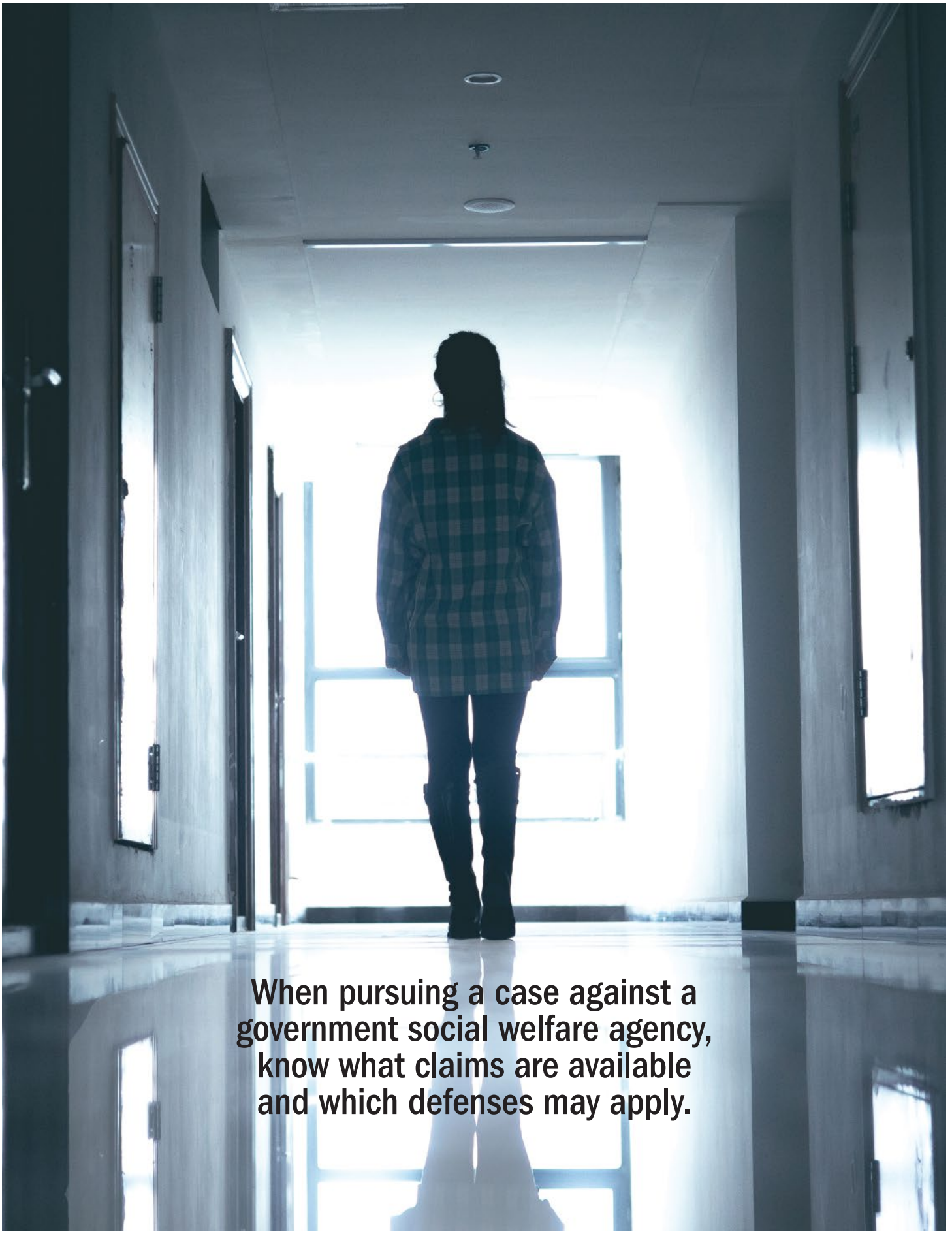
SHINING A LIGHT on Child Welfare Agency Negligence

By || **Ian Bauer and Daniel Pollack**

Every day, we hear about heart-wrenching tragedies involving government social welfare agencies and vulnerable children. Stories abound of child protective services agencies accused of hastily removing children from their families—or being blind to horrifying events. A well-known example is the case of Gabriel Fernandez, an eight-year-old boy who was abused, tortured, and murdered by his mother and her boyfriend in Palmdale, Calif.[1] To what extent might the local social welfare agency, which received numerous reports of the ongoing abuse, have been culpable in Gabriel's death?



