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Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision

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INTRODUCTION

"Beaten," "bruised," "tortured," "molested," "sexually violated," "burned," "killed": all words ripped from horrific headlines when foster parents abuse the children they were meant to protect. The perils facing California's foster children are particularly acute. According to the State's own data, a foster-care

1 See, e.g., David Crary, Foster Parents Discouraged by Deluge of Bad Publicity, L.A. TIMES, June 22, 2003, at A22, available at 2003 WL 2414859 (discussing media coverage of children abused in foster care); Jim Davis & Michael Baker, Lawsuit Alleges Abuse of Children, FRESNO BEE, Mar. 11, 2003, at A1 (describing horrific abuse allegations, including: foster parents starved, beat, tortured, and emotionally abused a four-year-old boy; foster parents bound a child with duct tape and burned and scarred him; and foster parents choked a seven-year-old foster child, tied him up with rope, and hung him on a bathroom hook, with duct tape covering his eyes and face); Matthew Franck, Deaths Are Driving Lawmakers to Change Foster Care, ST. LOUIS POST-DISPATCH, Feb. 2, 2003, at B1, available at 2003 WL 3553150 (describing three-year-old foster child found chained to a bed); Timothy Roche, The Crisis of Foster Care, TIME, Nov. 13, 2000, at 74, available at 2000 WL 28889353 (discussing foster care abuse cases, including allegations that a foster grandmother battered and tortured a six-year-old boy; the foster child was tied with panty hose and belts to a banister); State Agency Cited Hospital Where Foster Child Died, ST. LOUIS POST-DISPATCH, Mar. 24, 2003, at B4, available at 2003 WL 3565392 (describing death of two-year-old foster child from foster parents' violent shaking).

2 See, e.g., Troy Anderson, Child Advocates Blast Ruling: County Held Blameless in Foster-Care Case, L.A. DAILY NEWS, Nov. 12, 2002, at N4 (reporting foster parent's sexual abuse of a fourteen-year-old foster child); Troy Anderson, Voodoo Foster Care Suit May End in Settlement, L.A. DAILY NEWS, July 22, 2003, at N3, available at 2003 WL 5681474 (describing six foster care children who were physically abused, sexually abused, severely neglected, and exposed to voodoo rituals in an insect-infested foster home); Davis & Baker, supra note 1, at A1 (describing horrific abuse allegations); Richard Faussert, Charges Filed in Deaths of Two Boys Left in Car, L.A. TIMES, July 29, 2003, at B4, available at 2003 WL 2423796 (describing foster mother who left two foster sons in a car for five hours, where the sons died of heat exposure); Charlie Goodyear, Contra Costa to Pay $500,000 in Molest Case, S.F. CHRON., July 29, 2003, at A13, available at 2003 WL 3759249 (describing foster son who was molested and forced to share his foster father's bed); Jennifer Sinco Kelleher,
child is almost twice as likely to be maltreated in California than elsewhere.  

"California's foster care system is rated among the most dangerous to children in the nation." These statistics are troubling because California has the largest child welfare services system in the country: twenty percent of all children nationwide in foster care—almost 100,000—are in California.

Historically, the failings of the California foster care system were often blamed on budget constraints, inadequate staffing, or poor legislation. But given that the California Legislature, in conjunction with child advocacy groups, has passed numerous legislative reforms and has spent billions of dollars yearly on foster care, commentators increasingly attribute the

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3 U.S. Dep't of Health & Human Servs., Final Report: California Child and Family Services Review 2 (2003) [hereinafter Final Report] (observing that the rate of incidence of maltreatment of children in California foster care for fiscal year 2002, as reported in the state data profile, was 1.06% and did not meet the national standard of 0.57% or less).

4 Letter from Amici Curiae National Association of Counsel for Children and the Children's Advocacy Institute in Support of Real Party in Interest's Petition for Review in County of Los Angeles v. Superior Court to Chief Justice Ronald M. George and the Associate Justices of the California Supreme Court 12 (Nov. 5, 2002) (on file with California Supreme Court and author); see also U.S. Dep't of Health & Human Servs., Audit of Protections Provided to Foster Care Children Through the Juvenile Justice System in California (2000) [hereinafter 2000 Audit of Protections] (finding "significant problems" in the California foster care system).

5 Lisa K. Foster, Foster Care Fundamentals: An Overview of California's Foster Care System 10 (2001) ("California has the largest child welfare services system in the country: one in five of all child welfare children nationwide are in the California system."); Diane F. Reed & Kate Karpilow, Understanding the Child Welfare System in California: A Primer for Service Providers and Policy Makers 17 (2002) (indicating that as of April 2002, over 91,000 children were in the California foster care system).

6 Douglas J. Besharov, Protecting Children from Abuse: Should It Be a Legal Duty?, 11 U. Dayton L. Rev. 509, 510-11 (1986) (noting that "until recently, [stories of abuse] were seen as evidence of inadequate staffing and poor administrative procedures"); see also Reed & Karpilow, supra note 5, at 25 (describing a "severe shortage of social workers" and caseloads at "twice the recommended levels"). But cf. Troy Anderson, Foster Care in Crisis, L.A. Daily News, Dec. 28, 2003, at N1 (quoting social worker who says that social workers "used to have 80 to 100 cases" but now have approximately thirty).

7 Little Hoover Comm'n, Still in Our Hands: A Review of Efforts to Reform Foster Care in California 7 (2003) (explaining that the California legislature and governor have considered, since 1999, over one hundred bills and enacted more than forty pieces of legislation intended to address deficiencies in the child welfare system).

8 Foster, supra note 5, at 31 ("It costs federal, state, and county government over $1.5 billion for foster care administration and payments each year. An additional $500 million annually goes to child welfare services for children in foster care and their families each year. Billions are also spent through other systems for health and mental health care, special education, court administration, substance abuse treatment and other services used by foster
deficiencies of the system, at least in part, to the failure of child service agencies and caseworkers to follow the California Legislature's mandate. While systemic reasons may exist for these failings, the perception that social workers, at times, are "not doing their jobs" raises an important question. When should a government be liable for a social worker's negligent placement or supervision of a child in foster care?

The answer to this question was, at one time, settled. Under the California Tort Claims Act, a government could be held liable in two ways: directly and

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2000 AUDIT OF PROTECTIONS, supra note 4, at 7; see also Troy Anderson, 500 Foster Kids Missing, L.A. DAILY NEWS, Oct. 10, 2002, at N13 (reporting that Department of Children and Family Services is unable to locate approximately five hundred foster children in its custody); Anderson, supra note 6 (describing a foster care crisis where social workers are "overlooking the warning signs of many children in the community in real danger and are not able to properly ensure the safety of children in foster care"); Carla Rivera, State Moves to Shut Down Foster Family Agency, L.A. TIMES, Feb. 1, 2003, at B3 (reporting that state authorities moved to revoke the license of an agency alleged to have failed to ensure the health and safety of more than one hundred children under its supervision; claims included that the agency allowed unqualified staff members to evaluate potential foster families, failed to properly perform criminal background checks, and failed to report sexual abuse in timely fashion); Cheryl Romo, Everyone Seemed to Know Breanna and Joan Were in Danger, Except Those Charged with Guarding Them, L.A. DAILY J., Jan. 5, 2001, at 1 (reporting the deaths of two foster children and the failings of the system); cf. LITTLE HOOVER COMM'N, supra note 7, at 8-11 (noting lack of supervision and leadership is root cause of "dysfunctional" foster care system).

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Commentators generally believe that social workers are overburdened with large caseloads because of underfunding. REED & KARPILOW, supra note 5, at 25; see also CAL. DEP'T OF SOC. SERVS., SB 2030 CHILD WELFARE SERVICES WORKLOAD STUDY: FINAL REPORT 143-60 (2000) (discussing findings on worker caseload and outlining recommendations). Although progress has been made in recent years and caseloads are diminishing, underfunding is sometimes offered as an explanation or justification for a social worker's negligence. Id. But the issue of governmental liability is separate and distinct from the issue of whether underfunding historically has caused the foster care system to fail. See Salameda v. INS, 70 F.3d 447, 452 (7th Cir. 1995) (stating that "understaffing is not a defense" to an agency's violation of a law); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 654 (Ct. App. 1994) ("Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law."); cf. Robbins v. Superior Court, 695 P.2d 695, 707 (Cal. 1985) ("This court is not unmindful of the budgetary constraints facing counties. Nonetheless, financial considerations cannot justify an infringement of a basic constitutional right . . . ."). See generally Richard J. Pierce, Jr., Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 49 ADMIN. L. REV. 61, 63 (1997) (analyzing the issue of agency resource constraints and the need for agencies to adhere to administrative law).

derivatively. Direct liability, on the one hand, existed when a social worker or social service agency failed to follow the state statutes and regulations concerning foster care placement.\(^\text{12}\) In those situations, the government was negligent per se, and if that negligence proximately caused the child’s injuries, the foster child would recover. Derivative liability, on the other hand, existed when a social worker was negligent in supervising a foster child’s placement, and the child was harmed as a result of that negligence.\(^\text{13}\) Social workers were generally not entitled to governmental immunity because immunity extended only to basic policy decisions, and foster child care and supervision was not considered a policy decision.\(^\text{14}\) But in recent years, the California courts have retreated from this settled law.

In 2002, the Second District Court of Appeal in *Los Angeles County v. Superior Court (In re Terrell R.)*—in a radical departure from prior law—interpreted the California Tort Claims Act, along with the statutory provisions governing foster care placement, so narrowly that governmental immunity would now appear inevitable in any case alleging foster child mistreatment.\(^\text{15}\) The court reached its decision after concluding that the statutory provisions governing foster care placement were not intended to protect children from abuse.\(^\text{16}\) The court further held that a social worker not only has discretion to determine where to place a dependent child, but also has discretion to ignore statutorily mandated procedures in making that decision.\(^\text{17}\) The reasoning of that case, if followed, in conjunction with the federal courts’ traditional unwillingness to entertain claims under the federal civil rights laws,\(^\text{18}\) would

\(^\text{12}\) *Id.* § 815.6 (West 1995); see generally Johnson v. State, 447 P.2d 352, 359-63 (Cal. 1968) (finding state liable for parole officer’s failure to warn of foster child’s violent tendencies).

\(^\text{13}\) *CAL. GOV’T CODE* § 820.2; see, e.g., Elton v. County of Orange, 84 Cal. Rptr. 27, 30 (Ct. App. 1970).

\(^\text{14}\) Elton, 84 Cal. Rptr. at 30; see also Nunn v. State, 677 P.2d 846, 849-50 (Cal. 1984) (en banc); *Johnson*, 447 P.2d at 360.


\(^\text{16}\) *Id.* at 645-47.

\(^\text{17}\) *Id.*

\(^\text{18}\) See, e.g., Babcock v. Tyler, 884 F.2d 497, 503-04 (9th Cir. 1989), *overruling recognized by* Miller v. Gammie, 335 F.3d 889, 896-900 (9th Cir. 2003). Prior to July 2003, the Ninth Circuit provided absolute immunity for state social workers involved in child welfare proceedings. Federal relief may be available now that the Ninth Circuit no longer confers absolute immunity on social worker placement and supervision decisions. But even still, a § 1983 claim—requiring proof that the social worker was recklessly indifferent to well-established law—will provide an abused foster child relief in only the most egregious of cases. See generally Daniel J. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353, 367 (1991) (describing the consequences of Babcock); Christine M. Dine, *Comment, Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children’s Right to Safety*, 38 *CAL. W. L. REV.* 507, 509-10 (2002) (reviewing liability issues for foster care child abuse under federal law).
mean that children abused or neglected in the California foster care system would face formidable—if not insurmountable—barriers to obtaining legal redress for their injuries.

The Terrell R. case has enormous practical significance. Although numerous lawsuits are brought, very few foster care intentional abuse cases result in published opinions. In the last thirty years, only a handful of California decisions have directly addressed the governmental liability issue in the context of negligent foster care placement and supervision. Because of the dearth of decisions, every published decision takes on unusual significance. Anecdotal evidence suggests that based on the reasoning of Terrell R., private practitioners are more unwilling than ever to serve as attorneys for foster children when the suit involves a claim of foster parent abuse, because the chances of succeeding on such claims are perceived as remote. Government attorneys, on the other hand, now routinely bring demurrers asserting that they owe no duties, mandatory or otherwise, to foster children. The Terrell R. decision was so significant that, less than a year after it was decided, legislation was proposed and then passed to specifically address it. Although this recent legislation now purports to limit the impact of Terrell R., it does not explain how the Terrell R. court erred. Nor does the recent legislation indicate how a court can, in the future, avoid the mistakes the Terrell R. court made. This Article addresses these issues.

This Article examines the status of governmental liability under the California Tort Claims Act for a social worker’s negligent placement or negligent supervision of a foster child and explains why Terrell R. was wrongly decided. Part I describes the California foster care system and the significant challenges it faces, which make the governmental liability issue an important one. Part II examines the California Tort Claims Act, describes when a

19 See, e.g., Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165 (Ct. App. 1998); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643 (Ct. App. 1994); Elton, 84 Cal. Rptr. at 27.
20 No studies or statistics are available. Conversations, in August 2003, with individuals at the Los Angeles County Bar Association, the Los Angeles County Dependency Court, and child advocacy groups, as well as with private practitioners, suggest that Terrell R. has made it extremely difficult for injured foster children to obtain recourse from counties.
22 CAL. WELF. & INST. CODE § 16000.1(a)(3)-(b)(1) (explaining that “nothing in this section is intended to increase or decrease the liability of the state as it existed prior to the [Terrell R. case]. . . . It is the intent of the Legislature that nothing in the decision of the California Court of Appeal in [Terrell R.] shall be held to change the standards of liability and immunity for injuries to children in protective custody that existed prior to that decision.”); see also Duty to Foster Children Reaffirmation Act; Cal. A.B. 1151.
23 See CAL. WELF. & INST. CODE § 16000.1.
governmental entity may face liability, and discusses the competing policies at play in determining governmental liability questions. Part III analyzes the history of governmental liability and immunity in the foster care context, leading up to the recent decision in *Terrell R*. Part III argues that *Terrell R.* misapplied the California Tort Claims Act, misconstrued the child welfare statutes, and ignored binding precedent to effectively provide governmental actors absolute immunity in foster care placement and supervision. Specifically, the *Terrell R.* court reached that result by confusing and conflating two separate statutory bases for liability. The Article then explains how this move to absolute immunity, whether done intentionally or unintentionally, not only contradicts sound public policy, but is a result long rejected by the California Legislature and the California Supreme Court. Finally, in Part IV, this Article explores how a typical negligent placement or negligent supervision claim should be resolved. The Article explains why immunity is generally inappropriate in cases where the foster child is intentionally abused by the foster parents. The Article concludes that the courts must uphold the state of the law before *Terrell R.*, as set forth by the landmark California Supreme Court case *Johnson v. State of California*. If a social worker negligently places or negligently supervises a child in foster care, and the child is then physically or sexually abused as a result of that negligence, liability is the rule, not the exception.

I. AN OVERVIEW: CALIFORNIA'S FOSTER CARE SYSTEM

The issue of governmental liability is significant in the foster care context because all too often foster children are harmed by their foster parents. Although the purpose of foster care is to protect children from abuse, the system has often failed to achieve that goal, and is commonly described as being "in crisis." Understanding both the purpose of the California foster care system and its current crisis is thus essential to understanding the governmental liability issues discussed in this Article.

A. Temporary Child Protection as a Primary Purpose of Foster Care

Foster care exists to protect children when their parents can no longer properly care for them. Parents have a liberty interest in the care, custody, and raising of their children. But in cases of child abuse, neglect, or abandonment,

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a state has a compelling interest—if not a duty—to intervene. A state has the authority to protect children from abuse under the doctrine of parens patriae. When the government determines that a child is living in an abusive home environment, the child may be removed and placed in the foster care system.

In California, as elsewhere, the foster care system is intended to provide a temporary home-like setting to protect children who should not live with their parents because of abuse, neglect or abandonment. To this end, the dependency laws embody three goals: "(1) to protect the child; (2) to preserve the family and safeguard the parents’ fundamental right to raise their child, as long as these can be accomplished with safety to the child; and (3) to provide a stable, permanent home for the child in a timely manner." The foster care interest in the custody of their children “that derives from blood relationship, state law sanction, and basic human right”); In re Lucero L., 998 P.2d 1019, 1032 (Cal. 2000) (finding that a parent’s desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection (quoting Santosky, 455 U.S. at 758-59)); In re Sade C., 920 P.2d 716, 737 (Cal. 1996) (explaining that parents have a fundamental liberty interest in the care and custody of their children).

See generally Besharov, supra note 6; cf. Deshaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195-98 (1989) (holding that no legal duty exists for a state to protect a child not in its custody from parental abuse, but suggesting a duty might exist when the state takes a child into its custody).


