BE IT RESOLVED, that the American Bar Association supports and reaffirms:

(i) the rights of children removed from parental custody and placed by governmental agencies in foster care homes licensed and regulated by state and local governments to be protected from abuse, physical violence, and sexual assault while in foster custody;

(ii) the obligation of relevant state and local officials to provide for the continued safety of the foster care environment, once the state has assumed custody, control and responsibility for such children and placed them in foster care systems, and

(iii) the legal responsibility and liability of state and local governments and their agents for injury and abuse caused to children in foster care custody when, after receipt of information indicating ongoing or imminent harm of this kind, they exhibit gross negligence or reckless disregard in failing to respond or affirmatively protect children from such dangers.

and, further, calls upon legislatures, members of the bar and child advocates everywhere to seek to strengthen recognition and implementation of this interest of children in safe foster care through appropriate legislative guarantees, litigation initiatives, cooperation with state and local agencies charged with foster care oversight, and public and professional education programs.
REPORT

The Problem and the Need

Throughout our nation, a major governmental instrumentality for the care and protection of abused and neglected children, as well as children otherwise deprived of normal parental care, are the foster care systems established and operative in every state. An estimated one-half million children are being cared for in state licensed and reimbursed foster homes and, by and large, state and local agencies with oversight of foster care systems are doing commendable work in assuring responsible placements and monitoring the quality and adequacy of foster homes.

A critical element in proper care for children removed from parental homes by the state and placed in foster custody is the definition and discharge of agency responsibility to assure a safe environment there. It is important for the law to clarify and emphasize the legal obligations of child welfare agencies and personnel, no less than foster parents, to stand responsible for major dereliction when abuse occurs in the foster setting, both as a matter of constitutional duty and statutory and professional obligation. Recent claims of legal immunity for conduct marked by gross disregard of responsibilities and clear knowledge of imminent or ongoing harm to foster children, serve neither the interests of children nor the advancement of responsible government stewardship for the safety and welfare of children in the state’s charge.

In the highly publicized case of DeShaney v Winnebago County, 109 S. Ct. 998 (1989), the Supreme Court, in a Section 1983 action, held that state child welfare agencies and workers had no affirmative duty under the 14th Amendment’s due process clause to protect a child against violence by his natural parent which eventually produced irreversible brain damage, even though the state had received several complaints, was fully aware of the danger of such harm, and took no action to remove or otherwise protect the child from his father’s custody. In that decision, the Court specifically recognized, under its own precedents, that the outcome might have been different had this been an inmate who while in correctional custody was subjected to peer violence without protection from correctional personnel and, even more pointedly, it speculated:

*Had the state by the affirmative exercise of its power removed Joshua [the abused 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” (998 S. Ct. at 1006, n. 9).

Nevertheless, in three subsequent cases involving repeated sexual assaults on girls in foster parent custody [Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989) and Babcock v. Tyler, 884 F.2d 498 (9th Cir. 1989)] and acute neglect in foster care that reduced a 9-year old to a weight of 17 pounds [Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989)], appellate decisions have found official case workers and agencies in receipt of numerous complaints about a foster child's maltreatment and safety to be immune from liability as a matter of law.

In response to this development and in support and further delineation of past Association policy positions calling for full enforcement of child abuse laws, this recommendation asserts the right of children removed from parents and placed in state foster care systems to be protected from serious physical injury and other abuse and the affirmative obligation of responsible state officials to ensure such protection and stand liable for ensuing harm when, through gross negligence or reckless disregard of reports and other evidence of acute endangerment, they fail to take reasonable protective action. In so doing, the Association calls on legislatures and child advocates to enact or, through litigation and public education, to secure recognition and understanding of these principles.

The legal issues and principles involved in this initiative are clear and fully supportive of the recommendation. They may be stated briefly as follows:

(1) Children removed from the custody of their parent(s) or guardian as a result of child protective proceedings in the juvenile or family court and placed under the care, custody, and control of state and/or local child welfare officials or agencies, have a constitutional right, including but not limited to, the right to adequate medical care and to protection from harm while in the state’s custody. This right is guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) cert. denied 464 U.S. 864 (1983); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc) cert. denied 109 S. Ct. 1337 (1989); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976); and Brooks v. Richardson, 478 F. Supp. 793 (S.D.N.Y. 1979).

(2) Whenever children in foster care are deprived of these constitutional rights as a result of the gross negligence or deliberate indifference of officials charged with responsibility for their care, custody and control, the remedies
available to them for such deprivation should be the same as those available to adults whose constitutional rights have been violated and who have suffered injury as a result of official abuse or misuse of power. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967); Inmates of Boys' Training School v. Attleck, 396 F. Supp. 1354, 1364 (D. R.I. 1972) ("There is no age limitation contained in the constitutional guarantee of due process"); see also, Riddle v. Janskeep, 675 F. Supp. 1153, 1154 (N.D. 1987). The proposed policy recommendation calls for officials to be held fully accountable for abuse or neglect of foster children when these officials knew or should have known of the risk or danger the child was exposed to while in the state's custody. Egregious conduct not mere differences in professional opinion form the basis for liability here.

(3) The remedies available to children in the state's custody who have been injured as a result of official disregard or indifference to their health and safety should include the right to injunctive relief and to recover damages from those officials and/or agencies responsible for their care and supervision at the time the injury occurred. Foster children have been successful in obtaining classwide injunctive relief requiring broad changes in the foster care system. See, e.g., L. J. v. Messinga, 838 F.2d 117 (4th Cir. 1988), however, for some children already injured by official indifference, damages may be the only viable remedy.