When pursuing a case against a government social welfare agency, know what claims are available and which defenses may apply.

Holding a government social welfare agency accountable after a child is harmed is an arduous undertaking. These cases present unique obstacles from day one. The most critical records are in the hands of the agency—your target defendant—and may be subject to an array of overlapping state and federal confidentiality statutes.[2]

Will releases signed by the parent or guardian of a child be enough to obtain those child welfare records, or will you need a court order? Does your case involve historic child protective services practices and procedures, which were dramatically underdeveloped in comparison to modern child welfare systems?[3] Does sovereign immunity bar some or all of your client's claims? If your client is a minor, who has the authority to retain counsel and handle the case on the child's behalf? If your client is an adult who was abused or neglected as a child, has the statute of limitations run on some or all of the claims?

Answers to many of these (and other) questions will be jurisdiction-specific, but the same strategic framework for evaluating and pursuing cases against child welfare agencies can be used anywhere. You may be entitled to pursue a variety of claims on behalf of a child who has suffered abuse, neglect, exploitation, or other harm due to the acts or omissions of a government social service agency. Resist, however, the temptation to use the "kitchen sink" method. Consider whether any claim you assert will add to or distract from the persuasive core of the case. In our experience, less is more.

As creative as you might be, you must ground your case in well-established law and recognized causes of action for two related reasons. First, if you inject novel legal theories into your case, you may aid a defendant looking to obstruct, overturn, or delay an adverse jury verdict. Perhaps most important, do not stray from the goal of telling your clients' stories in a compelling, logical, and coherent manner that will resonate with both judges and jurors. They need to be moved by the emotional, persuasive core of your case and not distracted by your creative interpretation of the case law pertaining to, say, "trespass to chattels."

State Law Negligence Claims

Successful claims against social welfare agencies often are grounded in the special relationship between the agencies and the vulnerable communities they are charged with serving, such as young children. As a general rule, there is no duty to prevent a third party from harming another. Courts throughout the country, however, have recognized the existence of special, protective relationships in many contexts when one party is entrusted with the safety and well-being of another. Examples include the relationships between schools and their students, hotels and their guests, and hospitals and their patients.[4]

In cases involving profoundly vulnerable persons, courts have recognized a special duty of care on the part of people charged with their protection. For example, nursing homes have the duty to use reasonable care to protect vulnerable residents from foreseeable harm, including abuse by staff members.[5]

This special duty of care is founded in *The Restatement (Second) of Torts* §315(b),[6] and courts have held that it establishes social service agencies' affirmative duty of care to dependent children. As one court wrote, without "proper monitoring by the State, a foster child is wholly exposed to the will of the foster parents. In this setting, the State is the last watchman of the foster child's well-being. A more compelling illustration of the bases of a special relationship established [by §315(b)] is hard to imagine."[7]

Similarly, courts have recognized that—as with private citizens—affirmative conduct or "misfeasance" by a government agency gives rise to a concomitant duty of reasonable care under §302B of the restatement.[8] An actor's duty to act reasonably can include a duty to protect another from harm at the hands of a third party.[9] This duty arises when "the actor's own affirmative act has created or exposed the other to a recognizably high degree of risk of harm through such misconduct."[10]

While certain jurisdictions have not yet applied these common law standards to child welfare agencies and practices, these fundamental principles enjoy near-universal adoption and application in many far less compelling circumstances. Do not hesitate to use those other circumstances to argue by analogy that these principles should be extended to child welfare agencies that have broken the sacred trust placed in them.

