

# Whither the Witness the Federal Government's Special Duty of Protection in Criminal Proceedings After *Piechowicz v. United States*

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WHITHER THE WITNESS? THE FEDERAL  
GOVERNMENT'S SPECIAL DUTY OF PROTECTION  
IN CRIMINAL PROCEEDINGS AFTER  
*PIECHOWICZ v. UNITED STATES*

The citizen witness<sup>1</sup> is an indispensable part of criminal prosecution. Without witnesses, the rudiments of prosecution, such as identifying the accused and establishing the requisite nexus between the accused and the crime, would become insurmountable obstacles to conviction, and the criminal justice system would cease to function.

Unfortunately, the importance of citizen testimony breeds further criminal conduct by defendants awaiting trial who attempt to avoid conviction by intimidating and killing prosecution witnesses. Such crude attempts to circumvent the judicial process should spur the government to protect threatened federal criminal witnesses. Recognizing the crucial role witnesses play in the criminal justice system, the government must bear the burden of witness protection to foster effective citizen participation in the criminal process.

The Court of Appeals for the Fourth Circuit, however, held in *Piechowicz v. United States*<sup>2</sup> that the federal government has no obligation to protect a federal criminal witness<sup>3</sup> whose life is threatened prior to trial because of his scheduled testimony. The court relied on the discretionary function exception to the Federal Tort Claims Act (FTCA) to bar a wrongful death action against the United States brought by the survivors of a murdered federal criminal witness left unprotected by federal authorities.<sup>4</sup> The *Piechowicz* court failed to recognize a special governmental duty to protect federal criminal witnesses that arises from the involuntary nature of the government-witness relationship. By subpoenaing a citizen to testify, the government unilaterally forces a citizen into an involuntary relationship harboring potentially grave consequences.<sup>5</sup>

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<sup>1</sup> "Citizen witness" denotes a nonexpert, non-law enforcement individual summoned to testify for the prosecution. Furthermore, because the English language lacks an appropriate gender-neutral pronoun referring to persons in the singular, this Note uses "he" to describe a witness, rather than using the more cumbersome "he/she" or, alternatively, switching to and fro between "he" and "she."

<sup>2</sup> 885 F.2d 1207 (4th Cir. 1989).

<sup>3</sup> The term "federal criminal witness" describes a citizen subpoenaed to testify for the government in a federal criminal prosecution. This Note does not discuss the protection of state criminal witnesses because *Piechowicz* only addressed the question of federal witness protection.

<sup>4</sup> *Piechowicz*, 885 F.2d at 1209.

<sup>5</sup> This Note addresses only involuntary situations where a citizen is compelled to

This Note argues that principles of reciprocity, special relationships, and knowledge of a third party's dangerous violent tendencies create a special governmental duty—arising from the involuntary nature of the government-witness relationship—to protect threatened federal criminal witnesses. This duty vitiates governmental discretion otherwise immunized by the discretionary function exception to the FTCA. As background, Part I of this Note discusses the evolution of case law construing the discretionary function exception to the FTCA and concludes that this exception does not immunize the government from liability for failing to protect threatened witnesses. Part II discusses *Piechowicz v. United States*. Part III examines the three complementary legal doctrines of special relationships, reciprocity, and knowledge that, taken separately and cumulatively, establish a special governmental duty to protect threatened witnesses. This Note concludes that a breach of the duty of protection entitles injured federal criminal witnesses and the survivors of murdered federal criminal witnesses to a remedy at law. Recognizing this special duty to protect threatened federal criminal witnesses would remove existing incentives for perjury,<sup>6</sup> foster greater governmental accountability, and establish a more effective criminal justice system.

## I

### BACKGROUND

#### A. The Discretionary Function Exception to the Federal Tort Claims Act

Congress ostensibly designed the Federal Tort Claims Act (FTCA) as a general waiver of sovereign immunity with express exceptions through which the government may retain immunity.<sup>7</sup> The statute provides that the United States is liable for money damages for “personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>8</sup> Prior to the FTCA, plaintiffs pursued claims against the government through private re-

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testify and does not address the question of whether a special duty arises, for example, when a citizen, of his own volition, dials the emergency number “911.”

<sup>6</sup> Under the current system, an unprotected witness has an incentive to commit perjury if he believes it necessary to save his life or the lives of others.

<sup>7</sup> Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968). *Black's Law Dictionary* defines sovereign immunity as a doctrine which “precludes [a] litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes.” BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

<sup>8</sup> 28 U.S.C. § 1346(b) (1988).

lief bills,<sup>9</sup> a lengthy and protracted process that burdened Congress with literally thousands of claims and denied deserving plaintiffs access to the judicial system.<sup>10</sup> By enacting the FTCA, Congress sought to give citizens an equitable judicial forum for the prosecution of claims against the government.<sup>11</sup>

Congress was nevertheless reluctant to abrogate the doctrine of sovereign immunity entirely, fearing that a complete lack of immunity would effectively disable government by subjecting governmental action to unwarranted judicial scrutiny.<sup>12</sup> The discretionary function exception, then, was intended to immunize vital governmental decisionmaking from the threat of legal action. The provision excepts from liability:

[a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>13</sup>

Congress felt that executive and legislative branch autonomy had to be preserved; the wisdom of discretionary governmental actions could not be challenged by tort suits.<sup>14</sup>

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<sup>9</sup> Pursuing claims through private relief bills required members of Congress to introduce legislation through which individual claimants would be specifically compensated. Reynolds, *supra* note 7, at 81.

<sup>10</sup> *Id.*

<sup>11</sup> *Hearings Before the Joint Comm. on the Organization of Congress Pursuant to H.R. Con. Res. 18*, 79th Cong., 1st Sess., pt. 1, at 67-69 (1945).

<sup>12</sup> H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5, 6 (1945). Legislative history of the FTCA states that the discretionary function exception "is a highly important exception intended to preclude any possibility that the bill might be construed to authorize suit for damages against the government growing out of an authorized activity." *Id.* Congress also did not intend for the Act to allow claimants to obtain remedies for negligently performed acts involving an abuse of discretion. *Id.*; see *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984) (dual objectives of the FTCA and discretionary function exception are to provide a more expedient forum for redress of injuries than private bills of relief, and to protect "certain governmental activities from exposure to suit by private individuals"); see also Daniel E. Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception*, 6 AM. U.L. REV. 22, 23-24 (1957) (discussing the rationale for the discretionary function exception); Reynolds, *supra* note 7, at 83-84 (discussing the purpose of the discretionary function exception); Note, *Municipal Tort Liability for Failure to Provide Adequate Police Protection in New York State*, 39 ALB. L. REV. 599, 602-03 (1975) (authored by Bruce Blatchly) [hereinafter Note, *Municipal Tort Liability*] (noting opposition to judicial scrutiny of administrative decisions); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 832-33 (1981) (addressing argument that courts cannot determine the reasonableness of complex governmental activities).

<sup>13</sup> 28 U.S.C. § 2680(a) (1988).

<sup>14</sup> *Hearings on H.R. 5373 & 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess., ser. 13, at 29 (1942) [hereinafter *Hearings on H.R. 5373 & 6463*]; see Reynolds, *supra* note 7, at 83 (discussing testimony of Assistant United States Attorney General Shea); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989)

## B. Judicial Application of the Discretionary Function Exception

The discretionary function exception initially received favorable reviews from commentators.<sup>15</sup> Most assumed the exception simply codified existing judicial distinctions between compensable ministerial government actions and noncompensable policymaking actions,<sup>16</sup> and reaffirmed a judicial unwillingness to pass judgment on the soundness of governmental action.<sup>17</sup> The seemingly innocuous exception soon proved incapable of precise definition, however, and prompted one commentator to say that the "vague and ambiguous" discretionary function exception was a "monstrous joker . . . threatening to engulf the entire [Federal Tort Claims] Act in a twilight zone."<sup>18</sup>

In 1953 the Supreme Court first addressed the discretionary function exception in *Dalehite v. United States*.<sup>19</sup> *Dalehite* involved an explosion of fertilizer with an ammonium nitrate base that the government had decided to store in vessels in a Texas harbor prior to exportation.<sup>20</sup> The Court determined that because the decision to export fertilizer occurred at Cabinet level, all subsequent action in furtherance of the fertilizer policy fell within the discretionary function exception and rendered the government immune from liability.<sup>21</sup> In dissent, Justice Jackson noted that "the ancient and discredited doctrine that '[t]he King can do no wrong' . . . has merely been amended to read, '[t]he King can do only little wrongs.'" <sup>22</sup> Justice Jackson's point is well taken. A strict reading of *Dalehite* immunizes any government action if a court decides that negligence initially occurred at a policy level.<sup>23</sup>

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("The wellspring of the discretionary function exception is the doctrine of separation of powers. . . . [P]rinciples of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government." (citing *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982))).

<sup>15</sup> Matthews, *supra* note 12, at 23; *see also* Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 44 (1946) (stating that the exception was essential to the preservation of effective government).

<sup>16</sup> Matthews, *supra* note 12, at 23-24; *see also* Gottlieb, *supra* note 15, at 44; Reynolds, *supra* note 7, at 84.

<sup>17</sup> *Hearings on H.R. 5373 & 6463*, *supra* note 14, at 29 (testimony of Assistant Attorney General Shea); *see* Reynolds, *supra* note 7, at 84 (discussing Shea's testimony).

<sup>18</sup> Hugh Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U.L. REV. 41, 42 (1955).

<sup>19</sup> 346 U.S. 15 (1953).

<sup>20</sup> *Id.* at 17.

<sup>21</sup> *Id.* at 40.

<sup>22</sup> *Id.* at 60 (Jackson, J., dissenting).

<sup>23</sup> Consider, for example, a governmental program to export wheat to Ethiopia. Under *Dalehite*, governmental decisions to subsidize only a certain percentage of farmers, to use toxic fertilizers, and to store the grain in a hazardous manner—as in *Dalehite*—would be immunized from liability, because those decisions would be incident and necessary to the furtherance of the governmental scheme. Or, to use an oft-cited example,

Two years later, the Court in *Indian Towing Co. v. United States*<sup>24</sup> narrowed the breadth of *Dalehite*, holding the Coast Guard liable for negligently operating a lighthouse.<sup>25</sup> The plaintiff, a barge owner, alleged that his tugboat went aground because the Coast Guard failed to repair a malfunctioning lighthouse light.<sup>26</sup> The government sought immunity on the basis that it had undertaken a “uniquely governmental function.”<sup>27</sup> The Court rejected the claimed immunity and, in finding that the decision to provide lighthouse service triggered a governmental duty to use due care, held the government to the same standard of reasonable care as a private person.<sup>28</sup> Although arguably *Indian Towing* did not directly involve the discretionary function exception, the decision’s more “liberal attitude”<sup>29</sup> toward FTCA liability offered a narrower alternative to *Dalehite*’s definition of the discretionary function exception.<sup>30</sup>

More recently, in *Berkovitz v. United States*,<sup>31</sup> the Supreme Court held that the discretionary function exception did not bar a claim alleging that the government negligently approved production and distribution of an oral polio vaccine.<sup>32</sup> The Court labeled the government’s conduct nondiscretionary and articulated a two-part test for determining whether governmental action falls within the discretionary function exception. First, in examining the nature of the challenged conduct, a court must determine if the action involved

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perhaps an auto accident involving an Agriculture Department official en route to an export program meeting would not be actionable either. And, even if the government were liable in this example, it is nevertheless a “little wrong.”