(4) Extending absolute immunity from suits for damages to state officials for their activities related to the selection, monitoring and supervision of a child's placement in foster care is an unwarranted extension of official immunity. Affording qualified immunity to state officials on grounds that such children have no "clearly established constitutional right" to protection while in the state's custody is also an unwarranted extension of official immunity. Under principles established by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982) officials performing discretionary functions are immune from suits for damages in so far as their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. This "qualified" as opposed to "absolute" immunity is the norm for executive branch officials. The decisions of the Ninth, Seventh and Sixth Circuits have deprived abused and neglected foster children of their right to pursue an action for damages against officials responsible for that maltreatment by either shielding them with absolute or qualified immunity which goes beyond that immunity extended to other state officials, such as police officers. See, Malley v. Briggs, 475 U.S. 335 (1986).
(5) To the extent that existing statutes deny children in state custody the 
right to recover damages for violations of their constitutional or statutory rights to 
be protected from abuse or harm) those laws should be amended to permit 
children to obtain damages from officials responsible for such injury.

Past Association Policy Action

In recent years, the Association has consistently expressed support and 
endorsed initiatives for increasing the quality of care for children in foster 
homes. Support of the present recommendation would be an important further 
step toward realization of that goal.

In August of 1980, the House of Delegates approved a comprehensive 
resolution that both encouraged increased efforts to prevent, identify, and treat 
child abuse and neglect and supported extension of existing legislation directed 
to that end. The resolution endorsed legislation to "provide funding for child 
wellfare services, mandate case reviews and concrete plans for children in 
foster care" "and require legal protection for all children and parents receiving 
these services." A year later (August 1981), the Association called upon 
attorneys "to work more actively to improve the handling of cases involving 
abused and neglected children, as well as children in foster care," including 
development of better state legislation, court rules, and administrative 
regulations and interaction with members of other concerned professional 
groups. In February of 1984, the Association endorsed increased attention to 
the needs of children in many areas of the law, including the "implementation of 
statutory and programmatic resources to meet the health and welfare needs of 
children."

More recently (August 1989), the Association again showed its 
commitment to better care for children in foster custody. The House of 
Delegates expressed policy support for amendments to the Federal Adoption 
Assistance and Child Welfare Act of 1980 "that would strengthen the role of the 
legal system in planning for children in foster care and insure better and more 
consistent services for children". Generally, the amendments mandated 
increased judicial resources to improve the legal system for children in foster 
care including, among other things, the establishment of a private cause of 
action to require welfare agencies to comply with their child protection and 
related obligations under such legislation.

The subject resolution is the logical descendent of these Association 
policies and addresses a new hazzard that has arisen. The Association has 
worked hard, especially through the efforts of its National Center on Children
and the Law, to reduce the threat and incidence of child abuse in this country. At the same time, it has fought to improve the quality of foster care available to children. In both instances, the Association has endorsed the availability of judicial resources and effective use of legal services for the nation's children. It is a logical extension of these policies that the Association should now take this position delineating the foster care system's legal responsibilities topic assuring that children in foster care are protected from abuse and seeking to generate legislation, mobilize help to agencies, and encourage legal assistance and court access to vindicate children's rights to such protection.

Respectfully submitted,

RICHARD K. DONAHUE, Chairperson
Section of Individual Rights and Responsibilities

WALTER H. WHITE, Chairperson
Young Lawyers Division

MICHAEL E. BARBER, Chairperson
Section of Family Law

August, 1990

Resolves that the Association affirm (i) the rights of children to be protected from abuse, intentional physical harm and sexual assault while in foster care custody, (ii) the duty of states and their officials to provide a safe foster care environment, and (iii) the obligation of relevant state and local agencies and officials to stand legally responsible for gross negligence and reckless disregard in failing to respond to or provide affirmative protection from known dangers of this kind.

2. Approval by Submitting Entity.

This recommendation was approved by the Council of the Section at its Spring Meeting in Washington, D.C. in April 1990 and was approved by the Councils of the Young Lawyers Division and the Family Law Section at their regularly scheduled meetings, held, respectively, in May 1990 and June 1990.

3. Previous Submission to the House or Relevant Association Position.

The Association has been a leader in the movement to protect the right of children to be free from abuse. This measure seeks to extend that protection to a group of particularly vulnerable children--those in foster care custody--especially in light of recent claims of official immunity of government personnel who operate foster care systems and oversee children in state licensed and regulated foster homes, even in situations of egregious harm to children and gross malfeasance by supervising state agencies and their workers.

4. Need for Action at This Meeting.

Early action is desirable so that the Association will be able to speak out now on important cases of foster care abuse which are
coming before the courts and on ameliorative state legislation and regulatory policies.

5. **Status of Legislation.** (If Applicable.)

   N/A

6. **Cost to the Association.** (Both direct and indirect costs.)

   This recommendation involves no cost to the Association.

7. **Disclosure of Interest.** (If applicable.)

   No conflict of interest exists on the part of any proponent of this recommendation.

8. **Referrals.**

   This recommendation and report has also been sent to the chairs of all ABA Sections and Divisions other than the cosponsors.

9. **Contact Person.** (Prior to Meeting.)

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10. **Contact Person.** (Who will present the report to the House.)

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