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NOTES

DeShaney's Effect on Future "Poor Joshuas"[1]—Whether a State Should be Liable Under the Fourteenth Amendment for Harm Inflicted by a Private Individual

I. Introduction

The fourteenth amendment to the Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law."[2] A deprivation of these rights is protected against by the federal civil rights statute, 42 U.S.C. section 1983, which was enacted by Congress in 1871.[3] In recent history, numerous plaintiffs have sought relief beyond that provided by state law. Joshua DeShaney, the plaintiff in *DeShaney v. Winnebago County Department of Social Services*,[4] was one such individual. In *DeShaney*, however, the United States Supreme Court ruled that there is no deprivation of the constitutional right to liberty under the fourteenth amendment when the state fails to protect an individual from harm inflicted by a private citizen.[5]

Initially, a claim under section 1983 must satisfy two re-

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1. Justice Blackmun referred to Joshua DeShaney, the plaintiff in DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1012 (1989) (Blackmun, J., dissenting) as poor Joshua.

2. U.S. Const. amend. XIV, § 1.

3. Section 1983 reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

4. 109 S. Ct. 998 (1989).

5. *Id.*

quirements: (1) the conduct must be committed by a person acting under color of state law; and (2) the conduct must deprive the individual of a constitutional right.[6] In *DeShaney*, the first requirement was clearly satisfied and not in dispute. Therefore, the central issue was whether the second requirement was satisfied. The Supreme Court granted certiorari[7] to determine whether a state deprives an individual of a constitutional right and thus violates section 1983 when a state actor fails to adequately protect the individual from harm inflicted by a private actor.

Part I of this Note presents the facts of *DeShaney*, and then provides the background of the applicable law prior to *DeShaney*, noting in particular the numerous inconsistent approaches taken by courts on all levels to section 1983 claims. Part II discusses the reasoning of *DeShaney*'s majority and dissenting opinions. Finally, part III provides an analysis of *DeShaney* and proposes a uniform system of law under which similar cases might be decided in the future.

II. FACTS OF *DeShaney* AND PRIOR RELEVANT LAW

A. *Facts*

In 1980, Randy and Melody DeShaney were granted a divorce. The court awarded Randy DeShaney custody of their one year old son, Joshua. The defendant, Winnebago County Department of Social Services (DSS), first received a report of suspected child abuse by Randy in January, 1982. However, the DSS took no action until a year later when hospital authorities notified them that Joshua had been admitted with injuries

6. *See* Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1424 (9th Cir. 1988); *cf.* Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987) (requirements for a Section 1983 claim specifically for an official failing to exercise affirmative duty are 1) the failure to act violated "a constitutionally protected liberty or property interest," and 2) the official acted with deliberate indifference), *cert. denied*, 109 S. Ct. 1337 (1989); *see also* Sowers v. Bradford Area School Dist., 694 F. Supp. 125, 135 (W.D. Pa. 1988) (same requirements as *Taylor* except gross negligence is an acceptable threshold of misconduct in addition to deliberate indifference), *aff'd sub nom.* Appeal of Smith, 869 F.2d 591 (3d Cir.), *cert. granted and vacated sub nom.* Smith v. Sowers, 109 S. Ct. 1634 (1989), *cert. denied*, 110 S. Ct. 840 (1990)[hereinafter Sowers v. Bradford Area School Dist.]. Unfortunately, the Supreme Court did not grant certiorari, for this case would have provided a good opportunity for the Court to decide the important unresolved issues discussed in this Note.

7. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 485 U.S. 958 (1988).

which might have been abuse-inflicted.[8] The DSS removed Joshua from the home and placed him in temporary custody to consider his situation. The DSS then placed Joshua back into his father's custody after the father entered into a written agreement to enroll Joshua in school, obtain counseling for himself, and have his girlfriend move out of the home.[9] The caseworker assigned to Joshua made monthly visits to the home, noticed further signs of abuse and noncompliance with the agreement, and, on occasion, was even denied access to see Joshua. Although she took notes of all her observations, she took no further action.[10] Early in 1984, Joshua's father beat him so severely that he became profoundly retarded and will be institutionalized the remainder of his life.[11] Joshua and his mother brought an action against the DSS for deprivation of Joshua's constitutional right to "liberty" without due process of law. The District Court granted summary judgment for the DSS, and the Court of Appeals for the Seventh Circuit affirmed holding that a state's inaction is not a violation of the due process clause of the fourteenth amendment.[12] The Supreme Court affirmed.

B. The Law Before DeShaney

Prior to *DeShaney*, differing views existed among the federal courts concerning the applicability of statutory entitlement, special relationships, and, if such an entitlement or relationship existed, the necessary standard of conduct required to satisfy a section 1983 claim.

1. Statutory entitlement

"Statutory entitlement," one of the important issues raised in *DeShaney*, provides that certain individuals are guaranteed the benefit a statute is designed to provide. This benefit can be defined as either a "property" or "liberty" interest protected by the due process clause of the fourteenth amendment, and may be substantive or procedural in nature.

Two important Supreme Court decisions addressing the

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8. *DeShaney*, 109 S. Ct. at 1001.

9. *Id.*

10. *Id.* at 1001-02.

11. *Id.* at 1002.

12. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

statutory entitlement issue were within the context of procedural due process claims. In *Goldberg v. Kelly*,[13] the Supreme Court held that welfare benefits were a matter of statutory entitlement because the qualified recipients had a property interest in the benefits.[14] Because the plaintiff had an entitlement, a pretermination hearing of these benefits was required to satisfy procedural due process.[15] In a second case, *Board of Regents v. Roth*,[16] a university professor was not rehired after his employment contract expired, and was not given any reasons for his dismissal. The professor argued that this dismissal denied him a legitimate property interest without procedural due process, which violated the fourteenth amendment. Although the Supreme Court disagreed, it stated the following about liberty and property interests: "The meaning of 'liberty' must be broad indeed," and must include more than freedom from bodily restraint.[17] Similarly, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it."[18]

In *Youngberg v. Romeo*,[19] however, the Court relied on some of its prior decisions and held that an involuntarily committed mentally retarded individual's rights to personal security and freedom from bodily restraint were liberty interests which were *substantively* protected by the due process clause.[20] The majority further held that the individual's right to training was also a liberty interest, but only to the extent necessary to ensure that the other two liberty interests—personal safety and freedom from undue restraint—were protected.[21]

Entitlement to the benefits of property or liberty interests may originate in sources other than the Constitution, such as state law.[22] Although state law has certainly been relied upon for

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13. 397 U.S. 254 (1970).
14. *Id.* at 262-63 & n.8.
15. *Id.* at 263-65.
16. 408 U.S. 564 (1972).
17. *Id.* at 572 & n.8.
18. *Id.* at 577.
19. 457 U.S. 307 (1982).
20. *Id.* at 315-16.
21. *Id.* at 318-19.
22. *Roth*, 408 U.S. at 577. For a discussion of state law and constitutional duty, see Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1, 14-18 (1982).

an entitlement claim for procedural due process claims,[23] it is a more uncertain source for substantive due process claims. In *Sowers v. Bradford Area School District*,[24] the court made the following distinction: "Procedural due process involves expectations created by state law. . . . Substantive due process, on the other hand, is concerned with rights such as those listed in the Bill of Rights and [other fundamental] rights . . . ."[25]

Additionally, in *Youngberg*, the Supreme Court majority refused to address the respondent's state statutory entitlement argument in support of his substantive liberty interest: "It was not advanced in the courts below, and . . . [g]iven the uncertainty of [state] law and the lack of any guidance on this issue from the lower federal courts, we decline to consider it now."[26] One of the concurring opinions agreed with the majority's decision not to address the issue,[27] while the other concurrence entirely rejected the statutory entitlement argument: "[W]ere every substantive right created by state law enforceable under the Due Process Clause, the distinction between state and federal law would quickly be obliterated."[28]