<sup>24</sup> 350 U.S. 61 (1955).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 62.

<sup>27</sup> *Id.* at 64. A “uniquely governmental function”, the government argued, was an activity “which private persons do not perform.” *Id.* The government conceded that the operation of the lighthouse was not a discretionary governmental activity because it took place at the so-called “operational level” of activity and did not entail the requisite amount of discretionary activity to warrant application of the discretionary function exception. *Id.* However, the government argued that uniquely governmental functions, because they are inherently different from ordinary actions, should not be subject to tort liability.

<sup>28</sup> *Id.*

<sup>29</sup> Reynolds, *supra* note 7, at 101.

<sup>30</sup> See, e.g., *id.* (*Indian Towing* results in governmental liability whenever there is a duty to act, and a duty to act eliminates discretion); Note, 25 *FORDHAM L. REV.* 167, 170 (1956) (*Indian Towing* significantly expands federal liability beyond the narrow restrictions of *Dalehite*). In addition, some commentators feel that *Indian Towing* narrows sovereign immunity because it holds government to the same standard of reasonable care as a private person. See, e.g. Reynolds, *supra* note 7, at 101; Note, *Federal Tort Claims Act—A Liberalized Interpretation*, 35 *NEB. L. REV.* 509, 511 (1956) (authored by Charles K. Thompson) (*Indian Towing* imposes liability for uniquely governmental functions if a private person could conceivably undertake the same function).

<sup>31</sup> 486 U.S. 531 (1988).

<sup>32</sup> *Id.* at 532.

an element of judgment or choice.<sup>33</sup> A government official has no discretion if a federal statute, regulation, or policy specifically enumerates a course of conduct.<sup>34</sup> In the absence of a specific directive, conduct may be discretionary if there is room for judgment or choice. Second, if the action is sufficiently imbued with discretion to satisfy the first part of the *Berkovitz* test, then a court must determine if the judgment underlying the challenged action was based on public policy considerations.<sup>35</sup> "Public policy," according to the Court, encompasses social, economic, and political policy because Congress enacted the FTCA to protect legislative and administrative decisions in those areas.<sup>36</sup> Therefore, according to *Berkovitz*, the discretionary function exception applies only to actions that involve judgments or choices based on public policy considerations. The two-part *Berkovitz* test distinguishes ordinary, non-policy discretionary action from the type of higher order discretionary action that the discretionary function exception was intended to immunize from tort liability. As the Court stated in *Westfall v. Erwin*,<sup>37</sup> "virtually all official acts involve some modicum of choice,"<sup>38</sup> and to immunize such basic discretionary action from tort liability would result in a "wooden interpretation"<sup>39</sup> of the discretionary function exception.<sup>40</sup> Discretionary choices exist at all levels of government, but not all such choices warrant immunity from tort liability. Immunizing basic discretionary action from tort liability creates the "twilight zone"<sup>41</sup> feared by commentators writing at the time of the exception's promulgation.

*Berkovitz's* application to cases involving the negligent release of mental patients from government hospitals illustrates the discretionary function exception's intended effect. In *Smart v. United States*,<sup>42</sup> a pre-*Berkovitz* case, the Tenth Circuit held that the govern-

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<sup>33</sup> *Id.* at 536.

<sup>34</sup> *Id.* For example, if, as in *Berkovitz*, a Federal Drug Administration policy requires investigation of all lots of oral polio vaccine, the government has no discretion to fail to inspect a particular lot.

<sup>35</sup> *Id.* at 537.

<sup>36</sup> *Id.* In *United States v. Varig Airlines*, 467 U.S. 797, 813-14 (1984), the Court emphasized the type of conduct in issue in applying the discretionary function exception. In *Varig*, the Court said that "[i]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.* at 813. A court must determine if the challenged acts are of the "nature and quality" intended to be immunized from tort liability.

<sup>37</sup> 484 U.S. 292 (1988).

<sup>38</sup> *Id.* at 298.

<sup>39</sup> *Id.*

<sup>40</sup> *Westfall* involved an application of the qualified immunity doctrine under 42 U.S.C. § 1983. However, under the discretionary function exception, both § 1983 and non-§ 1983 analyses use the same definition of discretion.

<sup>41</sup> See Stromswold, *supra* note 18.

<sup>42</sup> 207 F.2d 841 (10th Cir. 1953).

ment was not liable for injuries caused by a discharged mental patient who recklessly drove a stolen automobile, because the decision to release “of necessity involve[d] the exercise of judgment and discretion” falling within the ambit of the discretionary function exception.<sup>43</sup> However, in two post-*Berkovitz* decisions, the First Circuit, in *Collazo v. United States*,<sup>44</sup> and the United States District Court for the Northern District of Illinois in *Mayer v. United States*,<sup>45</sup> concluded that the negligent release of a mental patient from government custody is not protected by the discretionary function exception. Both *Collazo* and *Mayer* found that the decision to release, though discretionary, is insufficiently policy-based to implicate the discretionary function exception.<sup>46</sup>

Although courts have struggled to define the parameters of the discretionary function exception,<sup>47</sup> *Berkovitz* clarifies discretionary function analysis and emphasizes that discretionary actions in furtherance of policy are not immune from liability, absent an inherent public policy basis. In *In re Franklin National Bank Securities Litigation*,<sup>48</sup> for example, the United States District Court for the Eastern District of New York held that chartering a national bank and subsequently declaring insolvency is protected by the exception, but negligently operating a bank is not immune from liability.<sup>49</sup> In *Greene v.*

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<sup>43</sup> *Id.* at 842-43.

<sup>44</sup> 850 F.2d 1 (1st Cir. 1988).

<sup>45</sup> No. 89-C-3468 (N.D. Ill. Dec. 4, 1989) (LEXIS, Genfed library, Dist File).

<sup>46</sup> *Collazo*, 850 F.2d at 2; *Mayer*, No. 89-C-3468 at 10 (LEXIS paging).

<sup>47</sup> *See* FDIC v. Irwin, 916 F.2d 1051, 1053 (5th Cir. 1990) (“The drafters of the FTCA failed to define the term ‘discretionary function,’ and decades of litigation have yet to yield a clear demarcation between actionable torts and immune discretion.”); *Estate of Gleason v. United States*, 857 F.2d 1208, 1209 (8th Cir. 1988) (The discretionary function exception is not “rigidly defined.”); *Ayer v. United States*, 721 F. Supp. 1395, 1396 (D. Me. 1989) (“The definition of ‘discretionary function’ has given the courts a great deal of trouble.”), *aff’d*, 902 F.2d 1038 (1st Cir. 1990).

Some courts have adhered to a strict operational-planning level distinction. *See, e.g.*, *Madison v. United States*, 679 F.2d 736 (8th Cir. 1982); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982); *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert. denied*, 389 U.S. 841; *Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal. 1982); *Social Sec. Admin. Baltimore Federal Credit Union v. United States*, 138 F. Supp. 639 (D. Md. 1956). Other courts have looked to statutes authorizing discretionary activity. *See, e.g.*, *Lynch v. United States Dep’t of Army Corps of Engr’s*, 543 F. Supp. 1211 (N.D. Cal. 1982); *Smith v. United States*, 330 F. Supp. 867 (D. Mich. 1971). Other criteria that courts have used in attempting to define the discretionary function exception include the “nature and quality” of challenged governmental action, *see, e.g.*, *Downs v. United States*, 522 F.2d 990, 991 (6th Cir. 1975); whether the activity involved a balancing of policy considerations, *see, e.g.*, *J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97 (5th Cir.), *reh’g denied*, 520 F.2d 943, *cert. denied*, 424 U.S. 954 (1976); and whether political policy considerations were involved, *see, e.g.*, *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973).

<sup>48</sup> 445 F. Supp. 723 (E.D.N.Y. 1978).

<sup>49</sup> *Id.* at 735.



*United States*,<sup>50</sup> the United States District Court for the Eastern District of Missouri held that after deciding to construct a stairwell in an office building, the government's duty to use due care mandated installation of a handrail.<sup>51</sup> These cases interpreting the discretionary function exception stand for the general proposition that once a policy decision is made, the government owes a duty of care to third persons who may act in reliance on governmental action taken in furtherance of the decision. In other words, the government makes some discretionary decisions that lack a sufficient policy basis to warrant immunity under the exception.

The foregoing suggests that, while the initial decision to subpoena a witness may be immunized by the discretionary function exception under *Berkovitz*, after subpoenaing a witness the government has no discretion to decide whether or not to offer protection. The decision to protect witnesses is simply not grounded in a sufficiently justifiable economic, social, or political policy to be immunized under the discretionary function exception. Moreover, principles of special relationships, reciprocity, and knowledge of a third party's violent tendencies further support a nondiscretionary duty to protect threatened federal criminal witnesses.

### C. Governmental Liability Based on a Special Duty Owed to Witnesses

The government owes subpoenaed witnesses a special duty of protection—triggered by the government's knowledge of a threat to witness safety—stemming from the special relationship between government and witness and from principles of reciprocity. A special relationship, reciprocity, and knowledge cumulatively create a special duty of protection that removes governmental action from the realm of immunized discretion.

#### 1. *Special Relationship*

Tort law has long recognized that a special relationship between two parties gives rise to an affirmative duty to act.<sup>52</sup> In the

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<sup>50</sup> 745 F. Supp. 1486 (E.D. Mo. 1990).

<sup>51</sup> *Id.* at 1492-93; *see also* Caraballo v. United States, 830 F.2d 19 (2d Cir. 1987) (United States Park Service has a duty to use due care when patrolling a public beach after deciding to patrol); *Eklöf Marine Corp v. United States*, 762 F.2d 200 (2d Cir. 1985) (decision to employ a navigational aid is discretionary, but decision as to number or location of navigational aids is not discretionary).

