federal medicaid program or medical assistance program "the state becomes bound by the federal regulations which govern the program and must comply with the federal regulations." Montoya v. Johnson, 654 F. Supp. 511, 514 (W.D. Tex. 1987). "Each [intermediate care facility for the mentally retarded] must employ appropriate numbers of qualified staff to provide clients services mandated by the Medicaid Act." Lelsz v. Kavanagh, 673 F. Supp. 828, 838 (N.D. Tex. 1987).

274. Lelsz, 673 F. Supp. at 837.


*Refusal by parents to authorize medical care when (a) medical experts agree that treatment is nonexperimental and appropriate for the child, and (b) denial of that treatment would result in death; and (c) the anticipated result of treatment is what society would want for every child—a chance for normal healthy growth or a life worth living—should be a ground for intervention.*

A child adjudicated neglected by the courts may be removed from her home and placed with the Department of Social Services. The Director of the Department of Social Services is required to accept the child for placement in a foster home and to supervise the placement. A child in foster care must be provided a physical examination, a written case plan, and “receive services designed to assure his adjustment to foster care.” Treatment services are required “to facilitate the child’s psychological adjustment” to the foster home. The cost of keeping children in foster care is to be paid from funds allocated by the General Assembly and by the county in which the child is placed. Payments for the cost of medical care are authorized “when it is essential to the health and welfare of such person.”

When the Department of Social Services receives custody of a child, the statute provides that the “Director may . . . arrange for, provide, or consent to, needed routine or emergency medical or

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280. Id. at 1201(III)(B)(5). See STANDARDS FOR HEALTH CARE SERVS., supra note 23, at 7. The standards generally provide that:

[a]gencies should provide an immediate assessment of each child’s health status, responding to any acute problems that might reflect trauma when removal from the family is necessitated, and should develop a health plan as an integral component of the child’s case plan. The health portion of the case plan should address a diagnostic, therapeutic, preventive, and rehabilitative physical and emotional health needs of each child in care.

Id. Specifically, a “Comprehensive Health Assessment should be completed within thirty days of placement . . . . The physician performing the Comprehensive Health Assessment should address and attempt to integrate the medical, emotional, developmental, educational, social, and cultural aspects of the child’s well being,” Id. at 2.6. “Child welfare agencies should assure access to necessary and qualified health and mental health services.” Id. at 3.10.

surgical care or treatment." 283 Furthermore, the Director, "[when] the parent is unknown, unavailable or unable to act... may... arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile..." 284 Prior to exercising his authority relating to medical care, the Director first must make reasonable efforts to obtain the parent's consent, but the absence of the consent does not prevent the Director from consenting to the medical care. 285 While the statute uses the word "may" in this situation, the word should be read as creating mandatory duties for the Director to secure necessary medical care. 286 To construe "may" as allowing, but not requiring, the Director to obtain medical care for a foster child in essence would permit the Director to neglect the child. 287

Common Law: Under common law, a parent has a duty to provide for the care and support of his or her children. 288 This duty includes providing "food, clothing, lodging, medical care and proper education." 289 This duty arises upon the state's assumption of custody and it exists separate and apart from the state's obligation to take the child into custody according to the parens patriae doctrine. 289 Therefore, because the state's authority to remove children from parents should be complimented by the state's responsibility to care for the children, the state assumes custody of the child, the state acts in loco parentis 291 and assumes parental

284. Id.
285. Id.
286. Whether a particular word in a statute is mandatory or merely directory must be determined in accordance with the legislative intent; and legislative intent is usually ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other. In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)(emphasis in original).
287. "It would be ludicrous if the state, through its agents, could perpetrate the same evil" that placement in foster care was designed to prevent. Brooks v. Richardson, 478 F. Supp. 793, 796 (S.D.N.Y. 1979).
288. See generally Venable, supra note 25, at 899.
290. "It is well settled that one assuming to act, though not under a duty, must act with care, especially when looking after children." See Bartels v. County of Westchester, 76 A.D.2d 517, - , 429 N.Y.S.2d 906, 909 (1980) See also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.6, 1044-46 (1956).
291. "In loco parentis" means "in the place of a parent; instead of a parent;
mentally handicapped, causing the medical care for children to be a public duty. 

Constitution—North Carolina: The language of article XI, Section 4 of the North Carolina Constitution, obliges the state to pay for medical care of the "indigent sick and afflicted poor." Because most foster children are indigent, the North Carolina Constitution creates a delegable state constitutional duty to provide medical care for foster children.

IV. STANDARDS OF MEDICAL CARE

Regardless of the basis giving rise to the state’s duty to provide medical care and regardless of the status of the person to whom the duty is owed, the choice of medical treatment and adequacy of that treatment is vested in professional care-givers and is granted presumptive validity. Therefore, procedural due process

charge, factitiously, with a parent’s rights, duties, and responsibilities.” BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

292. Bartels, 76 A.D.2d at ----, 429 N.Y.S.2d at 902. “When a state assumes the place of a juvenile's parents, it assumes as well the parental duties, and its treatment of its juvenile should, so far as can be reasonably required, be what proper parental care would provide.” Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). When state acts in loco parentis, it has a “duty to protect and support [the] child by providing adequate food, clothing, shelter, medical care and education . . . [including] the prevention of psychological, as well as social and physical deteriorations.” Pyfer, The Juvenile's Right to Receive Treatment, 6 Fam. L.Q. 279, 316 (1972) “The state has no right to substitute governmental for parental neglect.” Id. at 318.