This uncertainty, however, should not prohibit all substantive due process claims that are based on state law. Rather, if statutory entitlement can be timely established for *either* a substantive or procedural due process claim, then the claimant should be "entitled" to due process under the fourteenth amendment, regardless of what the statute provides—either a property or liberty interest, or some combination of both.[29] Be-

23. *See Roth*, 408 U.S. at 577; *see also* Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989). In *Taylor*, petitioners contended that the Georgia child protection statutes created a claim of due process entitlement based on the *Roth* decision. The Eleventh Circuit carefully analyzed the statutes and determined that the statutes mandated protection of foster children; thus, the entitlement claim was valid. *Id.* at 798-800. In addition to this procedural due process claim, the court also recognized the child petitioner's substantive liberty interests "to be free from the infliction of unnecessary pain, . . . and the fundamental right to physical safety as protected by the fourteenth amendment." *Id.* at 794. The court analogized these rights to those rights discussed in *Youngberg*, and held that the state's failure to ensure the child's safety constituted a deprivation of her liberty. *Id.* at 795.

24. 694 F. Supp. 125 (W.D. Pa. 1988).

25. *Id.* at 133 (citation omitted).

26. Youngberg v. Romeo, 457 U.S. 307, 316 n.19 (1982); *see also* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003 n.2 (1989).

27. *Youngberg*, at 327-28 (Blackmun, J., concurring).

28. *Id.* at 330 n.* (Burger, J., concurring).

29. In *DeShaney*, the benefit of the applicable state statute was a child's right to be free from child abuse. This substantive right was alleged to be a liberty interest which

sides statutory entitlement, another unsettled issue regarding some section 1983 claims is special relationships.

2. *Special relationships*

Because of the threat of unlimited liability, courts are reluctant to find every tort committed by a state actor actionable under section 1983.[30] Nevertheless, some courts have recognized that a "special relationship" between the state official and private citizen may impose upon the state actor an affirmative duty to protect the individual; in these circumstances, a state's failure to act may give rise to a section 1983 claim.[31] But questions over what factors give rise to such a "special relationship" have created uncertainty among the federal courts.

Perhaps the most controversial question in this area is whether a special relationship must be custodial in order to impose an affirmative duty to act. The Supreme Court has recognized three well-established custodial relationships. In *Robinson v. California*,[32] the Supreme Court ruled that state law would violate the fourteenth amendment if an incarcerated prisoner were not provided adequate medical care. The Court in *City of Revere v. Massachusetts General Hospital*[33] established that suspects in police custody were also in a custodial relationship. Finally, in *Youngberg v. Romeo*,[34] the Court found that a custodial relationship existed between an institutionalized mental patient and the state institution. Whether any other relationship between individuals and the state may be deemed "custodial" remains uncertain. The term itself eludes a precise definition.[35]

The uncertainty of a custodial relationship has led some

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entitles the child to substantive due process. *See infra* text accompanying notes 90-92.

30. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 544 (1981) ("It is hard to perceive any logical stopping place to such a line of reasoning."), *rev'd on other grounds*, 474 U.S. 327, 330-31 (1986).

31. *See infra* notes 36-43 and accompanying text. *But see* Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923, 927 (8th Cir. 1987) ("We do not believe that the concept of special relationships was intended to extend beyond prison or prison-like environments."); Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) (The term "special relationship" has become a "magic phrase, a category in which to dump cases when a court would like to afford relief."), *cert. denied*, 109 S. Ct. 1338 (1989).

32. 370 U.S. 660 (1962).

33. 463 U.S. 239 (1983).

34. 457 U.S. 307 (1982).