<sup>52</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1977) [hereinafter RESTATEMENT]; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 56 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; *see also* Annotation, *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R.4th 1194 (1985).

absence of such a duty or special circumstance, a person owes no duty of care toward another.<sup>53</sup> The existence of a special relationship, however, negates the “no duty” rule and imposes liability on a party who fails to exercise the duty of care arising from this special relationship.<sup>54</sup> As the *Restatement (Second) of Torts* notes, “there is no duty to control the conduct of a third person . . . unless a special relation exists between the actor and the other which gives rise to the other a right of protection.”<sup>55</sup> Special relationships imposing liability on a party for failing to act include innkeeper-guest,<sup>56</sup> school-pupil,<sup>57</sup> university-fraternity,<sup>58</sup> prison-inmate,<sup>59</sup> mental hospital-patient,<sup>60</sup> mortuary-survivors,<sup>61</sup> common carrier-passenger,<sup>62</sup> stockbroker-investor,<sup>63</sup> corporate officer-shareholder,<sup>64</sup> tav-

<sup>53</sup> See, e.g., RESTATEMENT, *supra* note 52, §§ 315-320; PROSSER AND KEETON, *supra* note 52, § 56; see also Annotation, *supra* note 52.

<sup>54</sup> See, e.g., RESTATEMENT, *supra* note 52; PROSSER AND KEETON, *supra* note 52; see also Annotation, *supra* note 52.

<sup>55</sup> RESTATEMENT, *supra* note 52, § 315.

<sup>56</sup> See *Duckworth v. Appostalis*, 208 F. 936 (D.C. Tenn. 1913) (innkeeper who knew of employee's violent nature was liable for employee's assaults of guests); *Garzilli v. Howard Johnson's Motor Lodges*, 419 F. Supp. 1210 (E.D.N.Y. 1976) (special relationship between innkeeper and his guest imposed liability on innkeeper for failing to prevent rape of guest by third party; court upheld \$2.5 million award to guest, entertainer Connie Francis); *Dye-Washburn Hotel Co. v. Aldridge*, 207 Ala. 471, 93 So. 512 (1922) (hotel is required to keep premises in safe condition and is liable for failing to do so).

<sup>57</sup> See *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 840 (1990) (state liable for harm caused by sexually abusive teacher); *Pagano by Pagano v. Massapequa Pub. Schools*, 714 F. Supp. 641 (E.D.N.Y. 1989) (school officials liable for physical and verbal abuse of student by other students); *Lauricella v. Board of Educ.*, 52 A.D.2d 710, 381 N.Y.S.2d 566 (N.Y. App. Div. 1976) (school liable for injuries sustained by student thrown out of window by other students); *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360 (1970) (school liable for death of student killed while slap-boxing with fellow student during lunch recess).

<sup>58</sup> See *Furek v. University of Del.*, C.A. No. 82C-SE-30, slip op. (Del. Super. Ct. 1986) (special relationship between university and fraternity imposed liability on university for injuries suffered by pledge during fraternity initiation).

<sup>59</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976) (special relationship between prison officials and inmates mandated the provision of adequate medical treatment to inmates), *reh'g denied*, 429 U.S. 1066.

<sup>60</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982) (special relationship between state institution and involuntarily committed mental patient required institution officials to ensure patient's safety).

<sup>61</sup> See *Draper Mortuary v. Superior Court*, 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982) (mortuary liable for mistreatment of corpse by third party because special relationship between survivors and mortuary imposed a duty of care upon the mortuary).

<sup>62</sup> See *Carroll v. Staten Island R.R.*, 58 N.Y. 126 (1874) (common carrier owed duty to passengers to provide for their safety).

<sup>63</sup> *Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1990) (special relationship between stockbroker and his customers); *Cant v. A.G. Becker and Co.*, 374 F. Supp. 36 (N.D. Ill. 1974), *supp. op.*, 379 F. Supp. 972 (N.D. Ill. 1974), and *supp. op.*, 384 F. Supp. 814 (N.D. Ill. 1974) (special relationship between stockbroker and investor imposed liability on stockbroker for failing to inform investor of stockbroker's changed status).

<sup>64</sup> See *Cable v. White*, 360 F. Supp. 1021 (E.D. La. 1973) (special relationship be-

ern owner-patron,<sup>65</sup> camp proprietor-camper,<sup>66</sup> state agency-foster child,<sup>67</sup> union-employer,<sup>68</sup> and, this Note argues, should include government-witness.

The *Restatement* recognizes that certain relationships demand a particular duty of protection because of the unique character of those relationships. The classic example of an innkeeper and his guest illustrates the Restatement principle. An innkeeper owes no duty of protection to the general public, but when a member of the general public enters the innkeeper's inn a particular duty of protection arises.<sup>69</sup> The guest expects that once he entered into a relationship and surrendered a certain amount of control to the innkeeper, the innkeeper would exercise reasonable care to protect the guest from foreseeable harm.

Courts have attempted to create a workable definition of special relationship. In *Jensen v. Conrad*,<sup>70</sup> the Fourth Circuit listed some of the factors constituting a special relationship between a citizen and the government. According to *Jensen*, this special relationship includes three factors: state custody of either the victim or the perpetrator of a crime at the time of or prior to the incident; an explicitly stated desire to provide affirmative assistance to a particular class of persons; and state knowledge of the claimant's plight.<sup>71</sup>

More recently, the Supreme Court held in *DeShaney v. Winnebago County Department of Social Services*<sup>72</sup> that, in the absence of physical

tween corporation president and shareholders imposed increased liability on president for misstatements to shareholders regarding potential takeover).

<sup>65</sup> See *Allen v. Babrab, Inc.*, 438 So. 2d 356 (Fla. 1983) (tavern owner liable for injuries suffered by tavern patron assaulted by third party in tavern parking lot).

<sup>66</sup> See *Wallace v. Der Ohanian*, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962) (special relationship between proprietor of youth camp and 11-year-old camper imposed liability on proprietor for failing to prevent rape of camper).

<sup>67</sup> See *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990) (special relationship between state agency responsible for care of abandoned children and abandoned children placed in foster homes), *cert. denied*, 111 S. Ct. 182 (1990); *Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (special relationship between foster home and children placed in foster home), *cert. denied*, 489 U.S. 1065 (1989).

<sup>68</sup> See *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) (special relationship between maritime union and vessel employer), *cert. granted sub. nom.* *Miles v. Apex Marine Corp.*, 110 S. Ct. 1295 (1990).

<sup>69</sup> See cases cited, *supra* note 56.

<sup>70</sup> 747 F.2d 185 (4th Cir. 1985), *cert. denied*, 470 U.S. 1052 (1985).

<sup>71</sup> *Id.* at 194-95; see also *Fox v. Curtis*, 712 F.2d 84, 87-88 (4th Cir. 1983) (courts should consider, among other factors, whether a custodial relationship exists between a citizen and the state, and whether the state is aware of a specific risk to a citizen). Though both *Jensen* and *Fox* mention knowledge as an aspect of special relationships, this Note addresses knowledge separately as part of the overall special governmental duty to protect witnesses. Moreover, as is further demonstrated in this Part, there are definitions of special relationships that do not include knowledge as a criterion, but that nevertheless encompass the government-witness relationship.

<sup>72</sup> 489 U.S. 189 (1989).

custody, no special relationship existed between the State of Wisconsin and a child victimized by a physically abusive father.<sup>73</sup> After returning the child from state custody to his father, the state did not intervene even though it suspected child abuse.<sup>74</sup> A final beating by the child's father left the child, Joshua DeShaney, brain damaged.<sup>75</sup> The Court said no special relationship existed because Joshua was not in state custody when the beating occurred.<sup>76</sup> According to *DeShaney*, a special relationship between citizen and government exists solely when the government involuntarily deprives a citizen of his liberty.<sup>77</sup>

A recent case interpreting *DeShaney*, however, held that a special relationship exists between the government and an informant not in state custody. In *G-69 v. Degnan*,<sup>78</sup> the United States District Court for the District of New Jersey said that where both parties—the informant and the police—anticipate that discovery of an informant's activities could endanger the informant's life, the state has assumed a duty to protect the informant.<sup>79</sup> Physical custody, the court said, is unnecessary to establish a special relationship when the government places citizens in a dangerous situation.<sup>80</sup>

*G-69* is consistent with so-called "snake pit" special relationship cases that hold the government liable for failing to protect persons that the government has placed in dangerous situations. As the Sev-

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<sup>73</sup> *Id.* at 194.

<sup>74</sup> *Id.* at 192-93.

<sup>75</sup> *Id.* at 193.

<sup>76</sup> *Id.* at 199-200.

<sup>77</sup> *Id.* The Court held that only those persons involuntarily restrained from acting on their own behalf are in a special relationship.

<sup>78</sup> 745 F. Supp. 254 (D.N.J. 1990).

<sup>79</sup> *Id.* at 265.

<sup>80</sup> *Id.* It should be noted that the *G-69* court granted the plaintiff prospective injunctive relief but also granted the defendants, state Attorneys General, and other state officials qualified immunity from 42 U.S.C. § 1983 liability. The court's rationale for granting qualified immunity was that the defendants could reasonably have believed that their conduct did not violate the plaintiff's constitutional rights at the time. *Id.* at 264. However, the court said that its grant of prospective injunctive relief "forecloses the qualified immunity defense in similar cases from this date forward." *Id.*

It should also be noted that, in a footnote, *G-69* attempted to distinguish *Piechowicz* by implying that no special relationship existed in *Piechowicz* because there was no government offer of protective custody or relocation. *Id.* n.8. However, *G-69* cites four post-*DeShaney* cases to support a government-informant special relationship that does not involve promises of custody or protection. *Id.* at 265 (citing *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356-57 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990); *Pagano by Pagano v. Massapequa Pub. Schools*, 714 F. Supp. 641 (E.D.N.Y. 1989); *Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1989); and *Dudosh v. City of Allentown*, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989)). Moreover, because *G-69* states that, in the future, government officials cannot use qualified immunity as a defense in government-witness cases, thereby implying that witness protection is nondiscretionary, *G-69*'s comparative treatment of *Piechowicz* is diminished.

enth Circuit stated in *Bowers v. DeVito*,<sup>81</sup>

[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.<sup>82</sup>

Accordingly, several post-*DeShaney* cases have held that a non-custodial special relationship implicating a duty to protect arises between the government and persons imperiled by governmental conduct. In *Swader v. Virginia*,<sup>83</sup> the United States District Court for the Eastern District of Virginia distinguished *DeShaney* by the degree of government involvement in creating the danger to a citizen<sup>84</sup> and held that the State of Virginia breached a duty to protect a prison employee's daughter who was raped and murdered by a prison inmate.<sup>85</sup> In *DeShaney*, Joshua DeShaney's father posed a threat irrespective of state involvement; Joshua DeShaney was in an otherwise "free world" environment when his father abused him.<sup>86</sup> In *Swader*, the state effectively created danger to the decedent by requiring the decedent's mother, with whom the decedent lived, to reside near the penitentiary, and by failing to prevent inmates from venturing near the decedent's home beyond the fenced-in portion of the penitentiary.<sup>87</sup> The state, therefore, placed a citizen in a potentially dangerous situation in which she would not have been absent state action.