Parens patriae, which means “parent of the country,” is defined as the government’s power and responsibility to protect and care for those citizens who cannot take care of themselves, such as infants. See generally Natalie Loder-Clark, Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare, 6 MICH. J. GENDER & L. 381 (2000).

See Santosky, 455 U.S. at 767 (interpreting state social services law and finding state’s interest in finding a child a new home arises only “when it is clear that the natural parent cannot or will not provide a normal family home for the child”) (quoting N.Y. SOC. SERV. LAW § 384-b.1.(a)(iv) (McKinney Supp. 1981-1982)); Stanley v. Illinois, 405 U.S. 645, 649 (1972); In re Sade C., 920 P.2d at 737; see also In re Marilyn H., 851 P.2d 826, 833 (Cal. 1993) (“Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.”) (internal citations omitted). In addition to being placed in foster family homes or with foster family agencies, children may be placed in: (1) emergency public shelters; (2) homes of relatives; or (3) group homes or residential treatment centers. Foster, supra note 5, at 20-24.


In re Santos Y., 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001) (discussing the three primary goals of the dependency system and citing to the relevant statutes). Child protection is a key
system thus "removes the child from the natural home situation while deficiencies are being corrected or arrangements are made for a change in parental responsibility." Once placed in foster care, the foster parents provide day-to-day care, but the child welfare agency retains general power over a child's life and "in effect, supervises the foster parents." 33

This degree of supervision is significant because of the California foster care system's size. Almost 90,000 children—approximately one out of every hundred—are in foster care. 34 California is one of eleven states operating on a state-supervised, but county-administered, model of governance. 35 Fifty-eight county welfare departments administer the system under the authority of the California Department of Social Services. 36 The 2002-2003 budget for foster care services in California exceeded $2.2 billion. 37

B. A System In Crisis

Despite the foster care system's goals, the system has often failed to protect children from abuse. The system is in crisis. Known as a "broken" and "costly" system, 38 "it is the overwhelming consensus of policymakers, child welfare administrators, service providers, parents, and current and former foster youth" that the foster care system needs "to be fixed." 39

As an initial matter, foster care is often not the intended sanctuary from abuse. On a national level, the statistics paint a troubling picture. The "rates of abuse and neglect of children in foster care may be greater than those in the general population." In some extreme cases, a child may be at greater risk of goal of the dependency laws. See, e.g., CAL. WELF. & INST. CODE §§ 202, 300.2, 361(c)(1), 361.2(a), 361.3(a)(8), 366.21(c), 16000.

32 Skoler, supra note 18, at 356; see also Foster, supra note 5, at 7 (arguing that the purpose of the foster care system is thus to "keep children safe while child welfare services are provided so they can be reunited with their families").

33 Skoler, supra note 18, at 358.

34 Foster, supra note 5, at 7; see also Reed & Karpilow, supra note 5, at 16-17 (finding that 91,951 children were in supervised foster care in California as of April 2002); Child Welfare Research Ctr., Child Welfare Supervised Foster Care Highlights from CWS/CMS, at 1, available at http://cssr.berkeley.edu/cwscmsreports/Pointintime/fostercare/childwel/arcAgeEthnic.asp (Jan. 2003) (noting that as of January 1, 2003, 89,210 children were in child-welfare supervised foster care).

35 Reed & Karpilow, supra note 5, at 5.

36 2000 Audit of Protections, supra note 4, at i; Reed & Karpilow, supra note 5, at 5.

37 Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature 2 (Feb. 4, 2003) (on file with author); see also supra note 8.

38 Little Hoover Comm'n, supra note 7, at 2.

39 Foster, supra note 5, at 8; see also Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, supra note 37, at 1 ("[T]he foster care system fumbles forward, and often backward, and costs children and families their happiness, their prosperity and even their lives.").

harm once they enter foster care than they would be if they remained with their abusive parents.\textsuperscript{41} In New York City, a study concluded that foster care children were one and one-half times more likely to suffer abuse and neglect than children in the general population.\textsuperscript{42} Likewise, a Baltimore study of 149 cases, based on the social service agency's own records, found that 28% of the children had been abused while in foster care.\textsuperscript{43} One commentator, after studying foster care nationally, concluded that "43% of [the foster children] had been placed in an unsuitable foster home, and that 57% . . . were at serious risk of harm . . ."\textsuperscript{44}

Statistics for the number of abused or neglected\textsuperscript{45} children in the California foster care system, however, are substantially higher than national foster care averages.\textsuperscript{46} According to a report released in January 2003 by the United States Department of Health and Human Services, the incidence of child maltreatment

\textit{Revolutionizing the Most Radical Blueprint}, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1994); Skoler, supra note 18, at 356; see also Kay P. Kindred, \textit{Of Child Welfare Reform: The Implications for Children When Contradictory Policies Collide}, 9 WM. & MARY J. WOMEN & L. 413, 461-63 (2003) (discussing study by the National Foster Care Education Project showing that "children in foster care are at a much greater risk of maltreatment than are children in the population at large").

\textsuperscript{41} Arcaro, supra note 40, at 647 ("The latest national data on child abuse fatalities suggest that a child is nearly three times more likely to die of abuse in foster care than in the general population."); Timothy J. Courville, Note, \textit{Governmental Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity}, 27 B.C. L. REV. 949, 984 (1986) ("Because of the many problems associated with foster care, some clinicians have concluded that placing a child in a foster home is often more harmful to a child than the original home situation may have been.") (citing Douglas J. Besharov, \textit{Child Protection: Past Progress, Present Problems, and Future Direction}, 17 FAM. L.Q. 151, 154 (1983)); Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, supra note 37, at 2 (noting that in California, "in some extreme but intolerable cases, the level of care [in the foster care system] is no better than the abusive homes from which those children were rescued"); see also CAL. DEP'T OF SOC. SERVS., \textit{REPORT TO THE LEGISLATURE ON INVESTIGATION OF COMPLAINTS AGAINST CERTIFIED FAMILY HOMES AND FOSTER FAMILY AGENCIES} 16-19, 32 (2001) (detailing the complaints of physical abuse, sexual abuse, and neglect, among other things, against certified family homes between January 1, 2000 and December 31, 2000). \textit{But see} Gelles & Schwartz, supra note 27, at 107 (explaining that some research shows that "children who reside in foster care fare neither better nor worse than children who remain in homes in which maltreatment occurred").

\textsuperscript{42} Dine, supra note 18, at 509-10.

\textsuperscript{43} Id. at 510 (citing BRENDA SCOTT, \textit{OUT OF CONTROL: WHO'S WATCHING OUR CHILD PROTECTION AGENCIES} 112 (1994)).


\textsuperscript{45} Child abuse and neglect are defined by section 11165.1 of the California Penal Code and section 300 of the California Welfare and Institutions Code. In California, abuse includes physical abuse, sexual abuse, emotional abuse, general neglect, severe neglect, and exploitation, including sexual exploitation. CAL. PENAL CODE § 11165.1 (West Supp. 2004); CAL. WELF. & INST. CODE § 300 (West Supp. 2004); see also REED & KARPILOW, supra note 5, at 9.

\textsuperscript{46} \textit{FINAL REPORT}, supra note 3, at 21.
in California foster care is almost twice the national average.\(^{47}\) The rate of recurrence for substantiated child maltreatment within six months was also 57% greater in California than nationally.\(^{48}\) In July 2003, the Director of the Los Angeles County Department of Children and Family Services conceded that children in the Los Angeles County foster care system were abused or neglected in almost 16% of the certified foster homes: a rate higher than almost anywhere in the nation.\(^{49}\) One recent study concluded that a child is "up to ten times more likely to die from abuse or neglect" in Los Angeles County foster care than in any other place in the nation.\(^{50}\)

Not only does the foster care system fail to provide safe sanctuary, it is also not, as intended, a temporary home.\(^{51}\) Too often the stay is permanent. By statute, children ought to remain in foster care for no longer than a year,\(^{52}\) but

\(^{47}\) *Id.* at 2 (noting that the incidence of maltreatment of children in foster care for the fiscal year 2000, as reported in the state data profile, was 1.06% as compared to a national standard of 0.57% or less); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2000: ANNUAL REPORT TO CONGRESS (2000).

\(^{48}\) *FINAL REPORT, supra* note 3, at 2 (observing that the recurrence rate for substantiated child maltreatment within six months for the fiscal year 2000 was 10.7%, compared to a national standard of 6.1%).

\(^{49}\) Troy Anderson, *L.A. Foster Abuse Rate High*, L.A. DAILY NEWS, July 23, 2003, at N3; *see also* Troy Anderson, *New Foster Chief Unveils Strategy*, L.A. DAILY NEWS, Mar. 26, 2003, at N3 [hereinafter *New Foster Chief Unveils Strategy*] (quoting David Sanders, director of the Los Angeles County Department of Child and Family Services, who stated that "the number of kids that appear to get hurt after the department gets involved in their lives is way too high"); Troy Anderson, *Public Hearings Sought on Foster Care System*, L.A. DAILY NEWS, Jan. 14, 2004, at N5 (noting prior *Daily News* estimates that up to half of the 75,000 children in the Los Angeles County child protective system and adoptive homes were needlessly placed in a system that is often more dangerous than their own homes).

\(^{50}\) Anderson, *supra* note 9; *see also* Troy Anderson, *Foster Care Cash Cow*, L.A. DAILY NEWS, Dec. 7, 2003, at N1 (citing government statistics showing that the "hundreds of thousands of children who have cycled through the county's system over the years are six to seven times more likely to be mistreated and three times more likely to be killed than children in the general population," and noting that over 660 children have died in the Los Angeles County foster care system since 1991); Cheryl Romo, *L.A. Ranks First by Far in Foster-Care Abuse*, L.A. DAILY J., Aug. 7, 2002, at A1 (discussing that rates of abuse in Los Angeles County are significantly higher than national rates).

\(^{51}\) The "average stay in foster care has risen over the past fifteen years with many children spending more than two years in care on a national level . . . ." Arcaro, *supra* note 40, at 647; *see also* New Foster Chief Unveils Strategy, *supra* note 49 (quoting director of Los Angeles County Department of Child and Family Services stating that "kids are in foster care for too long"). *See generally* LITTLE HOOVER COMM'N, *supra* note 7, at 2; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

\(^{52}\) Reunifications with family or permanency hearings are required to occur within twelve months of a child's entry into foster care. CAL. WELF. & INST. CODE § 361.5 (West Supp. 2004); CAL. R. CT. 1461; *see also* REED & KARPILOW, *supra* note 5, at 11-12 (discussing case resolution times and deadlines for holding permanency hearings); *FINAL REPORT, supra* note 3, at 7 (observing that the percentage of reunifications in California occurring within twelve months of entry into foster care (53.2%) did not meet the national standard of 76.2% or more).
more than one in four children remain in care longer than three and a half years. And the problem is expected to worsen. Although the number of children in foster care declined between 1998 and 2002, experts expect a new trend of an increasing number of children to enter the system.

Other problems exist, too. An estimated 25% of California foster care children do not receive timely medical care, and almost 50% do not receive appropriate mental health services. Upon leaving the California foster care system, approximately 33% of the children fail to complete high school, 33% spend time on welfare, 25% are arrested and spend time in jail, nearly 50% are unemployed, and almost 25% become homeless. A University of Wisconsin study, from the late 1990s, reached similar conclusions when studying the foster care system nationally. That study found that after leaving foster care, 27% of males were incarcerated within twelve to eighteen months, 50% were unemployed, 37% did not graduate from high school, 33% were on public assistance, 47% were receiving counseling or medication for medical problems just before leaving the system, and 33% were diagnosed with three or more psychiatric problems.

In part, the foster care system's problems are attributable to social workers failing to follow basic mandatory foster care requirements, such as a case plan, periodic reviews, and permanency hearings. A 2000 Federal Audit of the California foster care system found that federal and state requirements were consistently not met and significant systemic problems existed. After


54 Child Welfare Research Ctr., supra note 34, at 1.

55 LITTLE HOOVER COMM'N, NOW IN OUR HANDS: CARING FOR CALIFORNIA'S ABUSED & NEGLECTED CHILDREN 23 (1999) (projecting the active foster care population to rise to 167,000 by 2005, assuming the caseload grows at the same rate as in the last eight years).

56 Letter from the Little Hoover Commission to Governor Gray Davis and Members of the California Legislature, supra note 37, at 2.

57 LITTLE HOOVER COMM'N, supra note 7, at 5; see also FOSTER, supra note 5, at 29.


59 Id. (citing Susan DosReis et al., Mental Health Services for Youths in Foster Care and Disabled Youths, 91 AM. J. PUB. HEALTH 1094 (2001)).

60 2000 AUDIT OF PROTECTIONS, supra note 4, at 1, 7-8, 11-12, 13-14.

61 Id. at 4. As a result of a January 2003 review by the U.S. Department of Child and Family Services, the federal authorities threatened to withhold $18 million unless California submitted a detailed plan to improve its child care services. Carla Rivera, State's Plan to Upgrade Foster Care Approved, L.A. TIMES, June 26, 2003, at B8. The media has recently spotlighted other problems with California's foster care system. See, e.g., Troy Anderson, 257 Children Missing in Three Months, L.A. DAILY NEWS, May 6, 2003, at N4 (noting that 759 foster children are listed as missing, and 257 children ran away or were abducted in the first three months of 2003); Sue Fox, Audits Find Abuses in Foster Care Finances, L.A. TIMES, July 15, 2003, at B1 ("Millions of taxpayer dollars meant to recruit and train foster
reviewing eighty-one foster care cases from seven counties, the Audit found:

- Fifty-eight of the eighty-one cases did not have case plans that met federal or state requirements, while the remaining twenty-three had no case plan at all.\(^{62}\)
- The periodic reviews of seventy-six out of eighty cases studied were deficient: most reviews were either not held on a timely basis, or not held at all.\(^{63}\)
- The permanency hearings for forty-seven of the fifty-two cases that required such hearings, failed to comply with statutory requirements.\(^{64}\)

Even the Department of Children and Family Services admits that social workers spend insufficient time with the foster children they are meant to protect.\(^{65}\)

The need for social workers to carefully supervise foster children because of the dangers of foster parent abuse is well understood: the problem of abuse in the California foster care system has received significant attention.\(^{66}\)

In the past few years, more than a dozen reports from various governmental and nongovernmental organizations have documented the California foster care

\(^{62}\) 2000 Audit of Protections, supra note 4, at 7.

\(^{63}\) Id. at 8, 12-13 (explaining that of the eighty cases studied: (1) in eight cases no periodic reviews were held; (2) in twenty other cases there was one or more instances in which the required periodic review was not held; and (3) in thirty-seven cases one or more of the periodic reviews were not held in a timely manner).

\(^{64}\) Id.

\(^{65}\) Anderson, supra note 61 (quoting the director of the Los Angeles County Department of Child and Family Services, who stated that “social workers need to spend more time with foster children and develop relationships with them so they can spot the early signs of trouble”).

\(^{66}\) See supra notes 1-2; see, e.g., Fox, supra note 61 (discussing recent Los Angeles County foster care finance audits); Jason B. Johnson, Foster Care Fails State Kids, S.F. Chron., Jan. 14, 2003, at A15, available at 2003 WL 3745763 (noting that the U.S. Department of Health and Human Services has given California's Department of Social Services ninety days to start making improvements or face monetary sanctions); Erin McCormick, Alarming Breakdowns in State Foster Care, S.F. Chron., Dec. 1, 2002, at A1, available at 2002 WL 4037015 (discussing statistics and problems with California's foster care system); Gayle Pollard-Terry, Advice from Someone Who's Been There, L.A. Times, Jan. 20, 2003, at E1 (discussing film about Antwone Fisher, who was sexually abused and beaten while in California's foster care system); Rivera, supra note 61 (discussing the federally approved plan to improve California’s child welfare services); Romo, supra note 9 (discussing the death of two children pushed to death from ninth floor of courthouse by their mother); Cheryl Romo, Misty, Who Got No Breaks, L.A. Daily J., Nov. 12, 2002, at 1 (detailing horrific account of a rape of a foster child with Down's syndrome); Matthew B. Stannard, Judge Takes Responsibility in Death of Foster Child, S.F. Chron., Apr. 4, 2003, at A19, available at 2003 WL 3751984 (detailing a San Mateo County judge criticizing two social workers’ conduct and the county’s child welfare agency recommending reforms).
system's failings and have made recommendations for reform.\textsuperscript{67} Between 1999 and 2002, the California Legislature considered over 100 bills intended to address child welfare system deficiencies.\textsuperscript{68} In the last four years, although the number of foster children decreased,\textsuperscript{69} total funding for the child welfare system increased by over $699 million.\textsuperscript{70} At the same time, California state agencies spent over $8 million in research in an attempt to understand the failings of the system.\textsuperscript{71}

Although children abused in the foster care system are not without legal recourse, their options are limited.\textsuperscript{72} Federal constitutional claims under 42 U.S.C. § 1983,\textsuperscript{73} until recently, were not viable in California. Before July 2003, social workers in the Ninth Circuit were absolutely immune from federal suits for failure to protect children from foster parent abuse.\textsuperscript{74} Although the law in the Ninth Circuit appears to be changing,\textsuperscript{75} federal courts have been reluctant to allow children to press federal claims when state law provides a remedy.\textsuperscript{76} In

\textsuperscript{67}See, e.g., CAL. DEP'T OF SOC. SERS., REEXAMINATION OF THE ROLE OF GROUP CARE IN A FAMILY-BASED SYSTEM OF CARE (2001); CENTER FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT (1998); FOSTER, supra note 5 (2001); LITTLE HOOVER COMM'N, supra note 55, at 5. See generally LITTLE HOOVER COMM'N, supra note 7, at 6.