State Law Statutory Claims

In addition to common law negligence claims, many states have enacted comprehensive statutory schemes from which an actionable duty may be implied.[11] Although this depends on the statutory language and case law in each jurisdiction, the restatement expressly recognizes implied causes of action: "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate . . . accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."[12] Similarly, the U.S. Supreme Court recognizes implied causes of action when statutes provide

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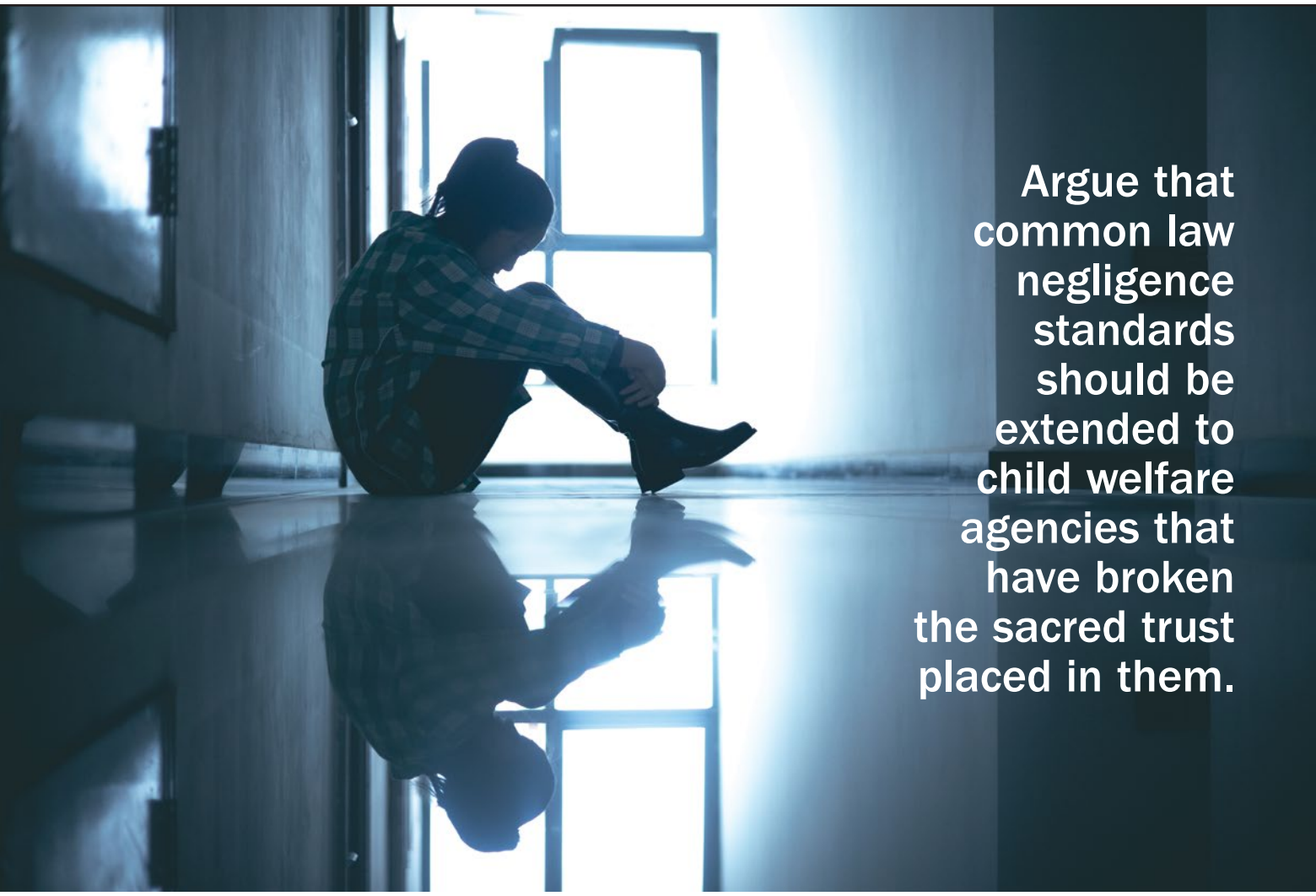

protection to a specific class of people but create no remedy.[13]

To the extent that your jurisdiction's pertinent statutory scheme has not yet been analyzed by the courts, review the statutes for mandatory, directive language that imposes clear obligations on child welfare agencies.[14] These obligations may include a duty to investigate allegations of child abuse, intervene and protect alleged victims from further abuse, or screen and monitor foster home placements, among other duties.