293. “Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of welfare.” N.C. Const. art. XI, § 4.


295. [I]t has been uniformly held in this state that the care of the indigent sick and afflicted poor is a proper function of the governor of this state and that the General Assembly may by statute require the counties of the state to perform this function at least within their territorial limits. Martin v. Board of Comm’rs, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935).

296. The fourteenth amendment entitles mentally retarded civilly-committed patients to “such training as an appropriate professional would consider reasonable . . . [and such decisions] . . . are entitled to a presumption of correctness.” Youngberg v. Romeo, 457 U.S. 307, 324 (1982). In the context of the eighth
does not require an "adversarial adjudicative" proceeding before a judge in which the care-givers responsible for treatment of the person in custody are subject to cross examination.\textsuperscript{297} It is well-settled that some situations entitle professional judgments to judicial deference.\textsuperscript{298} Professionals whose judgments are entitled to such def-

amendment, the "techniques or forms of treatment . . . is a classic example of a matter for medical judgment." Estelle v. Gamble, 429 U.S. 97, 107 (1976). In the context of the eighth amendment, the "particular course of treatment . . . remains a question of sound professional judgment." Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977). In the context of the eighth amendment "a federal judge should defer to the informed judgment of prison officials as to the appropriate form of medical treatment." Meriwether v. Faulkner, 821 F.2d 408, 414 (7th Cir. 1987), \textit{cert. denied}, 484 U.S. 935 (1987). "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments . . . ." Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976). A pre-trial detainee who "presented no expert or other evidence that the supervision and authorization under which he was prescribed medication failed to meet appropriate professional standards." Hamm v. Dekalb, 774 F.2d 1567, 1575 (11th Cir. 1985), \textit{cert. denied}, 475 U.S. 1096 (1986). The exercise of professional judgment is the appropriate inquiry in determining the adequacy of treatment for children in foster care. Doe v. New York City Dep't of Social Servs., 670 F. Supp. 1145, 1178 (S.D.N.Y. 1987). "The controlling standard for determining whether [rights of foster children] have been violated is whether professional judgment in fact was exercised." B.H. v. Johnson, 715 F. Supp. 1387, 1394 (N.D. Ill. 1989). In determining the adequacy of the medical care treatment for children in juvenile detention centers, "'it is the duty of a court to ensure that professional judgment in fact was exercised.'" Gary H. v. Hegstrom, 831 F.2d 1430, 1438 (9th Cir. 1986) (Ferguson, J., concurring)(quoting Wells v. Franzen, 777 F.2d 1258, 1261-62 (7th Cir. 1985)).


\textsuperscript{298} Parham v. J.R., 442 U.S. 584, 609 (1979)(regarding the admission of children to a state mental health care facility at parents' request); \textit{Youngberg}, 457 U.S. at 324. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security . . . 'Such considerations are peculiarly within the province and professional expertise of correctional officials . . . .'" Bell v. Wolfish, 441 U.S. 520, 547-48 (1979)(quoting \textit{Pell} v. \textit{Procouner}, 417 U.S. 817, 827 (1974).

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)(footnote omitted). \textit{But see Parham}, 442 U.S. at 619, "[i]t is possible that the procedures re-
herence are "competent, whether by education, training or experience, to make the particular decision at issue." These professional decisions can be challenged in court, but not by questioning whether the treatment decision "was the medically correct or most appropriate one. [The question is] only whether the decision was made by an appropriate professional in the exercise of professional judgment . . . ." Due process is denied only when the decision process was such a "substantial departure from accepted professional judgment, practice, or standards [so] as to demonstrate that the person responsible actually did not base the decision on such a judgment." Therefore, in the court proceeding, other experts are entitled to testify on the issue of whether the decision is "so completely out of professional bounds as to make it explicable only as an arbitrary nonprofessional one." Expert testimony is relevant on the issue of whether there was a "substantial departure from the requisite professional judgment." Choice of treatment must be "unsullied by consideration of the fact that the state does not provide appropriate treatment or funding for appropriate treatment." Therefore, a professional care-giver deviates required in reviewing a ward's need for continuing care should be different from those used to review a child with natural parents." Id. See K.H. ex rel. Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990) (when looking at the state's liability, the majority opinion emphasizes the state's failure to provide proper placement for the child, while the dissent suggests that we should look at both the failure to properly place the child and the state's failure to provide adequate care after placement). Id. at 854, 862.

299. "Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded." Youngberg, 457 U.S. at 323 n.30.