Similarly, in *Stoneking v. Bradford Area School District*,<sup>88</sup> the Third Circuit held that a special relationship existed between the state and public school students that gave rise to a duty of protection.<sup>89</sup> The court held that because students were required by law to attend school, they were in the "functional custody" of the state while at school, and the state was responsible for their safety.<sup>90</sup> Requiring the victimized student in *Stoneking* to attend public school increased the student's risk of sexual abuse by a teacher. The United States District Court for the Eastern District of New York reached a similar

<sup>81</sup> 686 F.2d 616 (7th Cir. 1982).

<sup>82</sup> *Id.* at 618; *see also* Estate of Gilmore v. Buckley, 787 F.2d 714, 722 (1st Cir.) (courts should see whether the state has affirmatively placed citizens in a position of danger in determining the existence of a special relationship), *cert. denied*, 479 U.S. 882 (1986).

<sup>83</sup> 743 F. Supp. 434 (E.D. Va. 1990).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 442.

<sup>87</sup> *Id.* *Swader* also noted that *Piechowicz* failed to mention that the *DeShaney* Court inadequately addressed the possible existence of a noncustodial special relationship in responding to the *DeShaney* plaintiffs' argument that a special relationship existed even in the absence of state action creating the danger in question.

<sup>88</sup> 882 F.2d 720 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 840 (1990).

<sup>89</sup> *Id.* at 723-24.

<sup>90</sup> *Id.*

conclusion in *Pagano by Pagano v. Massapequa Public Schools*,<sup>91</sup> holding that an elementary school owed a duty of care to protect its students from physical attacks by other students.<sup>92</sup>

In *Cornelius v. Town of Highland Lake*,<sup>93</sup> the Eleventh Circuit held the government liable to a citizen kidnapped and injured by members of a prison work squad.<sup>94</sup> The court stated that the work squad's presence under the guidance of state authorities created a danger to nearby citizens and gave rise to a special governmental duty of protection, even though the injured plaintiff was never in the state's physical custody.<sup>95</sup> Additionally, in *Wood v. Ostrander*,<sup>96</sup> the Ninth Circuit held the government liable for injuries that resulted when a policeman arrested an intoxicated driver of a car, impounded the vehicle, and left a female passenger stranded in a high crime area where she was subsequently raped.<sup>97</sup> Although the passenger was not in police custody when she was raped, the policeman's actions sufficiently distinguished the victim from the general public and established the requisite special relationship and special duty of care.<sup>98</sup>

Language in two pre-*DeShaney* witness protection cases supports the "snake pit" special relationship theory. In *Gardner v. Village of Chicago Ridge*,<sup>99</sup> an Illinois appellate court held that police had a duty to protect a witness injured by arrested individuals.<sup>100</sup> The police placed the witness in danger by asking him to identify suspects at a crime scene. The court held that as a result of this collaboration, the police owed the witness a special duty to prevent assault by the arrested persons.<sup>101</sup> The court observed that the "plaintiff[witness] was called into a position of peril by the police who allegedly knew that [the] defendant . . . had previously been arrested . . . and was capable of physical violence."<sup>102</sup> As a result, the police assumed a duty to exercise reasonable care in protecting the plain-

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<sup>91</sup> 714 F. Supp. 641 (E.D.N.Y. 1989).

<sup>92</sup> *Id.* at 642-43.

<sup>93</sup> 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990).

<sup>94</sup> *Id.* at 358-59.

<sup>95</sup> *Id.*

<sup>96</sup> 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).

<sup>97</sup> *Id.* at 586.

<sup>98</sup> *Id.* at 590; *see also* *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (government liable for injuries caused to children abandoned by police after father was arrested for drag racing); *Ward v. City of San Jose*, 737 F. Supp. 1502, 1507 (N.D. Cal. 1990) (police liable for failing to protect citizen from police-created danger).

<sup>99</sup> 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966), *aff'd in part, rev'd in part & remanded*, 128 Ill. App. 2d 157, 262 N.E.2d 829, *cert. denied*, 403 U.S. 919 (1971).

<sup>100</sup> *Id.* at 378, 219 N.E.2d at 150.

<sup>101</sup> *Id.* at 379, 219 N.E.2d at 150.

<sup>102</sup> *Id.* at 380, 219 N.E.2d at 150.

tiff.<sup>103</sup> In *Ellsworth v. City of Racine*,<sup>104</sup> the Seventh Circuit noted that a municipality creates a special relationship giving rise to a duty of protection when a municipality puts an individual in a position of danger from private persons.<sup>105</sup> Although the plaintiff, an undercover policeman, failed to establish the existence of a special relationship with the municipality based on his occupation, the court held that a limited special relationship, and therefore, a limited duty of protection, existed between the plaintiff—as witness—and the municipality.<sup>106</sup>

Post-*DeShaney* case law emphasizes unilateral government action endangering citizens and defines special relationship to include noncustodial situations and attenuated custodial relationships. When identifying special relationships, courts have deemed the involuntary position in which the government places citizens more dispositive than a strict definition of physical custody.<sup>107</sup>

<sup>103</sup> *Id.*

<sup>104</sup> 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

<sup>105</sup> *Id.* at 185. The *Ellsworth* court found that only a limited special relationship existed between the city and the plaintiff undercover police officer, and this limited relationship did not create an exhaustive duty of protection. Note, however, that the *Ellsworth* plaintiff argued that a special relationship existed because of his status as a municipal police officer and not because he was a witness. *Id.*

Other pre-*DeShaney* 42 U.S.C. § 1983 cases holding that no special relationship exists between government and witness can be distinguished on their facts. In *Bernstein v. Lower Moreland Township*, 603 F. Supp. 907 (E.D. Pa. 1985), the court stated that city government had no constitutional duty to protect a witness, because the government had no authority to protect someone who resided outside the city's jurisdiction. *Id.* at 911-12. However, the court stated in a footnote that the 1982 federal Victim and Witness Protection Act created a special relationship between witnesses and the federal government and established consequent legal rights and obligations. *Id.* at 911 n.3. In *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989), the court held that, in 1981 and 1982, no special relationship existed between a witness and the federal government. The court, however, expressed no opinion as to whether a special relationship would exist in light of subsequent case law. *Id.* at 102; *cf.* *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (no special relationship exists between government and persons injured by a person placed in the federal Witness Protection program); *Jet Indus., Inc. v. United States*, 777 F.2d 303 (5th Cir. 1985) (selection and supervision of witnesses in Witness Protection program a discretionary function), *cert. denied*, 476 U.S. 1115 (1986); *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985) (government not liable for injuries caused by participant in Witness Protection program); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980) (decision to release people from Witness Protection program is discretionary), *cert. denied*, 451 U.S. 908 (1981).

<sup>106</sup> See discussion of *Ellsworth*, *supra* note 105.

<sup>107</sup> It should be clear from the preceding discussion of post-*DeShaney* case law that the "snake pit" theory of special relationships has survived *DeShaney*. See also *Gregory v. City of Rogers*, 921 F.2d 750 (8th Cir. 1990) (holding that, after *DeShaney*, a special relationship can exist between the government and persons killed after the police removed a "designated driver" from their car); *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990) (holding that, after *DeShaney*, a special relationship existed between the government and citizens injured by a dangerous police officer, because the government trained and armed the officer, thereby endangering the citizens); *Crosby v. Luzerne County Hous. Auth.*, 739 F. Supp. 951 (M.D. Pa. 1990) (stating that, after *DeShaney*,

Under post-*DeShaney* case law, a special relationship thus exists between the government and a threatened federal criminal witness. The existence of this special relationship creates a nondiscretionary duty of protection because a duty, by definition, mandates specific action and vitiates discretion.

## 2. *Reciprocal Duty of Protection*

Principles of reciprocity dictate that both parties in a government-witness relationship assume equal but unique responsibilities. The witness's duty to testify honestly gives rise to a reciprocal governmental duty to protect the witness. This duty of protection when breached supports an actionable claim. As in a contractual relationship, the parties rely on each other to fulfill certain expectations. The government relies on witnesses to testify honestly and witnesses, in turn, must be able to rely on the government for protection.

Case law recognizes this reciprocal governmental duty to protect threatened witnesses. Nearly a century ago, the Supreme Court first acknowledged a citizen's right to testify free from harassment in *In re Quarles*.<sup>108</sup> In *Quarles*, a citizen, Henry Worley, informed a United States Deputy Marshal of George Terry's illegal liquor distillation, whereupon Terry allegedly assaulted and threatened to kill Worley.<sup>109</sup> Terry was charged with injuring, oppressing, threatening, and intimidating Worley in the "free exercise . . . of a right and privilege (the right to report violations of the law) secured to him by the Constitution and laws of the United States."<sup>110</sup>

Terry challenged his conviction by claiming that there was no statutory or constitutional right to report lawbreaking.<sup>111</sup> In response to Terry's argument, Justice Gray, writing for the Court, stated:

The right of a citizen informing of a violation of law . . . to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government . . . . [The right and duty of a citizen to assist in the

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special relationships exist when citizens are placed in a worse position because of state action); *Ward v. City of San Jose*, 737 F. Supp. 1502, 1507 (N.D. Cal. 1990) (under *DeShaney*, government liable for danger it created); Amy Sinden, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227 (1990) (arguing that the "snake pit" line of cases is consistent with *DeShaney*'s apparent requirement of involuntary submission to state action in finding a special relationship between citizen and state).

<sup>108</sup> 158 U.S. 532 (1895).

<sup>109</sup> *Id.* at 532-33.

<sup>110</sup> *Id.* at 532.