\textsuperscript{68}LITTLE HOOVER COMM'N, supra note 7, at 7.

\textsuperscript{69}Child Welfare Research Ctr., supra note 34, at 1; see also supra notes 54-55 (discussing the number of children in the foster care system).

\textsuperscript{70}FED. CHILD \\& FAMILY SERVS. REVIEW PROJECT, STATE OF CALIFORNIA PROGRAM IMPROVEMENT PLAN FOR THE CHILD WELFARE SERVICES PROGRAM 2 (2003).

\textsuperscript{71}LITTLE HOOVER COMM’N, supra note 7, at 7.

\textsuperscript{72}Realistically, a child will be unlikely to obtain meaningful relief from the foster parents themselves. Often the foster parent is judgment-proof, and insurance will not cover abuse claims, which involve intentional torts. See CAL. HEALTH \\& SAFETY CODE §§ 1527-1527.3 (West 2000) (establishing Foster Care Fund, which will pay foster children claims on behalf of foster family homes, but excludes claims based on criminal or intentional acts, such as physical or sexual abuse). See generally Mushlin, supra note 44, at 250 (discussing the inadequacy of damage remedies in foster care abuse cases).


\textsuperscript{74}See Babcock v. Tyler, 884 F.2d 497, 503-04 (9th Cir. 1989) (finding that state workers, including the child welfare agency, are entitled to absolute immunity from liability for placement in an abusive foster home), overruling recognized by Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003); see also Meyers v. Contra Costa County Dep't of Soc. Servs., 812 F.2d 1154, 1158 (9th Cir. 1987); Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995). But see Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289 (8th Cir. 1993) (denying qualified immunity to a Human Services director, a caseworker, and a foster care parent because a state has an obligation to provide adequate medical care, protection, and supervision with respect to children removed from parents and placed in foster homes). For a discussion of an apparent circuit split as to whether a constitutional right to safe foster care placement exists, and the difficulty in succeeding on such a claim, see Dine, supra note 18, at 513-15.

\textsuperscript{75}See Miller, 335 F.3d at 898-99 (recognizing the overturning of a decade of Ninth Circuit law by holding that social workers are not entitled to absolute immunity).

\textsuperscript{76}Since the landmark Supreme Court Deshaney case, claims against a social service agency or a county for negligence in the placement or supervision of a child in foster care are often brought under state tort law. Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S.
California, a state-law claim would be brought under the California Tort Claims Act. 77

II. LEGAL BACKGROUND: THE CALIFORNIA TORT CLAIMS ACT

In 1963, the California Legislature enacted several statutory provisions that have become known as the California Tort Claims Act. 78 The Tort Claims Act abolished absolute sovereign immunity and eliminated "all common law or judicially declared forms of liability for public entities . . . ." 79 As a result, since 1963, all government tort liability in California has been based on statute. 80 In enacting the Tort Claims Act, the legislature carefully considered arguments for why absolutely immunizing governments from liability could be justified for public policy reasons — but ultimately rejected them.

A. The Enactment of the Tort Claims Act And The Rejection of Absolute Immunity

The 1960s marked the end of absolute governmental immunity in California. Before then, government entities in California were generally immune from liability for acts undertaken in a governmental capacity. 81 In 1961, however, two California Supreme Court decisions—Muskopf v. Corning Hospital District 82 and Lipman v. Brisbane Elementary School District 83—
abolished sovereign immunity. In *Muskopf*, the court proclaimed that the doctrine of sovereign immunity was no longer available to protect public entities from liability.84 Instead, the *Muskopf* court held that "[g]overnment officials [would be] liable for the negligent performance of their ministerial duties . . . but [would] not be liable for their discretionary acts . . . even if it is alleged that they acted maliciously."85 It found the "rule of governmental immunity for tort [to be] an anachronism, without rational basis and [a rule that had] existed only by the force of inertia."86 Likewise, the *Lipman* court indicated that although government employees are entitled to immunity for "discretionary" decisions,87 public entities can be liable for their employees' negligent operational and ministerial acts.88

In response, the California Legislature enacted a moratorium statute suspending the effect of these twin decisions to study the governmental immunity issue.89 The Legislature appointed a Law Revision Commission, which recommended that public entities be held liable when an entity fails to exercise reasonable diligence to comply with mandatory duties, and to the same extent as its employees could be held liable.90 Although the Commission acknowledged the need to limit governmental liability, it also recognized that absolutely immunizing the government from any liability would be unwarranted:

[I]t would be harsh and unjust to deny compensation to all persons injured as the result of the wrongful or negligent acts or omissions of public employees. Government operates for the benefit of all; hence, it is reasonable to expect that all should bear some of the burden of the injuries that are wrongfully inflicted by the government.91

Consequently, the Law Review Commission recommended that the legislature follow the lead set by *Muskopf* and *Lipman* and abolish absolute

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84 *Muskopf*, 359 P.2d at 462-63.
85 *Id.*
87 *Lipman*, 359 P.2d at 467.
91 Cal. Law Revision Comm'n, *supra* note 90, at 810; see also Elson, 124 Cal. Rptr. at 310.
immunity.

B. Policy Considerations Underlying Governmental Tort Liability

The Legislature, in deciding whether to follow the Law Review Commission recommendations, was acutely aware of the competing policies that underlie governmental immunity issues. Understanding these policies is necessary to understand what the Legislature intended when it enacted the Tort Claims Act. The policies are also important because a court must focus on policy considerations in deciding whether discretionary act immunity applies.92

1. Policies favoring immunity: separation of powers and over deterrence.

Two policy rationales support granting governmental actors immunity from tort claims. The first, and most often cited, rationale supporting limiting governmental liability is separation of powers.93 This policy is rooted in the notion that the judiciary should not second-guess the decisions of a governmental agency (here, the case worker or social service agency).94 Judicial policy making is inappropriate because “such judgments are more

92 Nunn v. State, 677 P.2d 846, 849 (Cal. 1984) (en banc); Sanborn v. Chronicle Publ’g Co., 556 P.2d 764, 768-69 (Cal. 1976); see also Johnson v. State, 447 P.2d 352, 358 (Cal. 1968) (eschewing a literal approach to defining “discretionary actions” and concentrating instead on policy considerations relevant to the immunity claim). See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 78, § 2.115 (noting that to determine the scope of discretionary immunity “the judicial process must be focused principally on the policy considerations relevant to the purpose of the immunity”).
93 See Johnson, 447 P.2d at 360 (discussing separation of powers as a rationale for governmental immunity); see also Owen v. City of Independence, 445 U.S. 622, 648 (1980) (reasoning that in context of municipal functions, protecting cities from suits challenging discretionary decisions is based on “a concern for separation of powers... . . . For a court or jury, in the guise of a tort suit, to review the reasonableness of the city’s judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government.”); Kaisner v. Kolb, 543 So. 2d 732, 737 (Fla. 1989) (holding that governmental immunity is derived entirely from the doctrine of separation of powers). See generally Mark C. Niles, “Nothing But Mischief”: The Federal Tort Claims Act and the Scope of Discretionary Immunity, 54 ADMIN. L. REV. 1275, 1308-15, 1337-43 (2002) (discussing separation of powers as a justification for governmental immunity); Susan Randall, Sovereign Immunity and the Uses of History, 81 NEB. L. REV. 1, 102-13 (2002) (arguing that separation of powers is the only valid basis for governmental immunity); Laura Huber Martin, Comment, Caseworker Liability for the Negligent Handling of Child Abuse Reports, 60 U. Cin. L. REV. 191, 217 (1991) (arguing that the “primary justification for sovereign immunity is the separation of powers doctrine”).
appropriately left to the political branches of our governmental system, and because courts, which specialize in the resolution of discrete factual and legal disputes, are not equipped to make broad policy judgments.\(^9^5\) Basic policy choices made by governmental agencies involve decisions concerning the use of resources and the balancing of competing interests of various constituencies.\(^9^6\) Accordingly, there should be judicial abstention in areas where the responsibility for basic policy decisions has been committed to a coordinate branch of government.\(^9^7\)

A related, but different policy often urged to justify immunity, is that government workers should be free to exercise their judgment without constant fear of liability. With broad liability, public employees might be too cautious in their decision-making:

The justification for [immunity] is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.\(^9^8\)

A governmental actor's knowledge that he or she could be subjected to civil liability could also negatively affect his or her performance.\(^9^9\) Without some limitation on litigation, a government official may become "so inundated

\(^9^5\) Niles, *supra* note 93, at 1308.

\(^9^6\) Nunn, 677 P.2d at 849; *see also* RESTATEMENT (SECOND) OF TORTS § 895B cmt. d (1979) (noting that the "allocation of [the] available resources [may] be treated as a matter of political discretion" not subject to judicial review); Niles, *supra* note 93, at 1312 ("Policy choices invariably involve decisions concerning the use of scarce and/or expensive resources, and the balance of competing interests of various constituencies.").

\(^9^7\) Johnson, 447 P.2d at 361 n.8 (explaining that the purpose of immunity is "to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government . . . [if] such a policy decision, consciously balancing risks and advantages, took place."); *see also* Nunn, 677 P.2d at 849 (explaining that the "underlying reason for granting immunity" is "to ensure judicial abstention" from interfering with policy-making committed to the executive branch).

\(^9^8\) Johnson, 447 P.2d at 358; *accord* Hardy v. Vail, 311 P.2d 494, 496-97 (Cal. 1957); Elson v. Public Utils. Comm’n, 124 Cal. Rptr. 305, 309 (Ct. App. 1975) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Tenney v. Bradhove, 341 U.S. 367, 373-77 (1951) ("[I]t is indispensably necessary, that [the government official] enjoy the fullest liberty [and that he or she] be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."); Caldwell v. Montoya, 897 P.2d 1320, 1324, 1326 (Cal. 1995) (noting the "vital public interest in securing free and independent judgment" of public sector employees and that "fear of civil lawsuits might deter officials from the zealous and unflinching discharge of their public duties").

with civil claims that they would not be able to, or would at least be severely handicapped in, performing their normal duties." Accordingly, extensive liability would over deter and foster inefficient or ineffective government.

Both policies, however, have limited, if any, application when mandatory or non-policy-based decisions are involved. The separation of powers concern does not apply when an employee departs from a statutorily mandated path or performs an operational decision. In such circumstances, a court is not second-guessing a policy judgment. Rather, the court is merely enforcing the law. So too, the fear-of-liability/over deterrence rationale for limiting liability is not often implicated. The Tort Claims Act provides substantial protection to employees through indemnification (absent bad faith). The Act also provides employees a defense at public expense, when employees are sued for their official acts or omissions. These protections significantly reduce, if not eliminate, the dangers perceived in chilling employee ardor. Indeed, the California Supreme Court has held that a governmental actor's fear of liability cannot serve as a reason for granting immunity. It reaffirmed that holding as recently as 2000.


On the other hand, several policies favor imposing liability for a

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101 Johnson, 447 P.2d at 361; cf. United States v. Gaubert, 499 U.S. 315, 324 (1991) ("If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.").

102 Johnson, 447 P.2d at 361 (admonishing courts not to second-guess policy decisions of other branches of government).


104 Id. See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 78, §§ 2.89-2.90, 6.143-6.156.

105 Johnson, 447 P.2d at 359.

106 Id. at 360-61; Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 350 n.21 (Cal. 1976) ("We dismissed, in Johnson, the view that immunity continues to be necessary in order to insure that public employees will be sufficiently zealous in the performance of their official duties. The California Tort Claims Act of 1963 provides for indemnification of public employees against liability, absent bad faith, and also permits such employees to insist that their defenses be conducted at public expense . . . Public employees thus no longer have a significant reason to fear liability as they go about their official tasks. We also, in Johnson, rejected the argument that a public employee's concern over the potential liability of his or her employer serves as a basis for immunity.").

government’s negligent acts. The first is deterrence. Immunizing governmental actors from liability would remove a critical check on governmental behavior. The government – just like any private actor – will be more careful and less likely to be negligent if forced to internalize the costs of its actions. Potential liability also induces governmental workers to be more careful. Failure to use care would result in the stigma of being found negligent and the possibility of disciplinary action.

More fundamentally, finding government liability in certain circumstances would further the traditional tort theory that a negligent actor should compensate the innocent victim, and promotes goals of corrective and distributive justice, loss spreading, and fairness. A government “is a more appropriate candidate to bear the costs incurred by its negligent acts than the private citizen who sustains an injury through no ‘fault’ of her own.” Some even argue that a government is an ideal tort defendant, because it has the unique ability to spread losses arising from tort liability through taxes.


109 Id. at 872 (“If the theory of tort law is in part to compel private entities to become more efficient in light of potential tort liability, then there is no apparent reason why potential liability should not similarly force the government to be more prudent in its operations.”); see also Allen, supra note 94, at 824 (“Like any private business, forcing the state (or federal) government to internalize negligence costs creates incentives for the state to act more safely.”).

110 Krent, supra note 108, at 886 (“Others may be motivated to avoid liability by more personal incentives, whether to avoid the stigma of being found negligent or to avoid possible disciplinary action by their superiors.”). See generally Barry R. Goldman, Note, Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act, 26 GA. L. Rev. 837, 853-54 (1992) (“[T]he stigma attached to creating liability for the agency might deter a government agent from actively promulgating and enforcing contentious agency policies.”).

111 Niles, supra note 93, at 1294-95.

112 Id.; see also John C. Jeffries, Jr., Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 MICH. L. Rev. 82 (1989) (discussing theories of distributive justice and loss spreading in connection with governmental liability). Basic notions of fairness dictate that innocent plaintiffs (whether they are children or adults) should not be left without a remedy. The need to provide an innocent victim a remedy has long driven courts’ decisions. See, e.g., Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980) (“The most persuasive reason for finding plaintiff states a cause of action is that advanced in [Summers v. Tice]: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.”); Summers v. Tice, 199 P.2d 1 (Cal. 1948) (holding that negligent defendants should bear costs, not innocent plaintiffs); Kingston v. Chicago & Northwestern Ry. Co., 211 N.W. 913 (Wis. 1927) (finding that the defendant railroad company was liable for the entire damage to the plaintiff’s property, even though for the defendant’s negligence the plaintiff’s property would have been destroyed anyway, because to hold otherwise would allow a known wrongdoer to escape liability and leave an innocent plaintiff without a remedy).

113 James R. Levine, The Federal Tort Claims Act: A Proposal for Institutional Reform, 100 COLUM. L. Rev. 1538, 1553 (2000) (arguing that the governmental budget should be
California Supreme Court has recognized as much: "[I]t would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss, rather than distribute it throughout the community." Indeed, as one California court has explained, notions of fairness strongly dictate against granting governmental immunity:

This limitation upon immunities is manifestly just. An immunity is, after all, a license to harm. Thus, it should not extend beyond those functions which are so necessary to the public good that the public benefit from the free exercise of discretion in such functions plainly outweighs the private harm that may flow from misfeasance.

C. A Resolution Of The Policy Considerations: The Statutory Framework

In weighing these different policies, the Legislature attempted to strike a balance with the California Tort Claims Act. But the balance is weighted heavily in favor of liability. Where there is negligence, "liability for resulting harm is the rule, and immunity is the exception." Accordingly, governmental immunities must be "strictly construed." The burden is on the government to prove that the immunity should be conferred. The California Legislature's resolution of the policy concerns resulted in a Tort Claims Act that was intended to: (1) create liability on the part of governmental entities when injury was caused by a failure to perform a mandatory duty; (2) abolish absolute immunity and make public entities liable when their employees were liable; and (3) continue the immunity granted to public employees for their policy-adjusted to accommodate an expansion of tort liability to "spread the loss caused by government activity rather than leave the burden on the unlucky individuals harmed by the government's negligence"); see also Rayonier, Inc. v. United States, 352 U.S. 315, 319-20 (1957) (discussing the benefits of spreading the cost and burden of governmental liability through taxes).