Section 1983 Claims

In addition to state law claims, consider whether your client has viable federal civil rights claims, particularly under 42 U.S.C. §1983. Generally speaking, §1983 plaintiffs must establish two elements: deprivation "of a right secured by the Constitution or laws of the United States" and that such "deprivation was committed under color of state law."[15]

When claims are brought on behalf of children, the right at issue is typically the Fourteenth Amendment's substantive due process right to bodily integrity. A foster child has a liberty interest in being supervised by social workers and protected from harm inflicted by a foster parent.[16] This encompasses, for example, a dependent child's constitutional right "not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child"[17] and the right to be removed from an unsafe home.[18]

Your complaint must identify the federal right implicated, as well as the individual people responsible for the deprivation thereof. It is not enough to assert that "the state" violated your client's constitutional rights because states and their agencies are not "persons" subject to suit for money damages under §1983.[19]

Similarly, there is no respondeat superior liability in a federal civil rights action; each individual defendant must have personally participated in and caused the alleged deprivation of federal rights.[20] So you must consider whether the child faced a substantial risk of harm that state officials were aware of—and they were deliberately indifferent to that risk.[21]

Asserting federal civil rights claims has many pros and cons. On the positive side, prevailing plaintiffs are entitled to compensatory damages and reasonable attorney fees and costs.[22] In addition, punitive damages may be awarded for egregious misconduct to

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punish a defendant or to deter future misconduct.[23]

However, you likely will have to overcome, individual defendants' arguments that they are entitled to absolute or qualified immunity for their conduct.[24] You also must assess how defendants might use these doctrines given the particular facts and circumstances of your case. Then tailor your complaint and discovery plan to address the inevitable defense motion asserting that one or both immunities apply. As with any civil rights case, it is imperative to identify factually analogous precedent to demonstrate that the alleged misconduct was so clearly established that any reasonable official would have known that the conduct was unlawful.

So while asserting §1983 claims may be a viable strategy to leverage claims for fees and punitive damages, asserting them in a marginal case can lead to extensive delays while threshold issues surrounding immunity are resolved on appeal. Lest you think these delays are an academic concern, be aware that in federal civil rights cases, defendants are entitled to immediately appeal the denial of absolute or qualified immunity as a matter of right under the collateral order doctrine on an interlocutory basis.[25]

Expert Witnesses

As with any civil litigation involving particularized standards of care, you must retain the right expert witnesses. Carefully consider how your expert will fit into the context of your case. What experience does your expert have in terms of hands-on practice and training as a social worker or supervisor? Look for experts who have direct, personal experience making decisions akin to those at the heart of your case.

If your case involves negligent investigations by child protective services, retain a former child protective services investigator, ideally someone who rose through the ranks to become a supervisor or administrator of an investigative unit. Similarly, if your case involves negligent foster care placement and supervision, consider retaining an expert who was a child welfare services social worker, supervisor, or administrator.

Review your jurisdiction's pertinent statutes for mandatory, directive language that imposes clear obligations on child welfare agencies.

What experience do they have as an expert witness? Do they consistently testify for one side, which may create a perception of bias? If your expert has authored publications, how consistent are they with your theory of the case? If your expert has not served in this capacity before or is relatively inexperienced, help them understand the rhythms of civil litigation—including deadlines for the disclosure of opinions, any requirements for the issuance of a report, and the scope of any work product protections surrounding your communications.