<sup>111</sup> *Id.*



prosecution of any breach of the peace in the United States] are privileges and immunities arising out of the nature and essential character of the national government.<sup>112</sup>

Justice Gray implied that the government owed a moral obligation to protect a citizen witness. In addition to the constitutional protection afforded by the privileges and immunities clause,<sup>113</sup> Justice Gray believed that witness protection and effective government were inseparable. "[I]t is the duty of [the] government to see that [the witness] may exercise this right freely, and to protect him from violence while so doing, or on account of so doing, . . . [and this duty arises] from the necessity of . . . government itself."<sup>114</sup>

Courts have followed *Quarles's* reciprocity rationale to impose liability on the government for failing to protect witnesses. In *Swanner v. United States*<sup>115</sup> a government special employee/informant received death threats against himself and his family prior to his scheduled testimony about illegal liquor distillation activities.<sup>116</sup> The government knew of the threats, and advised Swanner, the informant, that he would be safe without protection if he remained at his home, which Swanner did.<sup>117</sup> Shortly thereafter, a bomb exploded in Swanner's house, seriously injuring him and his family.<sup>118</sup> The U.S. District Court for the Middle District of Alabama held that the discretionary function exception did not bar Swanner's claim because the government owed him a special duty of protection resulting from his assistance to the prosecution.<sup>119</sup> The government had a duty to protect Swanner in return for Swanner's duty to testify because "it had reasonably appeared to [federal] agents . . . that Swanner . . . was endangered."<sup>120</sup>

*Schuster v. New York*<sup>121</sup> is one of the most frequently cited cases in which government liability arose from a breach of the reciprocal duty of protection owed to a witness. Arnold Schuster recognized a fellow subway passenger as Willie Sutton, a notorious criminal sought by law enforcement agencies, and immediately reported this

<sup>112</sup> *Id.* at 536 (quoting *In re Kemmler*, 136 U.S. 436, 448 (1890)).

<sup>113</sup> *Id.* The privileges and immunities clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

<sup>114</sup> *Id.* at 536 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884)).

<sup>115</sup> 309 F. Supp. 1183 (M.D. Ala. 1970).

<sup>116</sup> *Id.* at 1186.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1187-88.

<sup>120</sup> *Id.* at 1187.

<sup>121</sup> 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

information to the New York City police department.<sup>122</sup> Schuster's help was crucial to Sutton's arrest, from which Schuster gained public acclaim.<sup>123</sup> Thereafter, Schuster received numerous death threats.<sup>124</sup> He notified the police, who assured Schuster that the threats were not serious.<sup>125</sup> Three weeks later Schuster was shot and killed.<sup>126</sup> The Appellate Division of the New York Supreme Court dismissed the wrongful death action brought by Schuster's survivors against the City of New York, stating that the city owed Schuster no duty of protection.<sup>127</sup>

The New York Court of Appeals reversed and held that the municipality had a special duty to reasonably protect citizen witnesses who were endangered as a result of their collaboration with the police.<sup>128</sup> "[W]here persons actually have aided in the apprehension or prosecution of enemies of society under the criminal law," the court said, "a reciprocal duty arises on the part of society [the municipality] to use reasonable care for their police protection."<sup>129</sup> The reciprocal duty to protect arose when Schuster became a witness and would not arise in favor of a member of the general public.<sup>130</sup> Reciprocity mandated an affirmative duty to protect Schuster.<sup>131</sup>

In *Crain v. Krehbiel*,<sup>132</sup> the United States District Court for the Northern District of California held that a federal agent's threat to withdraw protection from an informant if the informant did not testify established a claim for intentional infliction of emotional distress.<sup>133</sup> The court stated that the mere exercise of discretion by

<sup>122</sup> *Id.* at 79, 154 N.E.2d at 534, 180 N.Y.S.2d at 268; see also Note, *Municipal Tort Liability*, *supra* note 12, at 605.

<sup>123</sup> 5 N.Y.2d at 79, 154 N.E.2d at 536, 180 N.Y.S.2d. at 268.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; see also Note, *Municipal Tort Liability*, *supra* note 12, at 605.

<sup>126</sup> 5 N.Y.2d at 79, 154 N.E.2d at 536, 180 N.Y.S.2d at 268.

<sup>127</sup> 5 N.Y.2d at 76, 154 N.E.2d at 536, 180 N.Y.S.2d at 265.

<sup>128</sup> 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

<sup>129</sup> 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 270; see also *Morris v. Musser*, 84 Pa. Commw. 170, 174, 478 A.2d 937, 940 (1984) (acknowledging that reciprocity imposes a special duty of protection on police to protect individuals endangered as a result of cooperation as informers or witnesses).

<sup>130</sup> 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 270.

<sup>131</sup> See also *Estate of Tanasijevich v. City of Hammond*, 178 Ind. App. 669, 383 N.E.2d 1081 (1978). In *Tanasijevich*, an Indiana appellate court held that a municipality had a reciprocal duty to protect a citizen's property if it reasonably appeared that property damage would result from the citizen's cooperation with the police. The court said that the general duty of protection owed to the public "becomes particularized to [a] citizen who, in the interests of the general welfare, has placed individual or family well-being in jeopardy." *Id.* at 674, 383 N.E.2d at 1084.

<sup>132</sup> 443 F. Supp. 202 (N.D. Cal. 1977).

<sup>133</sup> *Id.* In addition to upholding the claim for intentional infliction of emotional distress, the court implied that, had it been presented with the question of the informant's constitutional rights as an informant, it would have found a violation of those rights under *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976) (right to be a witness

government agents did not cloak them with immunity.<sup>134</sup> Therefore, they had no privilege to breach a duty owed to the informant. The agents' actions, the court noted, constituted a "tortious breach of the duty to protect informants."<sup>135</sup>

These cases demonstrate that the government owes its witnesses a reciprocal duty of protection in return for their cooperation in a criminal proceeding. The bilateral government-witness relationship entails reciprocal duties which eliminate governmental discretion to not protect a witness.<sup>136</sup> The government, in other words, must assume a duty of protection corresponding to a witness's duty to testify.

### 3. *Knowledge*

The government's special knowledge of danger posed to a potential witness heightens the government's duty to protect. When the government knows that a criminal defendant with violent tendencies has threatened witnesses or may harm witnesses, the government cannot stand idly by under the umbrella of discretion. To argue that the government has discretion to withhold protection from witnesses in the face of a known danger is akin to arguing that a fireman has discretion to ignore the smell of smoke. The government is the only actor on whom witnesses can rely for protection, and the government is in the best position to be cognizant of potential danger posed to witnesses. The rationale for imposing this special duty of protection is largely premised upon one party's unique ability to prevent tortious harm to another by virtue of relationship-based knowledge,<sup>137</sup> as articulated in the *Restatement (Second) of Torts*.

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secured by the Constitution), *cert. denied*, 434 U.S. 839 (1977). *See also* United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974) (same), *cert. denied*, 419 U.S. 826 (1974); *In re Quarles*, 158 U.S. 532 (1895).

<sup>134</sup> *Crain*, 443 F. Supp. at 213.

<sup>135</sup> *Id.* at 214; *see also* Leonhard v. United States, 633 F.2d 599, 623 n.35 (2d Cir. 1980) (noting that the government may be liable for failing to adequately protect a witness from reprisals), *cert. denied*, 451 U.S. 908 (1981); *Miller v. United States*, 530 F. Supp. 611, 613, 615 (E.D. Pa. 1982) (noting that there was "no easy answer" whether the decision to protect witnesses was immunized by the discretionary function exception, and characterizing discretionary function exception case law as a "patchwork quilt").

<sup>136</sup> Duty by definition entails no discretion. *See, e.g.*, Howlett v. Rose, 110 S. Ct. 2430, 2435 n.5 (1990) ("Discretionary acts do not give rise to liability because they are not tortious. By definition, one who has discretion to act has no duty to act") (quoting *Penthouse, Inc. v. Saba*, 399 So. 2d 456, 458 n.2 (Fla. Dist. Ct. App. 1981)); *Owen v. City of Independence*, 445 U.S. 622, 649 (1980) (municipality has no discretion to violate duties imposed on it by the Constitution).

<sup>137</sup> By analogy, psychiatrists owe a duty to people whom the psychiatrists know to be endangered by their patients' conduct, because knowledge gained from the doctor-patient special relationship places psychiatrists in a unique position to warn potential tort victims. *See, e.g.*, *Currie v. United States*, 644 F. Supp. 1074 (M.D.N.C. 1986) (psychia-

Section 302B of the Restatement provides that “[a]n act or an omission may be negligent if the actor *realizes or should realize* that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.”<sup>138</sup>

The classic knowledge case of *Tarasoff v. Regents of the University of California*<sup>139</sup> illustrates the Restatement principle. In *Tarasoff*, the California Supreme Court held that a psychiatrist owed a duty to warn a person whom the psychiatrist knew might be harmed—and was subsequently murdered—by a patient of the psychiatrist.<sup>140</sup> The court held that psychiatrists “incur[] an obligation to use reasonable care to protect the [foreseeable] victim [of] . . . danger”<sup>141</sup> because psychiatrists possess unique professional skill and stand in a unique position to ascertain an individual’s potential for harm.<sup>142</sup> Similarly, in *Irwin v. Town of Ware*,<sup>143</sup> the Massachusetts Supreme Judicial Court held that a police officer who knew that a motorist was intoxicated had a duty to remove the motorist from the highway to prevent potential injury to other citizens.<sup>144</sup> The court noted that special governmental duties of protection are based in large part on foreseeability, or knowledge, of harm posed to citizens by government inaction.<sup>145</sup> The police officer knew the driver was intoxicated,<sup>146</sup> and, based on the officer’s professional experience and skill in dealing with intoxicated motorists, should have realized the harm the driver posed to third parties.

In *Horton v. Flenory*,<sup>147</sup> the Third Circuit held that a policeman who knew of a private club owner’s physical “interrogation” of a club employee had a duty to protect the employee, even though departmental policy mandated acquiescence regarding certain private disputes.<sup>148</sup> Again, as in *Irwin*, the policeman knew that serious

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trist’s duty not limited to easily foreseeable victims), *aff’d*, 836 F.2d 209 (4th Cir. 1987); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980) (psychiatrist owes duty to persons reasonably endangered by patient’s violence to take reasonable precautions to protect those parties); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (a special relationship between psychiatrists and victim or perpetrator may create liability); and discussion *infra* text accompanying notes 141-42.

<sup>138</sup> RESTATEMENT, *supra* note 52, § 302B (emphasis added).

<sup>139</sup> 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

<sup>142</sup> *Id.*

<sup>143</sup> 392 Mass. 745, 467 N.E.2d 1292 (1984).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 756, 467 N.E.2d at 1300; *see also* *Bernstein v. Lower Moreland Township*, 603 F. Supp. 907, 910 (E.D. Pa. 1985) (noting that knowledge of a special danger to others may create a special relationship).

<sup>146</sup> *Irwin*, 392 Mass. at 763-65, 467 N.E.2d at 1304-05.

<sup>147</sup> 889 F.2d 454 (3d Cir. 1989).

<sup>148</sup> *Id.* at 458.

harm was imminent, if not already present,<sup>149</sup> and this knowledge created a nondiscretionary duty to protect.