115 Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 653 (Ct. App. 1994).
116 Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 915 (Cal. 1985); accord Johnson v. State, 447 P.2d 352, 363 (Cal. 1968); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 462 (Cal. 1961); Scott, 32 Cal. Rptr. 2d at 652. See generally Ramos v. County of Madera, 484 P.2d 93, 98 (Cal. 1971) ("[T]he well-settled notion that in governmental tort cases, 'the rule is liability, immunity is the exception' [...] Unless the legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail.").
117 Scott, 32 Cal. Rptr. 2d at 652 (citing Sullivan v. County of Los Angeles, 527 P.2d 865, 870-71 (Cal. 1974); James W. v. Superior Court, 21 Cal. Rptr. 2d 169, 175-76 (Ct. App. 1993)).
118 Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1138 (N.D. Cal. 2000) ("Under California law, government defendants have the burden of proving that the actions of government employees fall within scope of a statutory immunity."); Lopez, 710 P.2d at 916 (finding government "must make showing that act complained of was a policy decision that consciously balance[d] risks and advantages") (quoting Johnson, 447 P.2d at 363); Bell v. State, 74 Cal. Rptr. 2d 541, 547 (Ct. App. 1998) (finding discretionary act immunity requires "proof that the specific conduct that gave rise to the suit involved" a basic policy decision).
Accordingly, under the California Tort Claims Act, a governmental entity, such as a county or a social services agency, may be held liable in one of two ways.\footnote{120} First, a public entity may be directly liable if it fails to discharge a mandatory duty.\footnote{121} Second, a public entity may be held derivatively liable for the acts or omissions of its employees.\footnote{122} Derivative liability will not exist, however, if the employee made a "discretionary," policy-based decision, regardless of whether that employee was negligent.\footnote{123}

1. A government is directly liable for breach of mandatory duties.

The negligence per se doctrine applies to public entities.\footnote{124} Under section 815.6 of the California Government Code\footnote{125} a three-pronged test applies to determine whether a governmental entity is directly liable. First, the public entity must be under a mandatory, not a discretionary, duty imposed by an enactment.\footnote{126} An "enactment" is defined to include constitutional provisions, statutes, charter provisions, ordinances or regulations.\footnote{127} Second, the enactment must be designed to protect against the risk of the particular kind of injury suffered by the party seeking to impose liability.\footnote{128} A plaintiff must show that the injury is "one of the consequences which the [enacting body] sought to

\footnote{120}CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 78, § 2.53.
\footnote{121}CAL. GOV'T CODE § 815.6 ("Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.").
\footnote{122}Id. § 815.2(a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his [or her] employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee . . . .")
\footnote{123}Id. § 820.2 (stating that a public employee is not liable for an injury resulting from an act or omission that was "the result of the exercise of the discretion vested in him [or her], whether or not such discretion be abused"); see also id. § 815.2.
\footnote{124}Alejo v. City of Alhambra, 89 Cal. Rptr. 2d 768, 771 n.3 (Ct. App. 2000).
\footnote{125}CAL. GOV'T CODE § 815.6.
\footnote{127}CAL. GOV'T CODE § 810.6.
\footnote{128}Id. § 815.6 (imposing liability only when enactment "is designed to protect against the risk of a particular kind of injury"); see also Haggis v. City of Los Angeles, 993 P.2d 983, 987-88 (Cal. 2000); Shelton v. City of Westminster, 188 Cal. Rptr. 2d 205, 211 (Ct. App. 1984).
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prevent through imposing the alleged mandatory duty. That the enactment confers some benefit on the class to which plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's purpose, the enactment cannot serve as a predicate for liability. Third, the failure to diligently discharge that mandatory duty must be a proximate cause of the injury suffered. The Tort Claims Act thus "applies to public entities the familiar rule of tort law that violation of a legislatively prescribed standard of care creates a rebuttable presumption of negligence."

California courts have struggled to define what a "mandatory duty" is. Generally, however, a mandatory duty is understood to refer to an "obligatory duty which a governmental entity is required to perform, as opposed to a permissive power that such entity may or may not exercise, as it chooses." The controlling question is whether the legislature intended that the enactment impose an obligation to take a specified action to prevent specific types of injuries. An enactment that contains mere recitations of goals and policies therefore does not impose a mandatory duty to act.

In determining whether a statute imposes a mandatory duty, established principles of statutory interpretation must guide the court. Whether a mandatory duty exists is a question of law for the courts to decide. Only

129 Haggis, 993 P.2d at 988 (quoting Hoff v. Vacaville Unified Sch. Dist., 968 P.2d 522 (Cal. 1998)).
130 Id.; Sutherland v. City of Fort Bragg, 102 Cal. Rptr. 2d 736, 741 (Ct. App. 2000).
131 Haggis, 993 P.2d at 988; see also Ibarra v. Cal. Coastal Comm'n, 227 Cal. Rptr. 371, 375 (Ct. App. 1986); State v. Superior Court, 197 Cal. Rptr. 914, 918 (Ct. App. 1984).
132 35 CAL. JUR. 3D Governmental Tort Liability § 11 (2002) (citing Lehto v. City of Oxnard, 217 Cal. Rptr. 450 (Ct. App. 1985)); see also CAL. EVID. CODE § 669 (codifying negligence per se doctrine and creating rebuttable presumption of negligence when person violates "a statute, ordinance, or regulation of a public entity").
133 35 CAL. JUR. 3D Governmental Tort Liability § 11; see also Morris v. County of Marin, 559 P.2d 606, 610 (Cal. 1977); Posey v. State, 225 Cal. Rptr. 830, 838 (Ct. App. 1986); Fox v. County of Fresno, 216 Cal. Rptr. 879, 881 (Ct. App. 1985).
136 Nunn v. State, 677 P.2d 846, 852 (Cal. 1984) (en banc); see also Fox, 216 Cal. Rptr. at 881 (asserting that whether a statute or ordinance is intended to create a mandatory duty is a question of law). In making a claim that a governmental entity has breached a mandatory duty, the specific statute that imposes the mandatory duty must be specifically identified in pleadings. Sullivan v. City of Sacramento, 235 Cal. Rptr. 844, 849 (Ct. App. 1987); Searcy, 223 Cal. Rptr. at 212.
137 Nunn, 677 P.2d at 851-52. In the absence of a clearly expressed legislative intent to the contrary, the words of a statute are deemed conclusive. Halstrom v. Tillamook County, 493 U.S. 20, 28 (1989); see also People v. Woodhead, 741 P.2d 154, 157 (Cal. 1987) ("[S]ignificance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.").
when the statutory language is ambiguous may other factors be considered.\textsuperscript{138} The language of the statute need not, however, manifest a legislative intent to create a private right of action.\textsuperscript{139} Rather, courts have held that a mandatory duty exists so long as the duty is explicitly phrased in the enactment using obligatory language, such as “shall” or “must.”\textsuperscript{140} Only in a narrow set of circumstances is the presence of obligatory language not dispositive.\textsuperscript{141} Notwithstanding the use of the term “shall” or “must,” a mandatory duty will not exist where the legislative intent is manifestly otherwise or where interpreting the statute literally would lead to an absurdity.\textsuperscript{142} Finally, because a statutory provision creates a mandatory duty in one area does not necessarily mean it imposes a mandatory duty in another related area.\textsuperscript{143}

\textsuperscript{138} Nunn, 677 P.2d at 851-52.
\textsuperscript{139} Haggis v. City of Los Angeles, 993 P.2d 983, 988 (Cal. 2000) (noting that the enactment establishing the mandatory duty does not need to manifest an intent to create a private right of action because that is the function of section 815.6) (citing Crusader Ins. Co. v. Scottsdale Ins. Co., 62 Cal. Rptr. 2d 620, 623 (Ct. App. 1997)).
\textsuperscript{140} Morris v. County of Marin, 559 P.2d 606, 610 (Cal. 1977); see CAL. GOV'T CODE § 14 (West 1995) (indicating that the word “shall” indicates mandatory, not permissive, language); see also CAL. BUS. & PROF. CODE § 19 (West 2003) (“‘Shall’ is mandatory and ‘may’ is permissive.”); CAL. FAM. CODE § 12 (West 1994) (“‘Shall’ is mandatory and ‘may’ is permissive. ‘Shall not’ and ‘may not’ are prohibitory.”); Sullivan v. County of Los Angeles, 527 P.2d 865, 867-68 (Cal. 1974) (interpreting statute using the word “must” to impose a mandatory duty); Ramos v. County of Madera, 484 P.2d 93, 99-100 (Cal. 1971) (finding that statutes using word “shall” regarding eligibility standards for government payments created mandatory duties); Woodbury v. Brown-Dempsey, 134 Cal. Rptr. 2d 124, 133 (Ct. App. 2003) (explaining that “[o]rdinaril, the word ‘may’ connotes a discretionary or permissive act; the word ‘shall’ connotes a mandatory or directory duty” and that “the Legislature is presumably aware of the ordinary meaning assigned to the words ‘may’ and ‘shall.’”); Decker v. U.D. Registry, Inc., 129 Cal. Rptr. 2d 892, 895-96 (Ct. App. 2003) (“Thus, ‘in most cases,’ the Legislature’s use in a statute of the word ‘shall’ indicates that the statute’s ‘provisions are mandatory . . . .’”) (quoting Abbett Electric Corp. v. Storek, 27 Cal. Rptr. 2d 845, 850-51 (Ct. App. 1994)); Judith V. v. Superior Court, 126 Cal. Rptr. 2d 14, 25 (Ct. App. 2002) (holding that statute providing that a status report “shall” be filed and served at least ten days before status review hearing in dependency proceeding creates a mandatory duty).
\textsuperscript{141} See generally REA Enters. v. Cal. Coastal Zone Conservation Comm’n, 125 Cal. Rptr. 201, 207-08 (Ct. App. 1975) (explaining that a “well established rule of statutory construction” is that the word “shall” connotes mandatory action).
\textsuperscript{142} Morris, 559 P.2d at 612 n.6 (“Although statutory language is . . . a most important guide in determining legislative intent, there are unquestionably instances in which other factors will indicate that apparently obligatory language was not intended to foreclose . . . the exercise of discretion.”); Estate of DePasse v. Harris, 118 Cal. Rptr. 2d 143, 151-52 (Ct. App. 2002) (“Whether the words ‘must’ or ‘shall’ should be construed as mandatory or directory depends on the intention of the Legislature in enacting the particular code section.”).
\textsuperscript{143} See, e.g., Nunn, 677 P.2d at 851; Cancun Homeowners Ass’n v. City of San Juan Capistrano, 264 Cal. Rptr. 288, 291 (Ct. App. 1989). See generally Creason v. Dep’t of Health Servs., 957 P.2d 1323, 1328 (Cal. 1998) (citing Morris, 559 P.2d at 612 n.6); CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 78, § 2.76 (listing cases finding no mandatory duty despite use of the word “shall”).
\textsuperscript{144} See, e.g., Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998) (finding that mandatory duty to assess factors as part of county’s foster care placement
A government is derivatively liable for its employees' negligence if the employee is not immune.

In addition to direct liability, a government agency may also be derivatively liable for its employees' acts or omissions, provided that the employee is not immune from liability. Immunity exists for an employee's "discretionary" acts committed within the scope of his or her employment. As section 820.2 of the California Government Code explains, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

Courts must use caution when determining whether discretionary act immunity should be conferred on a government employee's acts: the word "discretionary" does not have a literal interpretation. In the landmark case construing when an act is discretionary, Johnson v. State of California, the California Supreme Court held that the mere existence of a discretionary choice in the act performed does not automatically confer immunity. Rather, only planning-level activities, which require the governmental employee to make a decision did not impose mandatory duty as to what ultimate placement must be made); Brenneman v. State, 256 Cal. Rptr. 363, 366 ( Ct. App. 1989) (distinguishing mandatory duty to assess parolee's risk from any specific requirement to take action); Gray v. State, 254 Cal. Rptr. 581, 583 ( Ct. App. 1989) (finding that a statute requiring the California Department of Justice to notify a gun dealer of purchaser eligibility to possess weapon if purchaser fits into a particular category did not impose a duty to conduct investigation); Rose v. County of Plumas, 199 Cal. Rptr. 842, 847 ( Ct. App. 1984) (concluding that a statutory duty to train police officers in first aid did not create a mandatory duty to render aid).

CAL. GOV'T CODE § 815.2(a) (West 1995); see also Brenneman, 256 Cal. Rptr. at 367.

Id. §§ 815.2(b), 820.2.

Id. § 820.2.

Id. Many acts or omissions that are accorded immunity under section 820.2 as discretionary acts are also immunized under other specific statutory provisions. See, e.g., id. §§ 818.4, 821.2 (immunizing the issuance, denial, and revocation of permits, certificates, and licenses); see also Morris, 559 P.2d at 614 n.7 (noting that "many of the individual immunity provisions ... simply represent specific applications of the general 'discretionary' immunity principle").

Caldwell v. Montoya, 897 P.2d 1320, 1325 (Cal. 1995) ("Almost all acts involve some choice among alternatives, and the statutory immunity thus cannot depend upon a literal or semantic parsing of the word 'discretion.'"); see, e.g., Sanborn v. Chronicle Pub. Co., 556 P.2d 764, 769 (Cal. 1976) (concluding that although the decision to discuss a matter with the press may have been within clerk's discretion, as that term is used in common parlance, it was not "in the nature of a 'basic policy decision' made at the 'planning' stage of City's operations" but rather fell within the category of routine duties incident to the normal operations of the office of the clerk).

447 P.2d 352 (Cal. 1968).

Id. at 363. See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 10.11-16 (Robert Waxman ed., 4th ed. 1999 & Supp. 2003) (describing Johnson holding and explaining that a semantic or literal approach to "discretion" has been repeatedly rejected by the California Supreme Court).
basic policy choices, are entitled to immunity.\textsuperscript{151} Operational decisions, which only implement policy, are not immunized.\textsuperscript{152} This distinction is sound, because virtually all acts by governmental employees involve some degree of choice.\textsuperscript{153} Only when a "basic policy" decision is made does the employee's act constitute an exercise of "discretion" by a coordinate branch of government that "remain[s] beyond the range of judicial inquiry."\textsuperscript{154} The discretionary act immunity exception to the general rule of liability is thus a narrow one. The Legislature intended it to be "no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions."\textsuperscript{155}

In determining whether an employee has engaged in a basic policy decision, the status of the governmental employee, although not determinative, is relevant. Immunity may be denied to employees who occupy positions "at the lowest ministerial rung of official action."\textsuperscript{156} This is because basic policy

\textsuperscript{151} Johnson, 447 P.2d at 356-58; see also Barner v. Leeds, 13 P.3d 704, 709 (Cal. 2000) (noting that immunity is reserved for only "basic policy decisions" which have been committed to coordinate branches of government); Caldwell, 897 P.2d at 1324-25 (quoting Johnson and explaining that immunity is reserved for "basic policy decisions"). Notably, other states also only immunize governmental activity when basic policy decisions are involved. See, e.g., Commercial Carrier v. Indian River County, 371 So. 2d 1010, 1021-22 (Fla. 1979) (finding that governmental immunity only applies to policy-based decisions and surveying other states' laws to find general agreement among the states); Bruce A. Peterson & Mark E. Van Der Weide, Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity, 72 NOTRE DAME L. REV. 447 (1997) (explaining that state laws in California, Delaware, Hawaii, Indiana, Louisiana, Minnesota, Montana, New Jersey, Oregon, Utah, and Washington find that discretionary act immunity applies only when the government shows that its employee actually balanced public policy concerns in his or her decision); Susan Lynn Abbott, Note, Liability of the State and Its Employees for the Negligent Investigation of Child Abuse Reports, 10 ALASKA L. REV. 401, 417-18 (1993) (noting that immunity applies only to "basic policy decisions").

\textsuperscript{152} Johnson, 447 P.2d at 356-58; see also Barner, 13 P.3d at 710 n.2 (affirming the planning and operational decision distinction); Caldwell, 897 P.2d at 1325 (discussing Johnson's planning and operational decisions distinction as a workable test for discretionary act immunity).

\textsuperscript{153} Johnson, 447 P.2d at 356-58; see also Ham v. County of Los Angeles, 189 P. 462, 468 (Cal. Ct. App. 1920) ("[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."); CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 78, § 2.115 ("[T]aken literally, the term 'discretionary' lends itself to such a wide range of applications that it could conceivably nullify almost all vicarious liability of public entities under the Tort Claims Act for employee torts—a result clearly inconsistent with legislative intent.").