Your relationship with your liability experts should be collaborative. Look to them to educate you about the strengths and weaknesses of your case, to help you clearly articulate your theory of the case, and to advise you on attacking the defense experts.

Your expert must be conversant in the practices that existed at the time of the events at issue and the cultural context within which the events unfolded. If your case involves child welfare practices from the 1960s, for example, it is not enough that your expert knows modern child welfare practices and procedures. This is important in terms of both qualifying your expert and avoiding allegations of hindsight bias—the common, psychological phenomenon where people, after an event has occurred, reflect back on the event as being more predictable or inevitable than it actually was.

This means that you must do more than simply arm your expert with the facts and relevant documents of your case. Your expert must be able to establish the standard of care relevant to the particular time period and situation and clearly articulate how the defendant breached the standard in your particular case.

Often, this is tricky because the agency defendant wrote the applicable policies and procedures, which will be filled with caveats. Your expert must be ready to articulate a definition of the standard of care based on other sources—for example, national child welfare organizations or practices in other states—before explaining why, in the context of your case, the defendant did not do enough to protect your client. What steps were missed? What information was ignored? What decisions were made that cannot be justified? What choices did the defendant make when weighing the credibility of different witnesses? How would things have been different if the defendant had adhered to the standard of care?

Your liability expert will focus primarily on identifying the standard

of care and the resulting breach. However, the question of what would have been different had the defendant met that standard speaks to a critical, often overlooked element of your prima facie case against child welfare agencies—proximate cause. So be sure your expert also speaks to what the defendant should have done and explains in a tangible, concrete manner why those steps would have led to a different outcome.[26] Proximate cause is often an issue of fact for the jury, but your liability expert must address this issue on the stand, without relying on hindsight bias.

In cases against child welfare agencies, there are many other idiosyncrasies. Some states, for example, require the plaintiff to provide written, advance notice of intent to file a lawsuit against public entities, or they have unique procedural or substantive limitations based on a waiver of sovereign immunity.[27] Suing government social welfare agencies also involves laws, regulations, practices, and procedures that are constantly in flux, requiring you to keep abreast of any changes.

Moreover, in many states, defense counsel are government employees whose practice focuses exclusively on defending these cases—they are likely familiar with the nuances of the pertinent legal issues and will be prepared to exploit any perceived weakness in your case.

Given all these factors, the single quality that attorneys must have to successfully bring claims against social welfare agencies is tenacity. As trial lawyers, our clients entrust us to tell their stories, on their terms, and hold accountable the powerful people, wealthy corporations, and faceless bureaucracies who wronged them. This is a sacred, profound trust—all the more so when representing children who have endured unimaginable abuse and neglect because the social welfare agencies with the power to protect them sat idly by.