Other cases hold that knowledge creates a governmental duty to warn individuals who may be endangered by the conduct of others. Although these cases do not address the issue of protection, their reasoning nevertheless supports the imposition of a duty of protection, because knowledge places the government in a unique position and creates a duty which cannot be shirked. In *Rieser v. District of Columbia*,<sup>150</sup> for example, the Court of Appeals for the District of Columbia Circuit held that the discretionary function exception did not render immune the District of Columbia's decision to secure employment for a paroled sex offender in an apartment complex who subsequently raped and murdered the plaintiff-decedent.<sup>151</sup> The court found that the parolee's parole officer knew that the parolee would be in close proximity to female tenants of the complex, and, therefore, had no discretion to withhold information of the parolee's prior sex-related crimes from the parolee's potential employer.<sup>152</sup> The parole officer's knowledge and position created a duty to prevent an unreasonable risk of harm posed by the parolee to the female tenants. The parole officer breached this duty of protection owed to the endangered female tenants by failing to disclose the information.<sup>153</sup>

In *Johnson v. State*<sup>154</sup> the California Supreme Court held that the California Youth Authority's failure to inform a foster parent of a foster child's known violent and dangerous tendencies was not immunized under the state's discretionary function exception.<sup>155</sup> The Youth Authority's knowledge of the foster child's violent tendencies created a nondiscretionary duty to inform the foster parents of the child's dangerous nature.<sup>156</sup> The state was uniquely in a position to know of the danger posed by a "ward" to a third party. The court added that "courts should not casually decree governmental immunity" because that would insulate practically all governmental deci-

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<sup>149</sup> *Id.* at 457.

<sup>150</sup> 563 F.2d 462 (D.C. Cir. 1977), *modified on other grounds*, 580 F.2d 647 (D.C. Cir. 1978) (en banc).

<sup>151</sup> *Id.* at 475.

<sup>152</sup> *Id.* at 479.

<sup>153</sup> *Id.* at 479; *see also* *Miles v. Melrose*, 882 F.2d 976, 992 (5th Cir. 1989) (when a union, because of its unique position, knows and foresees that a union member will injure others, the union has a duty to prevent harm by not referring the potential wrongdoer to an unsuspecting employer), *cert. granted sub nom.*, *Miles v. Apex Marine Corp.*, 110 S. Ct. 1295 (1990).

<sup>154</sup> 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

<sup>155</sup> *Id.* at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243.

<sup>156</sup> *Id.*

sions from liability.<sup>157</sup>

Knowledge of danger posed to citizens, therefore, can create a governmental duty of protection or heighten an existing special duty of protection. Moreover, governmental knowledge of danger to third parties illustrates the stark reality of governmental inaction masquerading under the guise of discretion. Although special relationships and principles of reciprocity amply support a duty of protection, knowledge is the component of a special duty that most compellingly calls into question the legitimacy of “discretionary” decisions to withhold protection. A government that refuses to act when it knows that its citizens are endangered is a government that fails to govern. When the government attempts to cloak inaction with the discretionary function exception, it is essentially saying that its failure to govern is immune from liability. For the government to argue that it had knowledge of a danger and decided not to act, or that it had no knowledge of a danger despite its unique position, strains credibility and perverts the purpose of the discretionary function exception.

## II

### *PIECHOWICZ V. UNITED STATES*

#### A. Facts

In *Piechowicz v. United States*,<sup>158</sup> the Court of Appeals for the Fourth Circuit held that the survivors of a murdered federal criminal witness could not bring a wrongful death action against the United States for failing to protect the witness after he was threatened.<sup>159</sup> The government subpoenaed the witness, Scott Piechowicz,<sup>160</sup> and his wife Cheryl, to testify in the narcotics and firearms trial of Anthony Grandison.<sup>161</sup> The couple’s testimony was integral to the government’s case because their positive identification of Grandison established the crucial nexus between Grandison and certain incriminating evidence.<sup>162</sup> Without the Piechowicz’s testimony,

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<sup>157</sup> 69 Cal. 2d at 798, 447 P.2d at 363, 73 Cal. Rptr. at 251.

<sup>158</sup> 885 F.2d 1207 (4th Cir. 1989).

<sup>159</sup> *Id.*

<sup>160</sup> By all accounts, Scott Piechowicz was a law-abiding citizen who willingly accepted his duty to testify. A close high school friend described Piechowicz as “the kind of guy who, when everyone was getting drunk at parties, you could count on to drive you home. He was the straightest guy I ever knew.” Wash. Post, May 9, 1983, at A18, col. 4. Piechowicz’s high school journalism teacher remembered the former sports editor of the school paper as “the kind of boy you’d want your own son to be like. You don’t want to say the All-American boy because that sounds so trite. But in this case it’s true. He was the boy next door.” *Id.*

<sup>161</sup> *Piechowicz*, 885 F.2d at 1210.

<sup>162</sup> *Id.* On November 10, 1982, federal marshals arrested Anthony Grandison for allegedly violating his parole from a five-year sentence for assaulting Drug Enforcement

Grandison's motion to suppress the incriminating evidence would have likely succeeded.

Immediately prior to the suppression hearing concerning the contraband discovered in Grandison's hotel room, Grandison's common-law wife approached Cheryl Piechowicz and said something approximating, "If you know what's good for you, you'll say you've never seen [Grandison] before in your life."<sup>163</sup> Cheryl Piechowicz reported the threat to Drug Enforcement agent John Ryan and to Assistant United States Attorney James Savage.<sup>164</sup> Both men were aware of Grandison's propensity for criminal and violent action. Savage characterized Grandison as "potentially dangerous"<sup>165</sup> and noted that "his readiness and willingness to use deadly force in achieving his criminal ends" were established beyond a doubt.<sup>166</sup> Ryan, a former Baltimore city police officer, had arrested Grandison twice, including one arrest for assault.<sup>167</sup> Ryan, moreover, knew that Grandison had been indicted in 1979 in the United States District Court for the District of Maryland for obstructing a criminal investigation and conspiring to murder a Drug Enforcement Agency informant/witness.<sup>168</sup>

Nevertheless, Savage and Ryan deemed it unnecessary to report the incident as a threat against the Piechowiczes and made no effort

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agents. *Id.* at 1209-10. A search of Grandison immediately following his arrest produced a key to a room at Baltimore's Warren House Hotel. *Id.* In the meantime, a female associate of Grandison's accosted Scott Piechowicz, manager of the Warren House, and demanded entrance into Grandison's room at the hotel which was registered under the name of another Grandison associate. Memorandum to United States Probation Department from James C. Savage, case no. 82-00501, at 2 (May 27, 1983) [hereinafter Memorandum]. Piechowicz refused to allow the woman in the room without permission. *Piechowicz*, 885 F.2d. at 1210. To secure Grandison's permission, Piechowicz called a number the woman gave him and found himself talking to the Federal Bureau of Investigation. *Id.*

Piechowicz then entered Grandison's room and saw drug paraphernalia and a revolver in two separate bags. *Id.* A subsequent FBI search of a locked third bag uncovered 122 grams of cocaine and 100 grams of heroin worth over \$350,000, as well as four pounds of cutting substances. Memorandum, *supra*, at 3. Cheryl Piechowicz was also a Warren House employee. *Piechowicz*, 885 F.2d at 1210.

<sup>163</sup> *Piechowicz*, 885 F.2d. at 1210.

<sup>164</sup> *Id.*

<sup>165</sup> Deposition of James Savage, at 23 (Apr. 1, 1987).

<sup>166</sup> Memorandum, *supra* note 162, at 5. Others echoed Savage's assessment of Grandison's violent nature. Assistant United States Attorney Mark Kolman stated, "No one . . . is as evil as Anthony Grandison . . . . People like [Grandison] should be put away forever." United Press Int'l, Dec. 15, 1983 (NEXIS, OMNI Lib.). Assistant United States Attorney Ty Cobb stated that Grandison was a "master of manipulation" who "creates" heroin users. Wash. Post, May 12, 1983, at B3, col. 3.

<sup>167</sup> Deposition of John Ryan, at 14-15 (Apr. 2, 1987).

<sup>168</sup> *Id.* at 4-5. Grandison was indicted on obstruction of justice charges for attempting to murder a federal witness scheduled to testify against Walter R. "Gangster" Webster, a kingpin of a multimillion-dollar Baltimore drug operation. United Press Int'l, Apr. 29, 1983 (NEXIS, OMNI Lib).

to protect them.<sup>169</sup> The Piechowicz's only protection was a warning against threatening witnesses issued to all persons present at the suppression hearing.<sup>170</sup>

Five days before Grandison's trial, a hired assassin shot and killed Scott Piechowicz and his sister-in-law with a silenced machine gun, apparently mistaking the sister-in-law for Piechowicz's wife.<sup>171</sup>

## B. The District Court's Holding

Cheryl Piechowicz brought a wrongful death action in the United States District Court for the District of Maryland against the United States Government, Assistant United States Attorney Savage, and drug enforcement agent Ryan for breaching their duty to protect Scott Piechowicz.<sup>172</sup> The district court held that the decision to withhold protection from Scott Piechowicz was discretionary and dismissed Cheryl Piechowicz's complaint for failing to state a claim upon which relief could be granted.<sup>173</sup> In dicta, the court noted that the government did have a special relationship with Scott Piechowicz in light of *Jensen v. Conrad*,<sup>174</sup> but felt the relationship was too nebulously defined to give rise to an affirmative right to protection.<sup>175</sup>

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<sup>169</sup> *Piechowicz*, 885 F.2d at 1210.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* Vernon Evans, the hired killer, also conspired with Grandison to kill the witness who was scheduled to testify against Walter Webster in 1979 in Maryland. Deposition of John Ryan, at 4-5 (Apr. 2, 1987).

Evans visited Grandison in jail two days before the slaying and was promised \$9000 by Grandison for "pulling it off." Wash. Post, Sept. 13, 1983, at C5, col. 1. Grandison wrote his common-law wife, Janet Moore, that "no one can put me there (the hotel room)" but said he wanted Evans to "take care of something to be on the safe side." United Press Int'l, Aug. 17, 1983 (NEXIS, OMNI Lib.).

Grandison was convicted of first-degree murder, witness tampering, and conspiring to violate civil rights, in addition to his drug conviction, and was sentenced to death. *Grandison v. United States*, 780 F.2d 425 (4th Cir. 1985); United Press Int'l, Nov. 1, 1990 (NEXIS, OMNI Lib.). Evans was convicted of the same charges. *Id.* Janet Moore and Rodney Kelly, who aided in the murder, were convicted of witness tampering and civil rights violations. *Grandison*, 780 F.2d at 439.