\textsuperscript{154} Johnson, 447 P.2d at 360 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 25.11 (1958)); see also Barner, 13 P.3d at 710 n.2; cf. United States v. Gaubert, 499 U.S. 315, 325 (1991) ("A discretionary act is one that involves choice or judgment . . . . Discretionary conduct is not confined to the policy or planning level.").

\textsuperscript{155} Tarasoff v. Regents of the Univ. of Calif., 551 P.2d 334, 350 (Cal. 1976) (citing Johnson, 447 P.2d at 360); see also Barner, 13 P.3d at 709. See generally supra Part II.B.1.

decisions are normally only made by relatively high-ranking public employees. \textsuperscript{157} Relatively, courts have "no duty to abstain from reviewing the choices of a government employee without authorization or special expertise for making policy decisions." \textsuperscript{158} Discretionary act immunity "is an acknowledgement that courts lack the political authority and expertise to evaluate decisions based on policy variables." \textsuperscript{159} Therefore, as Justice Scalia has observed, immunity should be reserved for policy decisions where agency expertise is utilized, by "an officer whose official responsibilities include assessment of [social, economic, or political policy] considerations." \textsuperscript{160}

Even if an act by an employee is classified as discretionary, a government may still be held derivatively liable if the injury resulted "not from the employee's exercise of 'discretion vested in him' to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so." \textsuperscript{161} Courts have recognized that "although a basic policy decision may be discretionary and thus warrant governmental immunity, subsequent operational actions in the implementation of that decision still must face case-by-case adjudication on the question of negligence." \textsuperscript{162} Accordingly, a public entity may be liable for the "ministerial" acts of its employees. \textsuperscript{163}

The distinction between policy and operational or ministerial decisions, for purposes of determining whether governmental immunity exists, is firmly

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\textsuperscript{158} Peterson & Van Der Weide, supra note 151, at 491.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} United States v. Gaubert, 499 U.S. 315, 335 (1991) (Scalia, J., concurring).

\textsuperscript{161} McCorkle v. Los Angeles, 449 P.2d 453, 460 (Cal. 1969) (en banc) (citing \textit{Johnson}, 447 P.2d at 356); see also Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 915 (Cal. 1985) (finding that "subsequent ministerial actions taken in the implementation of" discretionary policy decisions are not immunized); Newton v. County of Napa, 266 Cal. Rptr. 682, 687-88 (Ct. App. 1990) (finding that a welfare department official's decision to conduct an investigation of child abuse is immune from liability, but that this does not preclude liability for actions implied in the decision to investigate); Sava v. Fuller, 57 Cal. Rptr. 312, 317 (Ct. App. 1967) ("[O]nce the determination has been made that a service will be furnished and the service is undertaken, then public policy demands (except when the Legislature specifically decrees otherwise) that the government be held to the same standard of care as the law requires of its private citizens . . . .")

\textsuperscript{162} Barner v. Leeds, 13 P.3d 704, 711 (Cal. 2000).

\textsuperscript{163} \textit{McCorkle}, 449 P.2d at 459; see also Barner, 13 P.3d at 709 ("[T]here is no basis for immunizing lower level decisions that merely implement a basic policy already formulated."); Ramos v. County of Madera, 484 P.2d 93, 98-99 (Cal. 1971) (en banc) (explaining that actors making low level ministerial decisions are not protected by immunity).
entrenched in California jurisprudence. To be sure, commentators have criticized this distinction, claiming that it unduly limits the scope of immunity. Some have even urged the California Supreme Court to overrule Johnson and adopt a literal definition of “discretionary.” Applying such a literal approach might be more consistent with Federal Tort Claims Act cases that grant broader immunity, including immunity for operational decisions involving the exercise of judgment. But the California Supreme Court has repeatedly rejected these urgings and has refused to overturn Johnson:

Even if we were inclined to disagree with the principles set forth in Johnson, we do not believe it would be appropriate to overrule or disapprove more than three decades of precedent applying authoritative settled statutory construction that has been central to the analysis and holdings of these decisions. The principles underlying the doctrine of stare decisis apply with special force in the context of statutory interpretation, because the Legislature remains free to alter what we have done.

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164 Barner, 13 P.3d at 710 n.2. Some commentators suggest that Johnson may be inconsistent with the intent of the Tort Claims Act. The merits of this argument are debatable, but whether Johnson is, in fact, inconsistent with the Act is a moot issue. The legislature’s inaction over thirty years indicates it has acquiesced in the Johnson interpretation. Id.; see, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983) (“In view of its prolonged and acute awareness of so important an issue, Congress’ failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings.”); People v. Meloney, 70 P.3d 1023, 1034 (Cal. 2003) (noting that when a “statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it”) (citations omitted). The continuing legislative acquiescence to Johnson “bespeaks ratification more than rejection.”

165 Id.; see also United States v. Gaubert, 499 U.S. 315, 325 (1991) (“A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions.”); cf. Berkovitz v. United States, 486 U.S. 531, 536-37 (1988) (noting immunity attaches to governmental “actions or decisions based on considerations of public policy”). Even federal law, however, immunizes only discretionary decisions that have some relationship to public policy. See, e.g., Coulthurst v. United States, 214 F.3d 106, 108-09 (2d Cir. 2000) (explaining that Berkovitz and Gaubert immunize only discretionary decisions that are “grounded in considerations of public policy” or susceptible to policy analysis); Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1130, 1135-36 (10th Cir. 1999) (describing subsequent interpretations of Berkovitz which lighten the government’s burden regarding when an official exercise of discretion is susceptible to policy analysis).

166 See, e.g., Creason v. State Dep’t of Health Servs., 957 P.2d 1323, 1329-30 (Cal. 1998) (applying Johnson’s distinction between operational and planning decisions), Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 915 (Cal. 1985) (applying Johnson’s distinction between operational and planning decisions, and indicating that immunity is conferred only for “basic policy decisions”); see also Nunn v. State, 677 P.2d 846, 849-50 (Cal. 1984) (en banc); Sanborn v. Chronicle Publ’g Co., 556 P.2d 764, 768-69 (Cal. 1976); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 349-50 (Cal. 1976); Ramos v. County of Madera, 484 P.2d 93, 98-99 (Cal. 1971).

167 Barner, 13 P.3d at 710 n.2 (citing Hunt v. Superior Court, 987 P.2d 705, 720 (Cal. 1999)).
Consequently, lower courts may not "casually decree governmental immunity" under the rubric of "discretion." They may reach that result only when the governmental entity has made a "strong showing" that its act was a basic policy decision. Immunity remains the exception; liability the rule.

III. THE CURRENT STATUS OF GOVERNMENTAL LIABILITY IN FOSTER CARE ABUSE CASES

Although, at one time, a county and its workers could be sued for negligent supervision or placement of a child in foster care, the courts have recently attempted to change the law. California appellate courts, in the last few years, have interpreted the foster care placement statutes so narrowly that direct liability will rarely, if ever, be found. Likewise, derivative liability – once the clearest path to governmental liability – is also now almost impossible to establish. The courts have improperly ignored the policy rationales and legal principles underlying the California Tort Claims Act to grant counties and their social workers absolute immunity. Whether by design or not, these rulings rob foster children of a remedy for injuries that the legislature intended to be redressed.

A. Traditional Understandings of Liability In Foster Care Placement and Supervision

In the years immediately following the enactment of the California Tort Claims Act, governmental liability for negligent foster care placement and supervision was the rule, not the exception. Social workers were not entitled to immunity, because their decisions regarding the maintenance, care, and supervision of dependent children did not constitute basic policy decisions. In

169 Johnson, 447 P.2d at 363.
170 Id.
171 Ramos, 484 P.2d at 98 (citing the "well-settled notion that in governmental tort cases, "the rule is liability, immunity is the exception" and stating that "[u]nless the legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail"). The California Supreme Court has never veered from this general rule. See, e.g., Lopez, 710 P.2d at 915 ("[I]n governmental tort cases, "the rule is liability, immunity is the exception."’); Milligan v. City of Laguna Beach, 670 P.2d 1121, 1123 n.2 (Cal. 1983) (stating that the court’s “decisions since the adoption of the Tort Claims Act of 1963 . . . have adhered to this basic axiom of tort law” that liability is the rule and immunity the exception); see also Baldwin v. State, 491 P.2d 1121, 1128-29 (Cal. 1972); Johnson, 447 P.2d at 363; Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 462 (Cal. 1961).
172 See, e.g., Los Angeles County v. Superior Ct. (Terrell R.), 125 Cal. Rptr. 2d 637, 640-41 (Ct. App. 2002); Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165, 170-71 (Ct. App. 1998).
173 See supra note 19-21 and accompanying text (discussing the impact of the Court of Appeal cases).
1968, the California Supreme Court, in Johnson, held that once the basic policy decision of placing a youth with foster parents has been made, immunity ends and subsequent negligent acts are subject to legal redress. In that case, the state was found liable for failing to warn a foster parent of the homicidal tendencies of the child placed in her home.

Although the Johnson court did not address the issue directly, the logic of that decision implied that social workers were not entitled to immunity from negligent foster care placement and supervision claims. The Johnson court reaffirmed that the Tort Claims Act did not alter the basic teachings of Muskopf that a government has a heavy burden and must make a “strong showing” to overcome the presumption against immunity. In Johnson, the court held that a parole officer’s decision to warn or not to warn foster parents of the child’s violent background was “at the lowest ministerial rung of official action,” and the negligent failure to warn constituted “a classic case for the imposition of tort liability.” The Court found persuasive that “since the entire populace of California benefits from the activity of the Youth Authority, it should also share equally the burden of injuries negligently inflicted on individual citizens.” Suits against the state, the court concluded, “provide a fair and efficient means to distribute . . . losses.” No reason existed to believe that this analysis did not apply with equal force to social workers.

By 1970, the courts had addressed the issue directly. In Elton v. County of Orange, the court of appeal held that social workers were not immune from negligent supervision claims because foster child supervision decisions do not involve making basic policy choices, and therefore are not discretionary acts within the meaning of the statute:

Decisions made with respect to the maintenance, care or supervision of a dependent child, or in connection with her placement in a particular home, may entail the exercise of discretion in a literal sense, but such determinations

174 Johnson, 447 P.2d at 363-64. Subsequent cases have held that the decision to initiate dependency proceedings and remove a child from parental custody is a basic policy decision that confers immunity. Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513, 519-20 (Ct. App. 1990); Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647-48 (Ct. App. 1989).
175 Johnson, 447 P.2d at 364 (explaining that “[o]nce the proper authorities have made the basic policy decision—to place a youth with foster parents, for example—the role of section 845.8 immunity ends; subsequent negligent acts, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress”).
176 Id. The California Supreme Court reached a similar conclusion in a related context three years later. Ramos v. County of Madera, 484 P.2d 93, 100 (Cal. 1971) (“The authority given counties to implement the basic policy decisions of the legislature as here (and where delegated to the Department of Social Welfare) is purely ministerial.”).
177 Johnson, 447 P.2d at 363.
178 Id. at 362.
179 Id. at 363.
180 Id.
181 Id.
182 84 Cal. Rptr. 27 (Ct. App. 1970).
do not achieve the level of basic policy decisions, and thus do not, under the provisions of Government Code section 820.2, preclude judicial inquiry into whether negligence of public employees was involved and whether such negligence caused or contributed to plaintiff's injuries. In that case, the foster parents allegedly "struck, battered, bruised, scalded, beat[] and physically and mentally forced [the plaintiff] to submit to physical and mental atrocities." The county's alleged negligence was its improper certification of the foster home and its negligent placement of the plaintiff in that home. The Elton court held that the initial decision to classify the child as a dependent child and to remove her from her parental home was a basic policy decision to which immunity would attach. But the actual placement of the child in a foster home, the certification, and the administration of the child's care were not planning or policy decisions, and were therefore left unprotected by statutory immunity. The court also found that the foster care statutes imposed mandatory duties.

The Elton decision and the analytical framework established in Johnson were followed throughout the 1970s, 1980s, and early 1990s. Case after case cited Elton approvingly, both in and out of the foster care context. Courts concluded that absolute immunity was not available to social workers.

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183 Id.
184 Id. at 29.
185 Id.
186 Id. at 30-31.
187 Id.
188 Id. at 31-32; see also Wood v. County of San Joaquin, 4 Cal. Rptr. 3d 340, 352 (Ct. App. 2003) (citing Elton as an example of how mandatory duties are imposed when a county fails to comply with its own "mandatory state standards of foster home inspection and supervision").
189 See, e.g., Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 651 ( Ct. App. 1994) (citing Elton and noting that there is no immunity for social workers who are "negligen[t] . . . in the supervision of a minor in foster care"); see also Morris v. County of Marin, 559 P.2d 606, 615 (Cal. 1977) (citing Elton); Ramos v. County of Madera, 484 P.2d 93, 99 (Cal. 1971) (citing and approving of Elton); Wood, 4 Cal. Rptr. 3d 340, 352 (Ct. App. 2003) (citing Elton); Walt Rankin & Assocs., Inc. v. City of Murrieta, 101 Cal. Rptr. 2d 48, 66 (Ct. App. 2000) (citing Elton); MacDonald v. State, 281 Cal. Rptr. 317, 333 (Ct. App. 1991) (citing Elton); Shelton v. City of Westminster, 188 Cal. Rptr. 205, 210 (Ct. App. 1982) (citing Elton). But see Smith v. Alameda County Soc. Servs. Agency, 153 Cal. Rptr. 712, 718 (Ct. App. 1979) (distinguishing foster care from other governmental tort claims because the foster care placement statutes were designed to protect the health and safety of dependent children, unlike other statutes).
190 MacDonald, 281 Cal. Rptr. at 326 (noting that foster care placement is unique in the kind and degree of a state and county's inspection duties); Smith, 153 Cal. Rptr. at 718 (explaining that foster care placement and supervision is unique). Social workers do, however, enjoy absolute immunity in their decision to investigate child abuse reports and initiate dependency proceedings, but only because of the prosecutorial nature of that decision. See Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513, 519 (Ct. App. 1990) (discussing prosecutorial immunity); Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647-48 (Ct. App. 1989) (discussing prosecutorial immunity); cf. Scott, 32 Cal. Rptr. 2d at 653 (immunity does not extend to negligence in performance of other social workers' functions
Supervision of defenseless children, once committed to the custody of the state, is a ministerial or operational act that must be accomplished with reasonable care. In 1984, the California Supreme Court sitting en banc, cited Elton with approval, characterizing the supervision of children in foster homes as involving ministerial, operational, or "street level" decisions. As such, social workers could not enjoy discretionary immunity for negligently placing or supervising foster children. Even as recently as 1994, the court of appeal in Scott v. County of Los Angeles held that although social workers may be immunized from liability for their decision to initiate dependency proceedings, "the same immunity does not extend to other functions of social workers." Foster child supervision consists of only "ministerial" acts.

The Elton holding—that social workers can be sued for negligent foster child placement and supervision—was not only the law in California, it was the law throughout most of the country. As a New York court observed: "The...
overriding weight of appellate authority in this country is in agreement that a State . . . may be answerable for injuries suffered by children as a result of negligence in the placement or supervision of children in their charge.\textsuperscript{196} As in \textit{Elton}, other state courts concluded that foster child supervision does not involve basic policy decisions, but only ministerial acts.\textsuperscript{197} Immunity is therefore not available.