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Notes

1. *See, e.g.*, "The Trials of Gabriel Fernandez" (Netflix 2020); Garrett Therolf, *Why Did No One Save Gabriel?*, The Atlantic, Oct. 2, 2018, https://tinyurl.com/4k4mf67j.
2. *See, e.g.,* 42 U.S.C. §5106a(2)(B)(viii) (2019) (states must provide for methods to preserve the confidentiality of all [child abuse and neglect program] records in order to protect the rights of the child and the child's parents or guardians); 45 C.F.R. §1340.20 (2015) (states must "hold all information related to personal facts or circumstances" about people involved in child abuse programs or projects as confidential); Wash. Rev. Code §26.44.031(1) (2013) ("the department shall not disclose . . . information related to reports or child abuse or neglect" except in certain circumstances); N.Y. Soc. Serv. Law §422(4) (child protective services "reports . . . as well as any other information obtained, reports written or photographs taken concerning such reports . . . shall be confidential" and only released in certain, enumerated circumstances).
3. For example, prior to the 1960s, most states did not have a comprehensive statutory scheme pertaining to child abuse investigation or reporting. In 1963, the U.S. Department of Health, Education & Welfare published "The Abused Child: Principles and Suggested Language For Legislation on Reporting of the Physically Abused Child," which included a model statute mandating reporting of suspected child abuse by physicians and other medical personnel to law enforcement. Notably, reporting to or by social workers (or any nonmedical personnel) was not part of the model statute, nor was the actual investigation of child abuse by any entity suggested, much less mandated, by the model statute. Over the next few years, the majority of states passed some form of the model statute. In some states, legislators went beyond the model statute, either requiring or permitting reporting by such groups as nurses, dentists, teachers, and social workers. *See, e.g.*, Kan. Laws 1965, ch. 386; Tenn. Code Ann. §38-601 (Supp. 1965); Ohio Rev. Code Ann. §2151.421 (Page Supp. 1964). Other states passed weakened versions of the model statute, which made reporting child abuse permissive and applicable to only medical professionals. *See, e.g.*, Wash. Laws 1965, ch. 13, §§3–4. The evolution of these statutory reporting and investigation requirements continues through to the present day.
4. *See, e.g., Gross v. Family Servs. Agency, Inc.*, 716 So.2d 337, 338 (Fla. 1998) ("Among the recognized 'special relationships' where defendants have been held liable for failure to exercise reasonable care when injuries have actually been inflicted by third parties are employer-employee; landlord tenant; landowner-invitee; and school-minor student") (citations omitted); *McLeod v. Grant Cty. Sch. Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953) (schools have a duty to protect students in their custody from reasonably anticipated dangers).
5. *See, e.g., Niece v. Elmview Group Home*, 929 P.2d 420, 427 (Wash. 1997); *Associated Health Sys., Inc. v. Jones*, 366 S.E.2d 147, 151 (Ga. Ct. App. 1988); *Bezark v. Kostner Manor, Inc.*, 172 N.E.2d 424, 426 (Ill. App. Ct. 1961).
6. *The Restatement (Second) of Torts* §315(b) (1965) provides that "there is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless [. . .] a special relation exists between the actor and the other which gives to the other a right to protection."
7. *H.B.H. v. State*, 387 P.3d 1093, 1101 (Wash. Ct. App. 2016) (internal citations omitted), *aff'd*, 429 P.3d 484 (Wash. 2018) ("Under well-established common law tort principles, [the State] owes a duty of reasonable care to protect foster children from abuse at the hands of their foster parents."). *See also, e.g., Barnes v. Nassau Cty.*, 108 A.D.2d 50, 54 (N.Y. App. Div. 1985) ("The overriding weight of appellate authority in this country is in agreement that a State or its subdivisions may be answerable for injuries suffered by children as a result of negligence in the placement or supervision of children in their charge.") (internal citations omitted).
8. *See, e.g., Washburn v. City of Federal Way*, 310 P.3d 1275, 1288–89 (Wash. 2013) ("Actors have a duty to exercise reasonable care to avoid the foreseeable consequence of their acts. This duty requires actors to

avoid exposing another to harm from the foreseeable conduct of a third party."); *Smit v. Anderson*, 72 P.3d 369, 373 (Colo. Ct. App. 2002) ("In determining whether to recognize a duty in a misfeasance case, courts must consider many factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the actor") (internal citations omitted).