For exhibiting special bravery in securing Grandison's conviction, then-FBI Director William Webster awarded Scott and Cheryl Piechowicz the Louis E. Peters Memorial Service Award. Webster said that witnesses such as the Piechowicz's are "more than important witnesses for the prosecution. [They] are themselves testimony to the moral fiber and patriotism that are America's strength." United Press Int'l, Oct. 27, 1984 (NEXIS, OMNI Lib.).

<sup>172</sup> *Piechowicz v. United States*, 685 F. Supp. 486 (D. Md. 1988).

<sup>173</sup> *Id.* at 491-92.

<sup>174</sup> *Id.*; see also *supra* notes 70-71 and accompanying text.

<sup>175</sup> The district court stated that the "precise contours of a special relationship which give rise to an affirmative right to protection by the state were not clearly established by governing case law." *Piechowicz*, 685 F. Supp. at 492.



### C. The Fourth Circuit's Holding

The Court of Appeals for the Fourth Circuit relied on the discretionary function exception and affirmed the district court's dismissal of Cheryl Piechowicz's wrongful death action.<sup>176</sup> The court applied the two-part *Berkovitz* discretionary function test<sup>177</sup> to immunize the challenged governmental conduct.<sup>178</sup> Addressing the first *Berkovitz* criterion (*i.e.*, whether the action involved an element of judgment or choice), the Fourth Circuit found that federal witness protection statutes and regulations granted agents considerable discretion in deciding "whether and how" to protect witnesses.<sup>179</sup> Title 9 of the United States Attorneys Manual—Criminal Division ("the Manual")<sup>180</sup> authorizes the Attorney General "to offer to provide for the health, safety, and welfare of witnesses . . . whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person . . . in jeopardy."<sup>181</sup> The absence of a specific directive and the presence of a personal judgment sufficiently imbued the government's decision with discretion to satisfy the first part of the *Berkovitz* test.

The Fourth Circuit again relied on the Manual in concluding that the decision to withhold protection from the Piechowicz family involved sufficient public policy considerations and therefore satisfied the second *Berkovitz* criterion.<sup>182</sup> The Manual requires the "responsible agents" to consider a witness's importance to the prosecution and assess the adequacy of local protection before deciding whether the witness deserves federal protection.<sup>183</sup> The court concluded that the decision to leave the Piechowicz family without any protection was, "in the broad sense,"<sup>184</sup> a determination of whether protection was "advantageous to the federal interest, and was accordingly one freighted with policy overtones."<sup>185</sup> Therefore, the government was not liable for failing to protect Scott Piechowicz.<sup>186</sup> In addition, the Fourth Circuit found that no special relationship existed because the government never took the Piechowicz family into custody, and hence, no duty was breached by government inaction.<sup>187</sup> Citing *DeShaney*, the court found that only persons "affirmatively restrained

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176 *Piechowicz v. United States*, 885 F.2d 1207, 1209 (4th Cir. 1989).

177 *See supra* notes 31-36 and accompanying text.

178 *Piechowicz*, 885 F.2d at 1211-12.

179 *Id.* at 1212.

180 *Id.*

181 *Id.*

182 *See supra* notes 31-36 and accompanying text.

183 *Piechowicz*, 885 F.2d at 1213.

184 *Id.*

185 *Id.*

186 *Id.*

187 The court discussed the special relationship only in regard to Savage's and

by the United States from acting on their own behalf” are owed protection.<sup>188</sup>

### III ANALYSIS

The involuntary special relationship between the government and witnesses entails reciprocal obligations and creates a duty of protection that is triggered when the government knows or should know of a threat posed to witness safety. A breach of this special duty of protection should give rise to a valid claim against the government by an injured federal criminal witness or his survivors.

#### A. The Special Duty of Protection Owed to Government Witnesses

##### 1. *The Special Relationship Between Government and Witness*

The background discussion of special relationships demonstrates that the government owes a duty of protection to individuals involuntarily endangered by unilateral governmental action. Post-*DeShaney* case law, consistent with the “snake pit” line of cases, argues against making physical custody the dispositive element in determining whether a special relationship exists between the government and witnesses. Instead, these cases hold that a special relationship giving rise to a duty of protection is created when the government affirmatively endangers citizens.<sup>189</sup> An involuntary special relationship is created when the government compels citizens to testify for the prosecution in a criminal proceeding. A federal criminal witness faces potential injury at the hands of those to whom the witness’s testimony is most damaging; there is no risk of injury absent governmental action in compelling testimony. The government, by throwing citizen witnesses into a snake pit, assumes a duty of protection which cannot be abandoned.

Unilateral governmental action that forces citizens into a potentially dangerous situation is the common denominator in snake pit special relationship cases. In *Swader v. Virginia*,<sup>190</sup> the government required the decedent to live near a dangerous situation; in *Stoneking v. Bradford Area School District*<sup>191</sup> and *Pagano by Pagano v. Massapequa*

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Ryan’s qualified immunity, and did not appraise it vis-à-vis the discretionary function exception.

<sup>188</sup> *Id.* at 1215; see also *supra* notes 72-77 and accompanying text.

<sup>189</sup> See *supra* notes 81-107 and accompanying text.

<sup>190</sup> 743 F. Supp. 434 (E.D. Va. 1990); see *supra* notes 83-87 and accompanying text.

<sup>191</sup> 882 F.2d 720 (3d Cir. 1988), cert. denied, 110 S. Ct. 840 (1990); see *supra* notes 88-90 and accompanying text.

*Public Schools*,<sup>192</sup> the government required students to attend school, thereby exposing them to harm by other students and teachers; in *Cornelius v. Town of Highland Lake*,<sup>193</sup> the government placed prisoners near townspeople; in *Wood v. Ostrander*,<sup>194</sup> the government abandoned a stranded motorist; and, in *G-69 v. Deghan*,<sup>195</sup> the government exposed an informant-witness's identity. In each of these post-*DeShaney* cases, the government unilaterally endangered citizens and left them defenseless, without government protection. Accordingly, because the government can unilaterally endanger a citizen through the power of subpoena, a special government-witness relationship is created that gives rise to a duty of protection. For purposes of special relationship analysis, no difference exists between the government abandoning a stranded motorist, for example, and the government abandoning a threatened witness. In both situations, the government has placed the citizen in a position of danger, and assumes a duty to use due care in ensuring the citizen's safety.

Furthermore, even a strict interpretation of *DeShaney* leads to the conclusion that a special relationship exists between the government and witnesses. In *DeShaney*, Joshua DeShaney's release from state custody was crucial to the Supreme Court's analysis. The Court reasoned that because Joshua was not in state custody at the time of his beatings, no special relationship existed between Joshua and the government that would create a duty of protection. Joshua had the same relation to the government as any ordinary citizen, and no governmental duty of protection arose.

Conversely, the federal government never released Scott Piechowicz from "custody."<sup>196</sup> Rather, the government continued to restrain him from acting on his own behalf.<sup>197</sup> Only the government could sever its special relationship with Piechowicz,<sup>198</sup> and

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<sup>192</sup> 714 F. Supp. 641 (E.D.N.Y. 1989); see *supra* notes 91-92 and accompanying text.

<sup>193</sup> 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990); see *supra* notes 93-95 and accompanying text.

<sup>194</sup> 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990); see *supra* notes 96-98 and accompanying text.

<sup>195</sup> 745 F. Supp. 254 (D.N.J. 1990); see *supra* notes 78-80 and accompanying text.

<sup>196</sup> *Black's Law Dictionary* notes that "custody" "is very elastic and may mean . . . mere power . . . of taking manual possession." BLACK'S LAW DICTIONARY 384 (6th ed. 1990). The government clearly has the power to take possession of a threatened witness, as reflected in the Attorney General's Manual and in the Witness Protection program. See *supra* text accompanying notes 180-83; see *infra* note 204.

<sup>197</sup> *Piechowicz v. United States*, 885 F.2d 1207, 1214-15 (4th Cir. 1989) (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)). For further discussion of *DeShaney*, see *supra* notes 72-77, 84-86, 107, 188-96 and accompanying text.

<sup>198</sup> Piechowicz could have ended the relationship by refusing to testify and risk being held in contempt of court. Clearly, that was not a viable option.

therefore only the government could lawfully ensure Piechowicz's safety. Piechowicz was powerless to withdraw from the relationship and provide for his own safety. He had no choice but to testify, even though the government endangered his life by subpoenaing him to testify. Like a prisoner to whom the government owes a duty of protection from other prisoners,<sup>199</sup> the government owed Piechowicz a duty of protection because its actions brought him into a relationship which Piechowicz could not end and the government chose not to end. In a very important sense, Piechowicz, unlike Joshua DeShaney, was functionally in the government's custody.

In addition, a special relationship exists between the government and witnesses in Piechowicz-type situations under the Fourth Circuit's definition articulated in *Jensen v. Conrad*.<sup>200</sup> Under *Jensen*, the government creates a special relationship with a citizen if three criteria are satisfied. First, "either the perpetrator or the victim must have been in legal custody at the time of the incident."<sup>201</sup> *Piechowicz* satisfies this requirement because the perpetrator, Grandison, was incarcerated at the time of the incident.<sup>202</sup> Second, *Jensen* declares that the government must have "expressly stated its desire to provide affirmative protection to a particular class or specific individuals."<sup>203</sup> *Piechowicz* satisfies this requirement because the federal government expressed its desire to protect threatened witnesses by creating the Witness Protection Program.<sup>204</sup> Finally, under *Jensen*, the government must have known of the claimant's plight.<sup>205</sup> *Piechowicz* satisfies this requirement because the government, through Ryan and Savage, knew that Grandison had previously attempted to murder witnesses, and had threatened the Piechowiczes. Application of the *Jensen* test establishes that the federal government has a special relationship with witnesses like

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<sup>199</sup> *United States v. Muniz*, 374 U.S. 150 (1963) (government liable for injuries to prisoner who was beaten by other prisoners); see also *Youngberg v. Romeo*, 457 U.S. 307 (1982) (mental institution must take action to ensure patient's safety from other patients); *Estelle v. Gamble*, 429 U.S. 97 (1976) (special relationship between prison officials and inmates).

<sup>200</sup> 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

<sup>201</sup> *Id.* at 194 n.11.

<sup>202</sup> Arguably Piechowicz was also in government custody. See *supra* notes 196-97 and accompanying text.

<sup>203</sup> *Jensen*, 747 F.2d at 195 n.11.