In the mid-1990s, however, California appellate courts began to chip away at what had once been bedrock law. Signs of this change became apparent when the Fourth District Court of Appeal criticized its own earlier decision. In \textit{Ronald S. v. County of San Diego}, the court described \textit{Elton} as a "difficult decision" because it believed foster care placement to be an activity "loaded with subjective determinations."\textsuperscript{198} Nevertheless, the court was careful to note that foster care supervision was unique: "[t]he maintenance of a child in a foster home involves an obligation of continued supervision by the County . . . . Much of what the County is obligated to do in terms of continued administration of the child's welfare undoubtedly constitutes simple and uncomplicated surveillance which reasonably could be characterized as ministerial."\textsuperscript{199} And despite its criticism of \textit{Elton}, the court emphasized that it did not intend to "disapprove[c] or retreat from [its] decision in \textit{Elton}."\textsuperscript{200}

By the late 1990s, what started as a criticism had turned into attempts to constrain \textit{Elton}'s holding, and then to reject it outright. In 1999, in \textit{Becerra v. County of Santa Cruz}, the court of appeal ostensibly held that although there may be liability for failure to follow specific statutorily mandated procedures, immunity would be the rule, not the exception.\textsuperscript{201} \textit{Becerra} correctly addressed the direct liability analysis to find that the placement statutes required assessment of certain mandatory criteria.\textsuperscript{202} But \textit{Becerra} then erred when it turned to the issue of derivative liability. Abandoning the holding of \textit{Elton}, and implicitly ignoring the instructions of \textit{Nunn} and \textit{Johnson}, the Court ruled that a social worker's placement of a foster child was entitled to immunity.\textsuperscript{203} Relying on \textit{Ronald S.} - but ignoring its explicit admonitions - the Court reasoned that

\begin{footnotesize}
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\item Washington County, 572 P.2d 1070 (Or. 1977). For a general discussion of governmental tort liability for a social service agency's negligence in the supervision of foster children, see Carolyn A. Kubitschek, Annotation, \textit{Social Worker Malpractice for Failure to Protect Foster Children}, 41 AM. JUR. TRIALS 1, \S 26 (2003); Sonja A. Soehnel, Annotation, \textit{Governmental Tort Liability for Social Service Agency's Negligence in Placement, or Supervision After Placement, of Children}, 90 A.L.R. 3D 1214 (1979).
\item Barnes, 487 N.Y.S.2d at 830.
\item \textit{See supra} note 195.
\item 20 Cal. Rptr. 2d 418, 424-25 (Ct. App. 1993).
\item Id. at 425.
\item Id.
\item 81 Cal. Rptr. 2d 165, 170-74 (Ct. App. 1998).
\item Id. at 170 (finding that the mandatory duty "imposed upon the County by section 16501.1, subdivision (c) . . . is to evaluate the stated criteria prior to making a placement selection").
\item Id. at 172-74.
\end{itemize}
\end{footnotesize}
because social workers exercise discretion in making placement decisions, the government is shielded from liability:

Selecting and certifying a foster [family] home for care of dependent children seems to us to be an activity loaded with subjective determinations and fraught with major possibilities of an erroneous decision. It appears to us that foster [family] home placement . . . constitutes an activity of a co-equal branch of government, and that the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review.  

In short, the Becerra court improperly applied the prohibited literal definition of "discretionary" and found that because "social workers engage in a discretionary analysis of the needs and interests of a dependent child, immunity exists."  

Then, in 2002, the court of appeal completely rejected the holdings of Elton. The court of appeal multiplied the mistakes of Becerra to not only reaffirm Becerra's faulty derivative liability analysis — de facto immunizing counties from all derivative liability — but also to eliminate any direct liability exposure. By doing so, the appeals court turned thirty years of precedent on its head.

B. The Illegitimate Move To Absolute Governmental Immunity

In September 2002, the Second District Court of Appeal decided County of Los Angeles v. Superior Court (In re Terrell R.). That case, in dramatic terms, reimposed absolute governmental immunity in the context of derivative claims for negligent foster child placement and supervision. Moreover, its holding, if followed by other courts, would render most direct liability claims unviable.

The facts of the Terrell R. case are not unusual for a foster care abuse case. In 1999, the County Department of Children and Family Services removed Terrell, an eleven-year-old, and his siblings, from the custody of their grandmother. The children were removed because the grandmother was unable to provide for them and was allegedly abusing prescription drugs. A state-licensed foster family agency certified a family friend, Robert Poole, as a foster parent. Poole, however, had completed only fifteen of the thirty hours of training that the agency required for certification. Moreover, a "child abuse index clearance, the results of a TB test, and verification of employment

204 Id. at 173 (quoting Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418, 425 (Ct. App. 1993)).
205 Id.
206 125 Cal. Rptr. 2d 637 (Ct. App. 2002).
207 Id. at 641.
208 Id.
209 Id.
210 Id.
had not been completed prior to the certification.\textsuperscript{211} Despite the County social worker’s awareness that Poole had not completed the requirements for certification, and that Terrell would not be with his siblings or other relatives, Terrell was placed in Poole’s home.\textsuperscript{212}

Poole’s home was not an appropriate placement.\textsuperscript{213} Although Terrell had his own bedroom, he slept in the same bed as Poole.\textsuperscript{214} Poole allegedly repeatedly sexually molested and abused Terrell over several months.\textsuperscript{215} The County social worker was unaware of what was happening because she did not visit Terrell at Poole’s home during his placement.\textsuperscript{216}

Terrell sued the County and others, asserting causes of action under the Tort Claims Act.\textsuperscript{217} Terrell alleged that his placement in the Poole home violated several mandatory duties.\textsuperscript{218} The alleged mandatory duty violations, included, among other things: (1) placing Terrell in an uncertified home; (2) failing to monitor Terrell’s condition and visit him regularly at his home; and (3) failing to place Terrell with relatives and his siblings.\textsuperscript{219} He also alleged that his supervision after placement was negligent.\textsuperscript{220} The county moved for summary judgment.\textsuperscript{221} It argued that it was immune from suit for two reasons. The county claimed it breached no mandatory duties that proximately caused any injury to Terrell.\textsuperscript{222} The county also urged that any negligence was the result of the social worker’s exercise of discretion, and therefore the County was also immune on any derivative liability claim.\textsuperscript{223} The trial court denied the County’s summary judgment motion and a writ of mandate was filed.\textsuperscript{224}

In writ proceedings, the Court of Appeal ordered the trial court to grant summary judgment in the County’s favor.\textsuperscript{225} The Court of Appeal granted the writ on two grounds. The court first found there could be no direct liability. According to the court, “foster care placement [and supervision] is a governmental function that involves the exercise of discretion” and the obligatory language of the foster care statutes are “merely [statements of] a

\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 642.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id. Terrell initially sued Robert Poole, Monica Poole, the County, Wings of Refuge, and Dependency Court Legal Services. The \textit{Terrell R.} decision focused only on the issue of whether the County could be held liable.
\textsuperscript{218} Id. at 642, 645.
\textsuperscript{219} Id. at 645-48.
\textsuperscript{220} Id. at 649.
\textsuperscript{221} Id. at 642-43.
\textsuperscript{222} Id. at 642.
\textsuperscript{223} Id. at 643.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 650.
More controversially, the court concluded that the purpose of the statutes and regulations regarding foster care placement is not to prevent sexual abuse. Instead, the court found that the statutes' purpose is to encourage family reunification. Therefore, no mandatory duties were imposed by the foster care placement statutes, and the County was not directly liable as a matter of law. Second, the court held that the County could not be derivatively liable. The court ruled that discretionary act immunity applied because social workers had choices on how to supervise and place children.

The court agreed that "selecting and certifying a foster [family] home for care of dependent children [is] . . . an activity loaded with subjective determinations . . . and that the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review." On December 18, 2002, the California Supreme Court denied review and denied a request for depublication.

C. Judicial Missteps: Why Los Angeles County v. Superior Court (Terrell R.) Got It Wrong

The Court of Appeal's broad pronouncements in Terrell R. were misguided, and the legal reasoning used to make those pronouncements was fundamentally unprincipled. First, the court's direct liability analysis was fraught with errors. It initially erred by ruling that the statutory provisions governing foster care placement impose no mandatory duties. The court compounded that error by holding that the purpose of the child welfare statutes is not to protect children from abuse. The court reached these conclusions—representing a significant departure from prior precedent—even though the text, the legislative history, and the government's own interpretation of the statutory provisions governing foster care placement all support the opposite conclusion. Second, the court erred in its derivative liability analysis. By ignoring binding Supreme Court precedent, the court reached the unfounded conclusion that a social worker is entitled to discretionary act immunity even for negligently making operational, non-policy based decisions.

226 Id. at 645-48.
227 Id.
228 Id.
229 Id. at 648-50.
230 Id.
231 Id. at 644-46.
232 Id. at 649 (quoting Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165, 172-74 (Ct. App. 1998)).
233 A rehearing was denied on October 18, 2002. Review and a request for depublication was denied on December 18, 2002.
234 Terrell R., 125 Cal. Rptr. 2d at 645-48.
235 Id.
236 Although this Article criticizes the Court of Appeal's analysis and interpretation of the
1. The statutes governing foster care placement impose mandatory duties.

The court's holding that the statutory provisions governing foster care placement do not impose mandatory duties as a matter of law ignores established principles of statutory construction. A court must first turn to the language of the statute and give the words their ordinary meaning. If the words of the statute are unambiguous, courts are compelled to apply their plain meaning, unless doing so would result in an absurdity or frustrate the statute's manifest purpose. If the court finds the statutory language ambiguous, it should then turn to extrinsic evidence, such as legislative history, to determine legislative intent. The Terrell R. court engaged in none of this analysis.

The conclusion that the child welfare statutes only set legislative goals and policies, and do not impose mandatory duties, is inconsistent with the statutory text. The child welfare statutes at issue in Terrell R. use mandatory, not

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Tort Claims Act, the Article does not intend to comment on the ultimate outcome based on the facts of that case. It may well be that even if the court had correctly applied the Tort Claims Act, no liability would have been found if the case had gone to trial. From the court's description of what happened, it is unclear that the social worker's negligence caused Terrell's injuries or that sufficient warning signs existed such that a reasonable social worker would have been on notice that the Poole home was an inappropriate placement.

237 Terrell R., 125 Cal. Rptr. 2d at 640-42.
238 CAL. CIV. PROC. CODE § 1858 (West Supp. 2004) ("[I]n the construction of a statute . . . the Judge is simply to ascertain and declare what is in terms or in substance contained therein . . ."); People v. Rubalcava, 1 P.3d 52, 56 (Cal. 2000); see also People v. Birkett, 980 P.2d 912, 915 (Cal. 1999) ("[W]e turn first to the language of the statute, giving the words their ordinary meaning.").
239 Lungren v. Deukmejian, 755 P.2d 299, 303-04 (Cal. 1988) (explaining that when statutory language is unambiguous, a court need not rely on other indicia of legislative intent); In re Lance W., 694 P.2d 744, 752 (Cal. 1985) (explaining that a court may not go beyond plain unambiguous language of statute); J.A. Jones Constr. Co. v. Superior Court, 33 Cal. Rptr. 2d 206, 210 (Ct. App. 1984) (explaining that where the text of a statute is clear, a court should not inquire into legislative intent).
242 CAL. CIV. PROC. CODE § 1859 (West 1983) (requiring that courts pursue the intent of the legislature when construing a statute); see also People v. Woodhead, 741 P.2d 154, 156 (Cal. 1987) (finding that if the language permits more than one reasonable interpretation, then the court must look "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part"); Nunn v. State, 677 P.2d 846, 851 (Cal. 1984) (en banc) ("[W]hen the specific language does not shed light as to the intent of the legislature, it can be determined from other factors."); Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049, 1056 (Cal. 1972) (finding that courts may use "extrinsic aids" besides legislators' statements to determine intent).
discretionary, language. The word "shall" appears repeatedly in the statutes. The plain language of the statutes at issue in Terrell R. makes clear that the social workers have mandatory duties including:

- placing the dependent child, if possible and safe to do so, in the home of a relative rather than a foster home;
- taking diligent steps to locate an appropriate relative and evaluating all relatives for their appropriateness, before placing a child in long-term foster care;
- providing family reunification services for all foster children;
- selecting foster homes, based on whether the home is safe, most family-like, and in close proximity to the child's biological parent's home, rather than selecting homes based on other considerations.

See supra note 140.

See, e.g., Cal. Fam. Code § 7950(a)(1) (West Supp. 2004) (requiring that certain considerations "shall be used," that "[p]lacement shall, if possible, be made in the home of a relative," that "diligent efforts shall be made to locate an appropriate relative," and that "[b]efore any child may be placed in long-term foster care, [relatives] shall be evaluated as an appropriate placement resource") (emphasis added); Cal. Welf. & Inst. Code § 16000 ("Family reunification services shall be provided . . . as required by law") (emphasis added); id. § 16501.1(c) ("[T]he decision regarding choice of placement shall be based upon selection of a safe setting . . .") (emphasis added); Cal. Dep't of Soc. Servs., DSS Manual of Policies and Procedures reg. 31-420.2 (1992) [hereinafter DSS Manual] (requiring a social worker to adhere to certain priorities in foster care placement).

Id. § 7950(a)(1) ("Placement shall, if possible, be made in the home of a relative, unless the placement would not be in the best interest of the child.") (emphasis added).

Id. ("Diligent efforts shall be made to locate an appropriate relative.").

Id. ("Before any child may be placed in long-term foster care, the court shall find that the agency or entity to which this subdivision applies has made diligent efforts to locate an appropriate relative and that each relative whose name has been submitted to the agency or entity as a possible caretaker, either by himself or herself or by other persons, has been evaluated as an appropriate placement resource.").

Cal. Welf. & Inst. Code § 16000 ("Family reunification services shall be provided for expeditious reunification of the child with his or her family, as required by law.") (emphasis added).

Id. § 16501.1(c) ("If out-of-home placement is used to attain case plan goals, the decision regarding choice of placement shall be based upon selection of a safe setting that is the least restrictive or most familylike [sic] and the most appropriate setting that is available and in close proximity to the parent's home, consistent with the selection of the environment best suited to meet the child's special needs and best interest, or both. The section shall consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment pursuant to Section 7950 of the Family Code."). (emphasis added); see also DSS Manual, supra note 244, reg. 31-420.2 (1992) (requiring a priority of relatives, foster family, and licensed group home).
• placing dependent children only in certified family homes, when a foster home placement is necessary;\(^250\) and
• visiting the foster child monthly,\(^251\) but at least three times in the first thirty days after placement.\(^252\)

Supporting the conclusion that mandatory duties exist in the child welfare statutes is evidence of what the Legislature did not do. If the Legislature had intended to exclude the child welfare statutes from the purview of the Tort Claims Act, it would have said so expressly.\(^253\) When the legislature has intended the word "shall" not to create a mandatory duty, it has been explicit.\(^254\)

If the obligatory, statutory language—the most important guide in determining legislative intent\(^255\)—was not dispositive, as the court apparently believed, the court was required "to point to other factors [to] indicate that [the] apparent obligatory language was not intended to foreclose" an exercise of discretion.\(^256\) But the court provided no reason why the plain obligatory language did not mean what it said.\(^257\) Nor did it cite, or could it cite, to any authority or legislative history to support its contrary interpretation.\(^258\) It could not do so, because the authority uniformly contradicts the court's holding.\(^259\)

Every decision prior to Terrell R. agreed that the child welfare statutes impose some mandatory duties, at least to evaluate certain criteria in making placement

\(^{250}\) DSS MANUAL, supra note 244, reg. 31-420.22 (permitting placement in a "licensed foster family home, licensed small family home, or a licensed foster family agency for placement in a family home which has been certified by the foster family agency") (emphasis added).

\(^{251}\) CAL. WELF. & INST. CODE § 16516.5(a) (requiring that foster children placed in group homes "shall be visited at least monthly by a county social worker or probation officer" and that "[e]ach visit shall include a private discussion between the foster child and the county social worker or probation officer"); DSS MANUAL, supra note 244, reg. 31-320.41.

\(^{252}\) DSS MANUAL, supra note 244, reg. 31-320.2.

\(^{253}\) See supra note 140 (explaining that mandatory duties exist only when the Legislature uses mandatory language).

\(^{254}\) See, e.g., CAL. CIV. CODE § 43.99(d) (noting that "[n]othing in this section shall be construed to alter immunity of employee of the Department of Housing and Community Development under the Tort Claims Act"); CAL. PENAL CODE § 12076(k) (deeming the Department of Justice's acts, as they pertain to firearms, to be discretionary within the meaning of the Tort Claims Act); Id. § 12084(e) (deeming action under this section "to be a discretionary act under the meaning of the California Tort Claims Act").

\(^{255}\) Morris v. County of Marin, 559 P.2d 606, 612 n.6 (Cal. 1977); see also Haggis v. City of Los Angeles, 993 P.2d 983, 987 (Cal. 2000) (quoting Morris and noting that statutory language is a most important guide to determining legislative intent); In re Sergio R., 131 Cal. Rptr. 2d 160, 164 (Ct. App. 2003) (quoting Haggis).

\(^{256}\) Morris, 559 P.2d at 612 n.6; see also supra notes 140-143 and accompanying text.

\(^{257}\) Terrell R., 125 Cal. Rptr. 2d at 640-48.

\(^{258}\) Id.

\(^{259}\) See generally Morris, 559 P.2d at 612 n.6 (finding the use of the word "shall" to be clear statutory language and that therefore there could be no question that the provision imposed a mandatory duty); Elson v. Pub. Utils. Comm'n, 124 Cal. Rptr. 305, 307-08 (Ct. App. 1975) (finding that a mandatory duty was clearly involved when the statute used obligatory language).
and supervision choices.260 Moreover, case law in other contexts, decided under section 815.6, has held that comparable statutory language imposed mandatory duties.261

In fact, even the social service agency’s own interpretation of the statutes is contrary to the court’s conclusion. The Department of Health and Human Services, which periodically reviews the Juvenile Justice System in California, recognizes that the dependency laws impose mandatory duties on social workers, such as maintaining a case plan, periodically visiting the foster child, and holding permanency hearings within set time periods.262 Moreover, common sense favors finding that the statutes impose mandatory duties. If the criteria and other requirements set forth in the foster care placement statutes may be simply disregarded, what was the purpose of their enumeration by the legislature? The California Legislature agrees. In response to the Terrell R. decision, the Legislature amended the Welfare and Institutions Code to reaffirm that the state has a “duty to comply” with the federal law requirements (such as maintaining case plans, holding periodic reviews and timely permanency hearings) relevant to the protection and welfare of foster care children.263

The court attempted to justify ignoring the statutory language, prior precedent, and the agency’s interpretation of its own regulations, by stating that because “foster care placement is a governmental function that involves the exercise of discretion,” mandatory duties could not exist.264 But this is no justification at all. That a statute imposes discretion in one area (in this case, the policy decision that an abused child should be removed from parental custody and placed in foster care), does not mean that the statute does not impose mandatory requirements on how that discretion may be used in other areas.