9. *The Restatement (Second) of Torts* §302B provides that "an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."
10. *The Restatement (Second) of Torts* §302B cmt. e.
11. *See, e.g.*, *Tyner v. Dep't of Soc. & Health Servs.*, 1 P.3d 1148, 1155 (Wash. 2000) (recognizing an implied statutory cause of action for negligent investigation arising out of Washington's child protective services statutes); *Mammo v. State*, 675 P.2d 1347, 1350 (Ariz. Ct. App. 1983) (recognizing an actionable duty arising out of Arizona's child protective services statutes).
12. *The Restatement (Second) of Torts* §874A (1979).
13. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 (1979) (*citing Cort v. Ash*, 422 U.S. 66 (1975)) (recognizing implied cause of action under Title IX's prohibition against gender discrimination in institutions of higher education).
14. *See, e.g.*, Wash. Rev. Code Ann. §26.44.050 (2020) ("[U]pon the receipt of a report alleging that abuse or neglect has occurred, the law enforcement agency or the department must investigate[.]"); Ariz. Rev. Stat. Ann. §8-456.01(C)(1) (2018) (directing that child protective services "shall . . . [m]ake a prompt and thorough investigation" into reports of child abuse or neglect, and "must evaluate and determine the nature, extent and cause of any condition created by the parents, guardian or custodian or an adult member of the victim's household that would tend to support or refute the allegation that the child is a victim of abuse or neglect"); N.M. Stat. Ann. §32A-4-3(C) (2018) ("The recipient of a report [alleging child abuse or neglect] shall take immediate steps to ensure prompt investigation of the report. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect.").
15. 42 U.S.C. §1983 (1996).
16. Generally, the U.S. Supreme Court has recognized that the substantive due process clause provides an interest in safe conditions, personal security, and bodily integrity for people in state custody. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) ("when 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"). *See also, e.g.*, *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) ("Once the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child.") (citations omitted). The Court has also recognized that the due process clause implicates a parent's right to the care, custody, and companionship of their children and that children enjoy a corresponding right to be raised and nurtured by their parents. *Troxel v. Granville*, 530 U.S. 57, 77 (2000). It is well-established, however, that the right to family unity is not absolute and must be balanced against the interests of the state in protecting children from abuse and neglect. *See, e.g.*, *Woodrum v. Woodward Cty.*, 866 F.2d 1121, 1125 (9th Cir. 1989); *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).
17. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990). *See also, e.g.*, *Meador v. Cabinet for Hum. Res.*, 902 F.2d 474, 476 (6th Cir. 1990) ("due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes").
18. *E.g.*, *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) ("The state's action in assuming the responsibility of finding and keeping the [foster] child in a safe environment placed an obligation on the state to ensure the continuing safety of that environment.").
19. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Will v. Michigan*, 491 U.S. 58, 71 (1989).
20. *See, e.g.*, *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658, 690 (1978); *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1020–21 (9th Cir. 2010) (to survive summary judgment, a plaintiff "must therefore adduce evidence that [the named defendants] . . . themselves acted or failed to act unconstitutionally, not merely that a subordinate did") (internal citations omitted).
21. *See, e.g.*, *Hernandez ex rel. Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (deliberate indifference is established if an "official [was] both aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed] and [the official] . . . also dr[e]w the inference") (internal citation omitted); *J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 792 (7th Cir. 2003) (requiring subjective actual knowledge or suspicion of the risk); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir. 2003) (state actors may be liable for placing children in a foster home "they know or suspect to be dangerous") (citation omitted); *White by White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (requiring that state officials "were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice").
22. 42 U.S.C. §1988(b) (2000).
23. *See Smith v. Wade*, 461 U.S. 30, 56 (1983).
24. The parameters and nuances of absolute and qualified immunity are far too extensive and context-dependent to explore in this article. Generally speaking, judges, legislators, witnesses, prosecutors, and people providing comparable quasi-judicial or quasi-prosecutorial functions will be entitled to absolute immunity for their official conduct. Similarly, officials may be protected by qualified immunity, a doctrine intended to give officials flexibility to act in areas where the law is unclear. For further reading, see Antonio Romanucci, Bhavani Raveendran, & Christopher Burton, *Confronting Qualified Immunity and the 'Reasonable' Officer Standard*, Trial, Sept. 2020, at 24.
25. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).
26. For example, one common misstep by social workers is a failure to obtain relevant child protective services history from another jurisdiction after a warning that such a history exists. It is not enough for your expert to simply state that failure to obtain this information constitutes a breach of the standard of care, the expert should also address why this additional history is important, what would have been learned if that history had been obtained, and what steps the defendant would have taken had it obtained the history.
27. *See, e.g.*, Idaho Code §§6-905 and 6-911 (1985); Va. Code Ann. §§8.01-195.6–195.7 (2016); Wash. Rev. Code §§4.92.100 (2020), 4.92.110 (2015).