35. For example, the Eighth Circuit has required "massive state control" similar to prison environments to create a custodial relationship which rises to the level of a special relationship for purposes of the fourteenth amendment. *Harpole*, 820 F.2d at 927.

courts to suggest that a special relationship may be other than custodial in nature.[36] In 1979, the Seventh Circuit found a special relationship and a violation of due process when police officers arrested a man for drag racing, took him to the police station, and abandoned his children in the automobile on the side of the freeway.[37] In *Fox v. Custis*,[38] the Fourth Circuit acknowledged that non-custodial relationships could give rise to affirmative duties:

> The qualification [to the general rule of denying a constitutional right of protection against criminals] . . . is that such a right and corollary duty may arise out of special custodial *or other relationships* created or assumed by the state in respect of particular persons. For example—as we have held in this circuit--such a right/duty relationship may arise under § 1983 with respect to . . . others in the state's custody or subject to its effective control.[39]

The Supreme Court expressed a similar view in *Martinez v. California*.[40] There, a parole officer was found not liable for the decedent's death caused by the parolee because of the decedent's failure to establish proximate cause. However, the Court in dicta left open the possibility that a special relationship could exist: "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole."[41]

The viability of this doctrine has been maintained even in the most recent cases, including one with facts similar to *DeShaney*'s. In *Estate of Bailey v. County of York*,[42] the Third Circuit sustained a civil rights verdict against the county agency for returning an abused child to her mother's home without ade-

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36. At least one case recognized that whether the plaintiff had been in legal custody *prior* to the incident may be a controlling factor. Jensen v. Conrad, 747 F.2d 185, 194 n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

37. White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

38. 712 F.2d 84 (4th Cir. 1983).

39. *Id.* at 88 (emphasis added). Although the Fourth Circuit found no such special relationship in *Fox v. Custis*, the decision "make[s] clear that 'special relationships' can be found outside the custodial context." Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1426 (9th Cir. 1988).

40. 444 U.S. 277 (1980).

41. *Id.* at 285.

42. 768 F.2d 503 (3d Cir. 1985). This decision was expressly rejected in Joshua's case at the appellate court level, DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 303 (7th Cir. 1987), but other courts continue to follow it. *See, e.g.*, Sowers v. Bradford Area School Dist., 694 F. Supp. 125, 130 (W.D. Pa. 1988).

quately investigating the situation. The court held that a government entity can even be responsible for omissions of its officials in appropriate circumstances.[43]

Other factors have also been considered significant in determining the existence of a special relationship. Clearly, no single factor establishes a special relationship. Taken together, however, the following factors have significantly strengthened any ordinary relationship between the state and an individual, regardless of its custodial status. Several courts have required that the state be aware of the specific risk to a specific plaintiff, as opposed to a member of the general public;[44] whether the state affirmatively placed the plaintiff in a dangerous position, and/or stripped the plaintiff of his capacity to defend himself;[45] finally, whether the state has affirmatively committed itself to protect the plaintiff.[46]

3. *Standard of conduct required for section 1983 claims*

In addition to statutory entitlement and special relationships, the appropriate standard of conduct necessary for section 1983 claims has also been an area of judicial uncertainty. In *Parratt v. Taylor*, the Supreme Court recognized a deprivation under the due process clause, even though the deprivation was

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43. *Estate of Bailey*, 768 F.2d at 506. The court did not elaborate on what would be considered "appropriate."

44. *See* Martinez v. California, 444 U.S. 277, 285 (1980) (decedent indistinguishable from the public at large); Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 (9th Cir. 1988) (one of four factors to determine existence of special relationship is whether state knew of specific risk); Jensen v. Conrad, 747 F.2d 185, 194 n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), *noted in Estate of Bailey*, 768 F.2d at 509 (factors that underscore a special relationship include whether state knew of victim's plight); Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983) (avoids general definition of special relationship but recognizes that plaintiff must be identifiable from any other member of the general public); Sherrell v. City of Longview, 683 F. Supp. 1108, 1113, (E.D. Tex. 1987) (special relationship may exist where police know of specific threats to particular victim by a known attacker).