300. Charters, 863 F.2d at 313 (footnote omitted).

301. Youngberg, 457 U.S. at 323. "Even if every expert . . . agrees that another type of . . . residence setting might be better, the federal courts may only decide whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice." Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248-49 (2d Cir. 1984).

302. Charters, 863 F.2d at 313.


from accepted professional judgment, practice, or standards when he limits his treatment options only to available resources. 305 Furthermore, because accepted medical practice includes examination by a qualified professional, preparation of a treatment plan preceding treatment, and follow-up treatment evaluation, 306 failure to follow these procedures is evidence that the care-giver did not exercise professional judgment. The professional care-giver’s failure to comply with relevant statutes or regulations relating to the standards of care are also relevant to “discerning the minimal standards accepted by professionals in their areas of expertise.” 307

V. CONCLUSION

Arguably, every child is entitled to necessary mental health care which would provide long and short-term benefits to the child, her family and society. However, a broad legal right to such care appears well-established only when the state assumes custody of the child. While the child remains in parental custody, her right to mental health care is derived, if at all, from statutes, and legislatures have been reluctant to mandate the delivery of such care. Statutory requirements that the Department of Social Services provide protective services and make reasonable efforts to keep the family together indicate that children should receive mental health treatment prior to their removal from home. Practically, this obligation is not recognized until after the Department is advised and determines that the welfare of the child is threatened and it is possible that the child may be removed from her home. There is no present affirmative statutory or constitutional state obligation to seek out situations where children may need mental health care and then offer to provide such care. A state has a statutory obligation to provide medical assistance (Medicaid), which sometimes includes mental health care. However, the state’s obligation is not to actually provide care, but to pay for the cost of care when the claimant presents herself for treatment.


306. JOINT COMM’N ON ACCREDITATION OF HEALTH CARE ORG., CONSOL. STANDARDS MANUAL 83-100 (1988).

The legal right to mental health care for children in state custody arises under the federal Constitution and has its origins in both the eighth and fourteenth amendments of the federal Constitution. The United States Supreme Court first addressed the right in the context of the eighth amendment, determining that prison inmates have a right to medical care for serious needs. This right to medical care is universally defined to include mental health care. In the context of the fourteenth amendment, health care has been included among individual “life, liberty and property” rights and is not limited to “serious” medical problems.

These federal Constitutional rights to mental health treatment, arguably also included in the North Carolina Constitution, have been extended by some courts to persons committed to mental health institutions and to children placed in juvenile detention as a consequence of criminal acts. While some, including former Chief Justice Burger, have questioned extending constitutional right to treatment to persons civilly committed, the better reasoned view supports such an extension. The Supreme Court has not specifically addressed the right to mental health treatment for all civilly-committed individuals. However, civilly-committed persons are entitled to at least the same right to mental health care to which prisoners are entitled. Furthermore, treatment is generally the primary purpose of civil commitment and in that event, due process requires treatment. Indeed, most state statutes authorizing civil commitments for mentally ill persons and delinquent children mandate treatment.

The constitutional right of foster children to mental health treatment is a question less frequently addressed by the courts. These children generally are not in institutions and are frequently voluntarily placed by the parents. Some commentators cite these factors as reasons for arguing that these children are not entitled to a constitutional right to mental health treatment. These distinctions are meaningless because, first, few placements are in fact voluntary. The voluntariness of such placements is questionable because they result from insistence or simply because the parents are unable to provide for the child. Second, a child in an institution or in a foster home is in both instances a stranger in a foreign land. The determinative factor is not where the child is placed, but that the child is removed from the home as a result of State action. Once the child is placed in state custody, the state’s failure to provide mental health care to the child deprives the child of her right to life and liberty. Surely, a child in state custody who has been
removed from the home for no fault of her own is entitled to the same protections as prison inmates. The purpose of the removal is to further the best interest of the child, and a placement without treatment is not consistent with her best interest. Furthermore, relieving the state of its obligation to provide such care allows the state to neglect the child.

The required level of medical care is uncertain. The *Estelle* decision established "adequate" as the level of care for prisoners protected by the eighth amendment. However, when treatment is one of the asserted purposes of the commitment, due process requires that the treatment afford the inmate a reasonable opportunity to reach maximum recovery. State statutes often provide for this level of treatment. Foster children are likewise entitled to the same level of mental health care. The state must act in the best interest of the child, and giving the child a reasonable opportunity to reach maximum recovery serves the best interest of the child.

To the extent that these rights to mental health care derive from the Constitution, the courts consistently have held that the cost of providing the care cannot interfere with the delivery of the services. In fact, federal courts are authorized to order governments to levy taxes required to adequately fund a child's constitutional right to mental health care. This constitutional mandate to provide mental health care, along with the courts' power to enforce delivery of such services, necessarily will focus our society's scrutiny on the reasons for taking people into state custody. This scrutiny will raise questions about who should be in prison, who should be in our mental institutions, when should we commit a child to detention and when should we remove a child from her home. Inevitably, such analysis will cause our society to renew its efforts to protect children in their homes and to keep families together.