<sup>204</sup> 18 U.S.C. § 3521 (1988). The Witness Protection Program authorizes the Attorney General to provide for the relocation and protection of witnesses and potential witnesses if he determines that a serious offense against a witness is "likely to be committed." *Id.* § 3521 (a)(1); see also *Bernstein v. Township of Lower Moreland*, 603 F. Supp. 907, 911 n.3 (E.D. Pa. 1985) (stating that the Witness Protection Program establishes a special relationship between the witness and the government).

<sup>205</sup> *Jensen*, 747 F.2d at 195 n.11.

Piechowicz.<sup>206</sup>

Nevertheless, in *Piechowicz* the Fourth Circuit ignored *Jensen* and instead reached a result with inequitable consequences, because under the court's interpretation of *DeShaney*, Anthony Grandison can sue the government but Cheryl Piechowicz cannot. Grandison, as a prisoner in government custody affirmatively restrained from acting on his own behalf, could maintain a due process claim against the government for failing to provide adequate medical care.<sup>207</sup> Cheryl Piechowicz, however, could not sue the government for failing to protect her husband because, as the Fourth Circuit held, no special relationship existed between her husband and the government. Such an ironic scenario illustrates the weakness of the Fourth Circuit's rationale in *Piechowicz*. Instead of recognizing the special relationship between witnesses and the government, the court limits special relationships to narrowly defined custodial situations, and unjustly denies relief to the survivors of murdered federal criminal witnesses.

## 2. *The Reciprocal Duty of Protection*

The bilateral government-witness relationship involves reciprocal obligations. The witness has a legal obligation to testify, and in return, the government owes a duty of protection should the witness be endangered as a result of his cooperation. In other words, a threatened witness deserves protection for his performance of a legal duty that has jeopardized his life.

The government-witness relationship is perhaps best characterized in this sense as quasi-contractual. Both parties act in reliance on certain reciprocal expectations of performance. The government's obligation within the "contract" should be a duty of protection, and, accordingly, a breach of this duty should give rise to an action in tort.<sup>208</sup>

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<sup>206</sup> *Jensen* apparently encompasses nonreciprocal relationships, such as a state-prisoner relationship. Here, state statutes have mandated minimally acceptable prison conditions, such as maximum occupancy when the state recognized that a minimum-security prisoner in the state's legal custody was endangered by sharing a cell with a maximum-security prisoner. In such a situation, reciprocity does not exist between the prisoner and the state, because the prisoner's only obligation is to serve a sentence. Moreover, unlike a witness, a prisoner confers no real benefit on the state; indeed, the prisoner ultimately caused his own "plight." Yet under *Jensen*, a state-prisoner special relationship still exists.

<sup>207</sup> See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (states must provide adequate medical care to prisoners), *reh'g denied*, 428 U.S. 1066 (1977); cf. *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed mental patients have a due process right to services necessary to ensure their reasonable safety).

<sup>208</sup> The contractual analogy is used merely to illustrate the reciprocal duties in the government-witness relationship and is not to be construed as a separate basis for liability.

To paraphrase *Quarles*, a moral obligation to protect threatened criminal witnesses is consistent with quasi-contractual duties as an aspect of reciprocity.<sup>209</sup> The reciprocity rationale of *Quarles*, *Schuster*, and *Swanner* clearly recognizes witnesses' importance to the criminal justice system by imposing a special duty of protection on the government.<sup>210</sup> These cases argue that it is simply unjust for governments to impose a legal obligation on witnesses to testify without imposing a concomitant governmental duty of protection.<sup>211</sup> A government that demands sacrifices from its citizens without providing anything in return resembles a totalitarian regime. Even taxation, perhaps one of the less palatable characteristics of a democracy, is not inherently unilateral, because in return for paying taxes, citizens receive a sound infrastructure, education, health insurance, and, essentially, most of the benefits of a civilized society. Witness protection may be one of the few areas where the government unilaterally demands sacrifices from its citizens—and indeed endangers its citizens—without any manifestation or acknowledgement of a reciprocal duty. The case law discussed earlier demonstrates that the government should assume a reciprocal duty of protection. In fact, this case law strongly argues for governmental assumption of a reciprocal duty of protection *particularly* in the context of the government-witness relationship. Witnesses are so crucial to the administration of justice that assumption of a reciprocal duty is perhaps more important than in other areas in which reciprocal duties exist.<sup>212</sup>

Moreover, the government's reciprocal duty of protection removes subsequent governmental action from the realm of discretion because "duty" is mandatory.<sup>213</sup> A duty is not something one decides to undertake after assessing a situation, or something one does incompletely; a duty is imperative. In recognizing reciprocal duties, tort law strives to encourage the exercise of reasonable care where clearly defined expectations and obligations between two parties exist. The government and subpoenaed witnesses are just such parties.

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209 *In re Quarles*, 158 U.S. 532 (1895); see *supra* notes 108-14 and accompanying text.

210 *Id.* *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970); *Schuster v. New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); see *supra* notes 115-31 and accompanying text.

211 The federal government already recognizes a similar reciprocal relationship with soldiers by compensating wounded veterans and the survivors of military personnel killed in the line of duty. Veterans' Benefits Act 38 U.S.C. § 301 (1988). The rationale for compensating soldiers applies to federal criminal witnesses; government service merits some form of reciprocal governmental obligation.

212 See *supra* text accompanying notes 56-68.

213 BLACK'S LAW DICTIONARY 505 (6th ed. 1990) ("Duty" is defined as a "mandatory obligation to perform.").

### 3. *Knowledge of a Threat to Witness Safety*

Knowledge is the fuel that fires the government's special duty to protect witnesses. When the government knows of a danger posed to witnesses, the government must act to prevent the danger because the government may be the only actor in a position to know of the danger and act accordingly. Refusing to act, despite knowledge of a danger to a witness, is tantamount to actually injuring that witness. When the government knew of Anthony Grandison's violent nature and propensity for witness tampering yet still failed to act, the government might just as well have furnished the machine gun that killed Scott Piechowicz.

Case law and the *Restatement* both emphasize the importance of knowledge in imposing a duty to act. In *Irwin v. Ware*,<sup>214</sup> the government knew that a drunk driver posed a danger to other motorists, and the government was therefore liable for failing to remove the driver from the road.<sup>215</sup> In *Horton v. Flenory*,<sup>216</sup> the government knew that a citizen was being injured, and the government was therefore liable for failing to stop the assault.<sup>217</sup>

Governmental knowledge of a danger to witnesses is completely analogous to the foregoing cases. Knowing that a witness may be harmed by a criminal defendant is no different from knowing that a motorist may be harmed by a drunk driver. Preventive action is imperative in both situations, and if the government fails to act, it should be liable for any ensuing harm. Such a view is consistent with the *Restatement (Second) of Torts*. *Restatement* section 302B states that an actor is negligent for failing to prevent harm that the actor "realizes or should realize" may occur.<sup>218</sup> Additionally, section 319 provides that: "One who takes charge of a third person whom he *knows or should know* to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."<sup>219</sup> When the government, therefore, knows or should know that a criminal defendant may harm a witness, the government has a duty to prevent such harm. In *Piechowicz*, for example, Grandison's criminal record, his prior attempt to assassinate a federal witness, and his threats provided sufficient notice of his potential to do harm and placed the government under a duty to protect the

<sup>214</sup> 392 Mass. 745, 467 N.E.2d 1292 (1984).

<sup>215</sup> *Id.* at 762, 467 N.E.2d at 1304-05. For further discussion of *Irwin*, see *supra* text accompanying notes 143-46.

<sup>216</sup> 889 F.2d 454 (3d Cir. 1989). For further discussion of *Horton*, see *supra* text accompanying notes 147-49.

<sup>217</sup> *Horton v. Flenory*, 889 F.2d 454, 459 (3d Cir. 1989).

<sup>218</sup> RESTATEMENT, *supra* note 52, § 302B.

<sup>219</sup> RESTATEMENT, *supra* note 52, § 319 (emphasis added).

Piechowicz.<sup>220</sup>

Because the government—whether acting through policemen, juvenile officers, parole officers, United States attorneys, or Drug Enforcement agents—is in a unique position to know of the danger posed by a third party to citizens, the government must be held liable for failing to take preventive action. Despite having physical custody of a dangerous individual, the government cannot prevent a person in custody from harming citizens, because, as in *Piechowicz*, the person can hire an assassin. The government must therefore fulfill its duty in an alternative manner: that manner is protection. It is inequitable, unjust, and contrary to fundamental principles of tort law to absolve the government of any responsibility for harm caused to a witness when the government knew that such harm was probable.

#### IV CONCLUSION

Recognizing the government's special duty to protect its witnesses will encourage citizen-government collaboration and provide for a more effective criminal justice system. The current state of affairs leaves threatened federal criminal witnesses with undesirable options if the government, as in *Piechowicz*, decides to withhold protection from witnesses in total disregard of the imminent dangers they may face. A threatened criminal witness who has been subpoenaed to testify and has been denied protection has three options: he can commit perjury; he can refuse to testify and risk contempt of court; or, he can truthfully testify and risk death. The government should strive to foster citizen cooperation to increase convictions and create a safer society, rather than ignoring the obstacles placed in the path of citizen participation in criminal prosecution.<sup>221</sup>

Nevertheless, in *Piechowicz*, the Fourth Circuit held that a federal criminal witness, a vital part of the criminal justice system, could be ignored by the government he was legally obliged to serve.<sup>222</sup> Principles of reciprocity, the involuntary special relationship between criminal witnesses and the government, and the government's

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<sup>220</sup> *Piechowicz v. United States*, 885 F.2d 1207, 1212 n.5 (4th Cir. 1989).

<sup>221</sup> Courts are aware of the problems involved in failing to protect or compensate criminal witnesses. "The present-day unwillingness of citizens to 'get involved' in the machinations of law enforcement stems in part from their fear of reprisals." *Estate of Tanasijevich v. City of Hammond*, 178 Ind. App. 669, 674, 383 N.E.2d 1081, 1085 (1978). The New York Court of Appeals observed that a failure to compensate deserving witnesses and their survivors "might well [make it] difficult to convince the citizen to aid and cooperate with law enforcement." *Schuster v. City of New York*, 5 N.Y.2d 75, 81, 180 N.Y.S.2d 265, 269, 154 N.E.2d 534, 537 (1958).

<sup>222</sup> *Piechowicz*, 885 F.2d at 1209.



knowledge of danger to a witness, however, create a duty of protection owed to a threatened witness that vitiates governmental discretion under the discretionary function exception to the FTCA. Deserving plaintiffs should be able to seek compensation through the courts for a breach of the special governmental duty of protection. Holding the government liable will provide the necessary incentives to protect criminal witnesses.

For the present, the federal criminal witness appears to be the forgotten soul of the criminal justice system, left unprotected by the government he so ably serves. Certainly he deserves more.

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