260 See, e.g., Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998) (holding that statutes, such as section 16501.1, created a mandatory duty to “evaluate stated criteria” in making a placement selection); see also Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 646 (Ct. App. 1994); Elton v. County of Orange, 84 Cal. Rptr. 27 (Ct. App. 1970). Admittedly, the Terrell R. court paid lip service to Becerra. But after noting that earlier decisions found that mandatory duties exist, Terrell R. reached the inconsistent result that section 16501.1, despite the holding in Becerra, created no mandatory duties. Terrell R., 125 Cal. Rptr. 2d at 646-47.

261 Compare Davila v. County of Los Angeles, 57 Cal. Rptr. 2d 651, 653 (Ct. App. 1996) (finding statutory language stating that when a coroner takes a dead body, the coroner “shall make a reasonable attempt to locate the family” imposes a mandatory duty to make a “reasonable attempt”) with CAL. FAM. CODE § 7950 (West Supp. 2004) (requiring that “[d]iligent efforts shall be made to locate an appropriate relative”).

262 See 2000 AUDIT OF PROTECTIONS, supra note 4, at i (“[C]ertain protections are mandated for each foster care child under State supervision’’); id. at 4 (“The objectives of our audit were to determine if the: (i) mandatory foster care protections consisting of the case plan, periodic reviews, and permanency hearings were provided . . . .”) (emphasis added).

263 CAL. WELF. & INST. CODE § 16000.1 (“It is the intent of the Legislature to confirm the state’s duty to comply with all requirements under Part B of Title IV of the Social Security Act (42 U.S.C. § 620 et seq.) and Part E of Title IV of the Social Security Act (42 U.S.C. § 670 et seq.) that are relevant to the protection and welfare of children in foster care.”).

264 Terrell R., 125 Cal. Rptr. 2d at 646.
AVOIDING THE MISTAKES OF TERRELL R.

Even though the ultimate placement decision may be left to some degree to the social worker’s discretion, a social worker is still required to evaluate and adhere to certain criteria in making that decision.

2. A fundamental purpose of the child welfare statutes is to prevent child abuse.

The Court of Appeal’s conclusion that the child welfare statutes imposed only nonobligatory duties was unprecedented. Even more controversial, however, was the court’s conclusion—made without analysis or citation to authority—that the purpose of statutes governing foster care placement “is to preserve the family relationship, not to prevent sexual abuse.” As an initial matter, it is curious how the court was able to divine statutory purpose, without analyzing or referring to the statute’s text, its legislative history, case precedent or any other authority. But putting aside these obvious criticisms, the court’s conclusion is flawed for more fundamental reasons.

While it is true that a purpose of the child welfare statutes is “to preserve the family relationship” when possible, the paramount concern of the foster care system is the prevention of child abuse. This conclusion logically

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265 A long line of cases holds that even if a statute does not impose a mandatory duty to take a specified action, a mandatory duty may exist to investigate or fulfill certain criteria in making that decision. See, e.g., Brenneman v. State, 256 Cal. Rptr. 363, 366 (Ct. App. 1989) (holding that statute did not impose mandatory duty to take action, but did impose a mandatory duty to investigate); State v. Superior Court (Perry), 197 Cal. Rptr. 914, 922-23 (Ct. App. 1984) (explaining that real estate commissioner had a mandatory duty to investigate complaints of wrongdoing, but that the statute did not impose mandatory duty to take action in event of wrongdoing). See generally CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, supra note 150, § 9.32 (explaining that although a statutory provision may create a mandatory duty in one area (e.g., to investigate), the statute may not create a mandatory duty in another (e.g., to act)).

266 See, e.g., Becerra v. County of Santa Cruz, 81 Cal. Rptr. 2d 165, 170 (Ct. App. 1998); Elton v. County of Orange, 84 Cal. Rptr. 27, 30-31 (Ct. App. 1970); cf. Wood v. County of San Joaquin, 4 Cal. Rptr. 3d 340, 351 (Ct. App. 2003) (relying on Elton and citing foster care as situation in which mandatory duties exist).

267 Id., 125 Cal. Rptr. 2d at 646-47.

269 Cf. CAL. CIV. PROC. CODE § 1859 (West Supp. 2004) (mandating that in construing a statute the intention of the legislature is to be pursued). See generally William N. Eskridge, Jr. & Philip P. Frickey, STATUTORY INTERPRETATION AS PRACTICAL REASONING, 42 STAN. L. REV. 321, 322 (1990) (discussing and explaining various theories of statutory interpretation and concluding that courts consider a “broad range of textual, historical, and evolutive evidence when it interprets statutes”).

270 Id., 125 Cal. Rptr. 2d at 646-47.

271 See, e.g., FINAL REPORT, supra note 3, at 4 (stating the priority that “[c]hildren are, first
follows because the state only has the right to remove a child from a parents’ custody when compelling circumstances, such as abuse or neglect, compel that removal. The state likewise may only return a child to his or her parents’ custody when it is safe to do so. The majority of minors who are placed in the foster care system are placed because of evidence of parental abuse. Similarly, the reason behind placing a child in a relative’s home, or keeping siblings together, is the belief that the preservation of family ties, when safe to do so, best protects a child’s welfare. Hence, contrary to the court’s holding,

and foremost, protected from abuse and neglect); David J. Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 FAM. L.Q. 329, 329 (2000) (stating that Congress was clear, in passing the Adoption and Safe Families Act, that the paramount goal for public welfare systems is to secure the health and safety of children within the systems); see also Dorothy E. Roberts, Is There Justice in Children’s Rights? The Critique of Federal Family Preservation Policy, 2 U. PA. J. CONST. L. 112 (1999) (stating that Congress’s intent in recent legislation was to make health and safety of children in foster care the top priority).

See, e.g., CAL. WELF. & INST. CODE § 361(c) (permitting removal if, among other circumstances, there is a “substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor” or the minor has been “sexually abused” and “there are no reasonable means by which the minor can be protected from further sexual abuse . . . without removing the minor from his or her parent of guardian”); Id. § 16501 (West 2001) (explaining that child welfare services include services directed toward, among other things: (a) protection and promotion of the welfare of all children; (b) prevention or remedying of child neglect, abuse, exploitation, or delinquency; (c) prevention of unnecessary separation of children from families by identification of and assistance in resolving family problems; and (d) restoration to families of children previously removed); see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (stating that natural parents have a fundamental liberty interest in the care, custody, and management of their child, even if the state has temporarily taken custody of that child); Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 27 (1981) (stating that a state needs a “powerful countervailing interest” to interfere with a parent’s right to her child’s companionship).

CAL. WELF. & INST. CODE § 361.5 (West Supp. 2004) (requiring no reunification, among other things, when (1) the parent/guardian has caused the death of a child by abuse or neglect; (2) the child was adjudicated a dependent as a result of severe sexual or physical abuse, and the court factually finds that reunification would not be in the child’s best interests; (3) the child has been twice removed from the same home because of abuse or neglect; or (4) the parents sexually molested the child).

Nationwide, more than fifty percent of children placed in foster care are removed from their family homes because they suffered parental abuse. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1994 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 651 (Comm. Print 1994) (stating that more than 50% of children placed in substitute care were separated from their parents specifically for protection, while an additional 20.9% were removed because the parent was absent or unfit); see also Brendan P. Kearse, Abused Again: Competing Constitutional Standards for the State’s Duty to Protect Foster Children, 29 COLUM. J.L. & SOC. PROBS. 385, 385 (1996).

See CAL. FAM. CODE § 7950 (requiring placement “in the home of a relative, unless the placement would not be in the best interest of the child”).

the child welfare statutes and the foster care system are designed specifically to protect children from abuse by temporarily removing them from their abusive homes. 

Additionally, the court’s ruling is difficult, if not impossible, to square with the statutes’ plain language, which speaks directly to ensuring that the County places children in safe homes and looks after their best interests. To provide just a few examples, section 300.2 of the Welfare and Institutions Code states that the purpose of the dependency laws is "to provide maximum safety and protection for children who are currently [being abused] . . . and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." Section 16501.1 of the Welfare and Institutions Code explains that the foster care system was "designed to provide time-limited protective services to prevent or remedy neglect, abuse or exploitation, for the purposes of preventing separation of children from their families." Numerous other provisions use similar language. Indeed, since Terrell R., the Legislature enacted section 16000.1 of the Welfare and Institution Code to clarify that "the state has a duty to care for and protect the children that the state places into foster care, and as a matter of public policy, the state assumes an obligation of the highest order to ensure the safety of children in foster care."
Case precedent interpreting these statutes also supports the conclusion that one of the purposes of the child welfare statutes is to prevent abuse. As one court has explained, the foster care statutes impose a duty of supervision on social workers that "was clearly designed to protect" against child abuse. Moreover, there is a "direct and rationally deducible connection between the agency's negligent placement of a child in an inappropriate foster home and the injury to the child."

Legislative history also runs contrary to the court's findings. Much of California's foster care regulations are based on federal legislation. In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, which California adopted in 1982. That legislation sought to deemphasize the use of foster care and to promote other means of remedying child abuse and neglect while preserving families. It required welfare agencies to make reasonable efforts to maintain children with their families, and if that was not possible, to reunify children with their families as soon as it was safe to do so. Although family preservation or family reunification was a key component of the 1980 legislation, child safety was still of paramount concern. If, however, there was any doubt that the overall purpose of the child welfare laws was to prevent abuse, that doubt was erased in 1997.

282 Id. § 16000.1 (emphasis added).
283 See, e.g., Hansen v. Dep't of Soc. Servs., 238 Cal. Rptr. 232, 236 (Ct. App. 1987) (discussing section 16501 and explaining that one of its purposes is to prevent or remedy the neglect, abuse, and exploitation of children); Smith v. Alameda County Soc. Servs. Agency, 153 Cal. Rptr. 712, 718 (Ct. App. 1979) (noting that foster care placement statutes, as contrasted with certain adoption statutes, were "designed to protect the health and safety of dependent children . . ."); cf. Jordy v. County of Humboldt, 14 Cal. Rptr. 2d 553, 560 (Ct. App. 1992) (finding that a "public entity has a duty to prevent physical abuse of children in the custody of the state where it has notice of the abuse.")
285 Id.
286 Foster, supra note 5, at 43-47 (describing major legislative milestones affecting California's foster care system).
291 Shotton, supra note 290, at 230-33; see also Cal. Welf. & Inst. Code § 361.54 (West Supp. 2004) (providing exceptions to reunification in cases of likely abuse).
In 1997, Congress enacted the Adoption and Safe Families Act,\(^{292}\) which California implemented in 1998.\(^{293}\) In that Act, Congress amended the Child Welfare Act to explicitly state that the “paramount goal for public child welfare systems is to secure the health and safety of the children who enter” the welfare system.\(^{294}\) The Act thus “prioritize[d] child health and safety over family preservation.”\(^{295}\) Indicative of Congress’ move away from family reunification were the Act’s requirements that states terminate parental rights for children who have been in foster care for fifteen of the past twenty-two months.\(^{296}\) The Act also significantly shortened the timeframe in which reunification could occur,\(^{297}\) requiring a permanency hearing within twelve months after a child is placed in foster care.\(^{298}\) Finally, states were relieved of their efforts to reunify the child with their family, if a court determined that a parent has: (a) murdered one of their children; (b) committed involuntary manslaughter of one of their children; (c) conspired to commit murder or involuntary manslaughter against one of their children; (d) committed a felony assault resulting in serious bodily injury to the child or the other parent; or (e) had their parental right’s involuntarily terminated for one of their other children.\(^{299}\) Several commentators even criticized Congress for overly emphasizing child health and safety and for dictating aggressive permanency planning, rather than promoting family reunification.\(^{300}\) In light of this 1997 legislation, Congress and the

\(^{294}\) 42 U.S.C. § 671(a)(15)(A) (2000) (“[T]he child’s health and safety shall be the paramount concern.”); see also FOSTER, supra note 5, at 35 (“Significant changes in federal and state laws and policy reflect a re-emphasis of child safety over family preservation.”); Herring, supra note 271, at 330 (noting the emphasis in federal law on child safety); Roberts, supra note 271, at 113 (“ASFA amends the 1980 Act to direct state authorities to make the health and safety of children in foster care their top priority.”); Developments in the Law—Unified Family Courts and the Child Protection Dilemma, 116 HARV. L. REV. 2009, 2114-115 (2003) (tracing the history of the ASFA and noting that “[w]hat emerged was the family law’s version of the absolute priority rule: while families’ and parents’ interests and rights remained important, children’s health and safety became the ‘paramount concern’ of the child welfare system”).
\(^{295}\) FOSTER, supra note 5, at 45.
\(^{296}\) 45 C.F.R. § 1356.21(i) (2003); see CAL. WELF. & INST. CODE § 727.32 (West Supp. 2004); CAL. R. CT. 1496.3.
\(^{297}\) 42 U.S.C. § 672(5).
\(^{298}\) 42 U.S.C. § 1320a-9; CAL. WELF. & INST. CODE § 727.3; id. § 11404.1 (West 2001).
\(^{300}\) Roberts, supra note 271, at 116-17. See generally Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189 (1999). This Article is not intended to engage in the continuing debate over child welfare philosophy and whether state law should emphasize children’s reunification with their biological parents over adoption of these children by new families. Nor is it suggesting when a child should be
California Legislature intended that at least one purpose—if not the primary purpose—of the child welfare statutes was to prevent abuse. Terrell R. erred when it broadly held otherwise.

In sum, the child welfare statutes were intended to assure the safety of children. When a child is physically or sexually abused, due to the government’s negligent failure to take legislatively mandated actions, a cause of action for direct liability should lie. This is precisely the type of claim that Government Code section 815.6 intended to allow.

3. Discretionary act immunity rarely applies to foster care placement and supervision.

Not only did the Terrell R. court incorrectly analyze whether there was direct liability, the court also erred in its derivative liability analysis. The court concluded that “a social worker is immune from liability for negligent supervision of a foster child unless the social worker fails to provide specific services mandated by statute or regulation.” Building on Becerra’s faulty analysis, the court explained that discretionary act immunity under Government Code section 820.2 applied, because foster care supervision is “an activity loaded with subjective determinations, and fraught with major possibilities of an erroneous decision.” In so ruling, the court applied the literal definition of “discretionary” that has been repeatedly rejected by the California Supreme Court, confused derivative and direct liability, and ignored the rules of stare decisis.

The court of appeal first erred in its discretionary immunity analysis when it found that a social worker is immune for all acts not mandated by statute. No such immunity exists. As described above, immunity attaches only to “basic policy decisions”—those decisions that involve planning rather than operational or ministerial decisions. The California Supreme Court has made

removed from the parental home, or questioning whether the law sufficiently promotes family preservation. But there is universal agreement that children who have been severely physically or sexually abused must be protected. The Article thus makes only the modest point that whether the means to achieving child safety are through family preservation or adoption from foster care, the purpose of the statutes is to protect children from harm.

In this respect California is not different than other states. See generally Martin, supra note 93, at 194-95 (1991) (surveying states’ child welfare statutes and noting that all the “statutes have as their purpose the protection of abused children”).


Id.

See supra notes 148-155 and accompanying text.

Terrell R., 125 Cal. Rptr. 2d at 648-50.

See supra note 151 and accompanying text.

this point repeatedly. To determine whether a "basic policy decision" has been made, a court must look to the underlying rationales supporting governmental immunity (i.e. in this case, separation of powers). But the Terrell R. court neither explained why the alleged supervision constituted a basic policy decision, nor discussed how the rationales underlying governmental immunity required finding that the social worker had made a basic policy decision in neglecting to supervise the foster child. Instead, the court applied the impermissible literal or semantic definition of "discretionary" to conclude that immunity applied to all nonmandatory obligations. That analysis was misguided.

This analytical error must have been caused by the court's confusion between derivative liability and direct liability. As explained above in Part II, only direct liability is concerned with whether a mandatory duty is imposed. Derivative liability is broader, permitting a government entity to be sued for the negligent acts of employees unless the government makes a strong showing that a basic policy decision is involved. In Terrell R., the court never explained how the government met this burden. Moreover, it applied the same standard for both the derivative and direct liability issues because it held that social workers are immune from negligent supervision claims "unless the social worker fails to provide specific services mandated by statute or regulation." By doing so, the court conflated two distinct bases of liability. If the court's analysis was correct and discretionary act immunity under section 820.2 applied to all nonmandatory acts, section 820.2 would be rendered a nullity. There would never be an occasion to analyze whether derivative liability exists because the direct liability analysis would be dispositive in all cases: any nonmandatory act would entitle the employee to immunity. But sections 820.2 and 815.6 are not mere repeats of one another, and should not be read to be redundant. Basic canons of statutory construction reject such a conclusion.

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309 See supra notes 92-93 and accompanying text.

310 Terrell R., 125 Cal. Rptr. 2d at 648-50.

311 Id. at 644-45, 649 (stating that "[t]he appropriate degree of supervision of a foster parent, in excess of the visitation schedule mandated by statute or regulation, is a uniquely discretionary activity" and noting that "discretionary decisions" made in connection with placement decisions should be outside the scope of review).

312 See supra Part II.C.1-2.

313 Johnson, 447 P.2d at 363 (explaining that government has a heavy burden and must make a "strong showing" to overcome the presumption against immunity); see also supra Part II.C.2 and note 171.

314 Terrell R., 125 Cal. Rptr. 2d at 649.

315 Cal. Pac. Collections, Inc. v. Powers, 449 P.2d 225, 227 (Cal. 1969) (en banc) (reasoning that a court may not construe a statute to render language "redundant and a nullity, thereby violating one of the most elementary principles of statutory construction"); Napa Valley Wine Train, Inc. v. Pub. Utils. Comm'n, 787 P.2d 976, 979 n.11 (Cal. 1990) ("[W]e are not
The *Terrell R.* court not only applied an improper standard to discretionary-act immunity, but also departed from prior precedent that was directly on point. The *Elton* decision was on all fours. *Elton*, just like *Terrell R.*, involved the failure to place a child in a properly certified home and to properly supervise.\(^{316}\) But the *Terrell R.* court summarily rejected the *Elton* holding. Rather than discuss *Elton* in detail, in a footnote the court dismissed *Elton* as "not controlling" because: (1) "the appeal in *Elton* followed a demurrer, not a summary judgment;" (2) *Elton* was decided prior to the adoption of statutes mandating the exercise of discretion by social workers"; and (3) the appellate "court [that decided *Elton*] . . . later severely limited the holding of *Elton* and described the decision as 'difficult.'"\(^{317}\) But each reason given for ignoring *Elton* was spurious.

First, no distinction should be made between the demurrer and the summary judgment, because the court's determination of whether governmental immunity applies involves threshold questions of law.\(^{318}\) The *Terrell R.* court recognized this itself.\(^{319}\) More specifically, the court did not limit itself to finding that the social worker had fulfilled the mandatory duties prescribed by the statutes and regulations.\(^{320}\) Rather, the court ruled, as a matter of law, that the statutes and regulations set forth no mandatory duties.\(^{321}\) Second, that certain statutes (notably unidentified by the *Terrell R.* court) may allow social workers to exercise discretion, as explained above, is not relevant in determining whether discretionary act immunity applies, because it does not explain whether a basic policy decision has been made in a particular case.\(^{322}\) That distinction is therefore no distinction at all. The factual basis for this

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\(^{316}\) *Elton v. County of Orange*, 84 Cal. Rptr. 2d 27 (Ct. App. 1970).

\(^{317}\) *Terrell R.*, 125 Cal. Rptr. 2d at 649 n.5.

\(^{318}\) See, e.g., *Barner v. Leeds*, 13 P.3d 704, 709 (Cal. 2000) (determining discretionary act immunity as a question of law after the trial court granted summary judgment); *Haggis v. City of Los Angeles*, 993 P.2d 983, 987 (Cal. 2000) ("Whether an enactment creates a mandatory duty is a question of law . . ."); *Nunn v. State*, 677 P.2d 846, 851 (Cal. 1984) (explaining that whether an enactment is intended to impose a mandatory duty is a question of law); see also *Regents of the Univ. of Cal. v. Superior Court*, 976 P.2d 808, 821 (Cal. 1999) (holding that a court must conduct de novo review of a trial court's resolution of underlying statutory construction issues).

\(^{319}\) *Terrell R.*, 125 Cal. Rptr. 2d at 643 (explaining that whether a mandatory duty exists and whether a government is immune from suit raise questions of law).

\(^{320}\) *Id.* at 648-50.

\(^{321}\) *Id.* at 645-48.

\(^{322}\) See supra Part II.C.2; see also supra note 161 (discussing cases finding derivative liability where a government employee was negligent after making basic policy decision).
assertion is also suspect. If anything, recent federal legislation adopted by California provides greater, not less, guidance as to what social workers can or can not do. Third, the Terrell R. court is simply wrong when it suggested that the court of appeal later “severely limited the holding of Elton” in foster care abuse cases. On the contrary, the Elton court, in Ronald S. v. County of San Diego, was explicit that it was not attempting to “disapprov[e] or retreat from” Elton. Instead, the Ronald S. court recognized that immunity would not attach in the foster care context. Terrell R. thus provided no reason why it should depart from established law.

V. A Return to What the Legislature Intended

As shown above, the Terrell R. court erred. That it did so, however, begs a question: how should a court methodically analyze a negligent placement or supervision claim in the future? Synthesizing Parts II and III above, what follows is a framework for how judges should correctly analyze foster care abuse cases, followed by a short explanation for why holding governments liable for negligent foster care placement and supervision is a sound result.

A. The Resolution of Negligent Placement and Negligent Supervision Claims

The resolution of negligent placement and supervision claims mirror one another. For both types of claims, as discussed above, a court must address whether the government may be held directly or derivatively liable: two separate and distinct analyses. In deciding whether either liability prong is satisfied, a court must keep in mind that the Legislature intended liability to be the rule, not the exception.

1. Direct governmental liability.

As explained, a government is directly liable if a social worker fails to consider and assess the mandatory criteria set forth in the placement and supervision statutes, and those failings result in the child’s injuries. In a

323 See supra notes 292-301 and accompanying text (discussing 1997 federal legislation adopted in California in 1998); see also supra notes 60-65 and accompanying text (discussing California’s failure to meet federal and state mandatory foster care requirements).
324 Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418, 425 (Ct. App. 1993); see also supra notes 198-200 and accompanying text.
325 See Ronald S., 20 Cal. Rptr. 2d at 425 (explaining that when a child is in the custody of the county, the county’s administration and surveillance of that child is properly characterized as ministerial).
326 See supra Parts II.C & III.A.
327 See supra note 171 and accompanying text.
328 By way of example only, these mandatory duties during placement would include, but are
negligent placement claim, a government avoids liability if evidence exists that the social worker evaluated and assessed all the statutorily required criteria, and that a rationale existed for choosing a placement based on the criteria considered. This is because under the direct liability standard, a government is not liable merely because the court disagrees with the selection ultimately made, so long as the criteria and priorities of the statutes and regulations are adhered to. If, however, any of the required criteria were not considered or the required duties were not met, the government is per se negligent.

Evidence that a social worker placed a child in a particular foster care home because of convenience, or cost, or for expediency—reasons not set forth in the statutes as being permissible placement criteria—should expose the government to liability. This is because the specific placement criteria which a social worker must consider before placing any foster child are mandatory, and requirements such as considering whether the foster placement is a safe setting are specifically intended to protect the foster child from abuse.

The same principles apply to a negligent supervision claim. Under a negligent supervision theory, a government would be liable if, among other things, a social worker failed to take reasonable efforts to monthly visit the children to which they are assigned, maintain and regularly update a case.

not limited to: (1) taking reasonable efforts to prevent out-of-home placements, CAL. WELF. & INST. CODE § 16501.1(b)(1) (West Supp. 2004); (2) basing the choice of an out-of-home placement on the selection of a “safe setting that is the least restrictive or most family-like,” id. § 16501.1(c); (3) considering, in the order prioritized by the statute, where to place the child (such as with relatives), id.; (4) taking diligent efforts to place siblings together in the same home, or to explain why the siblings were not placed together, id. § 16002(b); (5) explicitly setting forth in the case plan why the placement is in the best interests of the child, if the child is placed a “substantial distance from the home of the child’s parent,” id. § 16501.1(f)(7); and (6) considering the other placement criteria and priorities set forth by the statutes and regulations, id. § 361.3; DSS MANUAL, supra note 244, regs. 31-420.1, 31-420.2.

See supra notes 124-132 and accompanying text; see also Becerra, 81 Cal. Rptr. 2d at 170.

See supra note 328.

See, e.g., CAL. WELF. & INST. CODE § 16501.15 (defining a “safe” home as one free from abuse or neglect).

Id. § 16516.5(a) (requiring that foster children placed in group homes “shall be visited at least monthly by a county social worker or probation officer” and that “[e]ach visit shall include a private discussion between the foster child and the county social worker”); DSS
plan for the foster child, hold a timely permanency hearing, or provide family reunification services. Direct liability exists in such circumstances, so long as causal injury can be shown, because: (1) the foster care statutes and regulations use obligatory language, and (2) the purpose of requiring visits, case plans, permanency hearings, and family reunification is to protect foster children from harm.

2. Derivative governmental liability.

Once a court has resolved the direct liability issue, a court must also address the derivative liability question. A government can be held derivatively liable, if a social worker negligently places or supervises a child in a foster care home, regardless of whether the mandatory duties are complied with. Although the decision to place a child in foster care is a basic policy decision to which prosecutorial immunity attaches, the exercise of that discretion and the placement and supervision of a child in a particular foster home must be done with due care. A government is not immune simply because a social worker has discretion to make choices. Immunity attaches only if the social worker makes a basic policy decision.
To some extent, whether immunity applies will depend on the nature of plaintiff's claim. A county is entitled to immunity, for example, if the plaintiff argues that the child should never have been placed in foster care, or that the social worker should have considered other criteria not set forth by the statutes. That abused children should be placed in foster care rather than kept with their families, or that certain criteria instead of others should be considered, are high-level decisions made by the legislature. If, however, a social worker ignored warning signs that should have placed a reasonable social worker on notice that the foster parents posed a danger to the child, then immunity can not be conferred.345 A social worker has no discretion, either in placement or supervision, to ignore warning signs that a child is in danger. Stated differently, the child welfare statutes impose a general duty for social workers to protect foster children in their control against intentional foster parent abuse.346

In short, the decision to place a child with, or supervise a child in, a...
particular foster parent home—although involving discretionary choices—is not a basic policy decision entitled to immunity. This is because social workers may not make policy decisions to place children in danger, to not supervise, or to ignore signs that the foster parents are abusive. A social worker when deciding a particular placement (within the confines of the statutory criteria), or when supervising that placement (again within the confines of the statutory requirements) is not rendering a high-level decision, formulated after debate and input from different levels of county government, with concern over the future ramifications of that policy. Rather, a social worker is merely exercising his or her own judgment: what the California Supreme Court has rightly described as "a classic case for the imposition of tort liability." 

B. A Few Final Observations

This article has attempted to demonstrate why the recent trend to ostensibly grant the government absolute immunity in foster care abuse cases is unprincipled and inconsistent with the Legislature’s intent. Before the Article concludes, however, some brief observations as to why limited immunity is the correct result seems appropriate.

First and most importantly, rarely granting governmental immunity in foster care abuse cases is the right result because that is what the law requires. The California Legislature decided long ago to abolish absolute governmental immunity. A court of appeal is simply not an appropriate forum to rethink what the legislature has done. If the Legislature wishes to limit government claims in foster care abuse cases, then it must say so explicitly. Of course, the Legislature has never done so and, on the contrary, has sought to protect children more not less.

Second, although always an important consideration for deciding when liability should attach, deterrence takes on singular importance in cases involving the protection of children. In the foster care context, the government is asserting itself to become the custodian of a child. If a government is going to interfere with families, and parents’ rights to raise their own children as they see fit, the government better have a good reason to do so and better

348 That the California Legislature enacted legislation specifically to address Terrell R.—a remarkable and unusual response to a court of appeal decision—is itself strong evidence that the courts have gone astray in resolving foster care abuse cases. See CAL. WELF. & INST. CODE § 16000.1 (West Supp. 2004).
349 See supra Part II.A.
350 See supra notes 66-71, 286-300 and accompanying text.
351 See supra notes 108-110 and accompanying text.
352 See supra Part I.A.
353 See supra note 25 and accompanying text; see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (explaining that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state
do a good job to protect those children. Indeed, the entire purpose of the foster care system is undermined if children are removed from their homes to protect them, but then are negligently exposed to even more dangerous conditions. The strongest incentives – including the risk of civil liability – are therefore needed to ensure that children are protected and that government workers use extraordinary care to fulfill that goal. This is particularly true given the recent revelations about California’s foster care system and the apparent perverse financial incentives that may exist for the state to improperly remove children from their families.

Third, granting governments immunity when children are abused because of a social worker’s negligence, leads to a strange result. Foster children who are injured because of their foster parents’ negligent acts are entitled to recover from the government. They can do so through the foster care fund. That fund, however, disallows any recovery when a child is injured because of a foster parent’s intentional torts. A bizarre system, not intended by the Legislature, is thus created if children negligently injured are permitted to recover from the government, but children who are intentionally abused may not. In fact, in negligence cases, as compared to foster parent intentional abuse cases, the need to recover from the government is less acute because the foster child has other ways of seeking recovery: such as from the foster parent’s

354 See generally Kindred, supra note 40, at 455-56 (discussing the competing interests of protecting children and respecting family integrity, and arguing that because of the potential "harm posed to children by family intervention," the "state should not intervene without good reason"). For a discussion of how poverty has been mistaken for child neglect, and the disparate impact that child protection services have on racial or ethnic minorities, see Candra Bullock, Comment, Low-Income Parents Victimized by Child Protective Services, 11 Am. U. J. GENDER SOC. POL’Y & L. 1023 (2003).

355 See supra Part I.A (explaining that temporary child protection is the primary purpose of foster care); see also Kindred, supra note 40, at 459 (noting that “[t]here is substantial support for the proposition that, except in cases involving seriously harmed or abandoned children, a child’s situation is not improved through removal” and that “removal frequently results in placing a child in a more detrimental situation, thus compounding the harm”).

356 See Troy Anderson, Foster Cash Lure May Fade, L.A. Daily News, Feb. 17, 2004, at N3 (describing financial incentives to place children in foster care); Troy Anderson, Foster System Probe Sought by Legislators, L.A. Daily News, March 6, 2004, at N4 (noting Daily News investigation which “uncovered estimates that as many as half of the 75,000 children in [Los Angeles] county foster care and adoptive homes were needlessly placed in a system often more dangerous than the homes from which they were removed,” and explaining that “[f]or each child placed in the system, counties receive $30,000 to $150,000 a year”); Troy Anderson, Supervisors Tackle Foster Care, L.A. Daily News, Feb. 18, 2004, at N3 (noting Los Angeles County supervisors’s decision to negotiate with the state and federal governments to eliminate financial incentives for putting children in foster care).


358 See id.; see also Hill v. Newkirk, 31 Cal. Rptr. 2d 859, 864-65 (Ct. App. 1994) (discussing claims for which the fund is liable).

359 Cal. Health & Safety Code § 1527.3(a) (excluding intentional acts from coverage).
insurance carrier.

CONCLUSION

The California Tort Claims Acts has, until recently, long served as an important means by which foster children may obtain recourse from the government for injuries suffered as a result of a social worker's negligence. In the 1990s, the California courts of appeal retreated—without justification—from the dictates of the Tort Claims Act and the uniform decisions of the California Supreme Court. A low point was reached in late 2002 when, in *Los Angeles County v. Superior Court (Terrell R.)*, the court of appeal confused the issues of direct and derivative liability to effectively grant social workers absolute immunity. That case ignored over three decades of law, the purposes behind the Tort Claims Act, and basic canons of statutory construction to reach a result that contradicts the California Legislature's unambiguous intent.

The Legislature was wise to limit the impact of *Terrell R.* Contrary to that case's holding, the child welfare statutes that use obligatory language impose mandatory duties on social workers. Moreover, the government is not immune when a social worker negligently supervises or places a foster child merely because the social worker exercises "discretion." Decisions made with respect to the maintenance, care, or supervision of a foster child are not basic policy decisions entitled to immunity. As the California Supreme Court has held repeatedly, governmental liability is the rule, not the exception. That governments should be exposed to liability when social workers negligently place or supervise foster care children is not only the law, but also supported by strong public policy. Accordingly, in the future, the courts must be careful to avoid the mistakes of *Terrell R.*