45. Estate of Gilmore v. Buckley, 787 F.2d 714, 722 (1st Cir. 1986); *see also Balistreri*, 855 F.2d at 1425 (one factor to consider is if state affirmatively placed plaintiff in danger); Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him . . . . When a state cuts off sources of private aid, it must provide replacement protection."). *See generally* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 56, at 377 (5th ed. 1984) [hereinafter PROSSER ON TORTS](defendant liable if he is responsible for increasing plaintiff's danger).

46. *Jensen*, 747 F.2d at 194-95 n.11, *noted in Balistreri*, 855 F.2d at 1425. The existence of a child protection statute may also constitute an express statement to protect the individual. *Jensen*, 747 F.2d at 194 n.11. *See supra* note 23.

negligently caused.[47] Justice Powell criticized the majority for this conclusion, and stated: "I would not hold that such a negligent act, causing unintended loss of or injury to property, works a deprivation in the *constitutional sense*."[48]

Five years later, in *Daniels v. Williams*,[49] the Court adopted Justice Powell's opinion when it overruled *Parratt* "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." In *Davidson v. Cannon*, a case heard immediately after *Daniels*, the Court reiterated its newfound belief that "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required."[50]

Although these cases have shown that mere negligence will not support a due process claim, lower courts have faced the difficult task of trying to distinguish higher degrees of misconduct. In particular, there has been controversy and confusion over the sufficiency of "gross negligence" as a single standard. In *Fargo v. City of San Juan Bautista*,[51] the Ninth Circuit held that conduct constituting gross negligence *or* recklessness would be a deprivation of a liberty interest. On the other hand, in *Archie v. City of Racine*[52] the Seventh Circuit entirely rejected the gross negligence standard for due process claims.

Another standard—deliberate indifference—has also been discussed by the Supreme Court and adopted by some lower courts. The Supreme Court has applied the deliberate indifference standard to the eighth amendment which prohibits cruel and unusual punishment.[53] Lower courts have extended the standard to section 1983 causes of action.

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47. 451 U.S. 527, 536-37 (1981).

48. *Id.* at 548 (Powell, J., concurring).

49. 474 U.S. 327, 330 (1986).

50. 474 U.S. 344, 347 (1986); *see also* Germany v. Vance, 868 F.2d 9, 22-23 (1st Cir. 1989) (The court stated that "explicit and unqualified language in *Daniels* leaves little room for debate" and felt that Justice Brennan's statement in the *DeShaney* dissent was also an obvious support to *Daniels*).

51. 857 F.2d 638, 640-41 (9th Cir. 1988). *See infra* text accompanying notes 95-96; *see also* Sowers v. Bradford Area School Dist., 694 F. Supp. 125, 135 (W.D. Pa. 1988) (either gross negligence or deliberate indifference will satisfy a section 1983 claim).

52. 847 F.2d 1211, 1219 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989). *See infra* text accompanying note 98.

53. The Court stated: "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the eighth amendment. This is true whether the indifference is manifested

For example, after the gross negligence standard was rejected in *Archie*, the Seventh Circuit applied the deliberate indifference standard in assessing a fire department dispatcher's failure to respond to a decedent's request for help.[54] In *Doe v. New York City Department of Social Services*,[55] the Second Circuit discussed the requirements necessary to establish deliberate indifference for a section 1983 cause of action against a placement agency for a child sexually abused by a foster parent. Finally, in *Sowers v. Bradford Area School District*,[56] the district court reasoned that either deliberate indifference *or* gross negligence would be sufficient to sustain a section 1983 action against school officials for an alleged sexual assault on a student. Until the Supreme Court decides upon a single standard, lower courts will continue to apply such differing standards of conduct for section 1983 claims.

III. Reasoning of the DeShaney Court

With the facts of *DeShaney* and the background of relevant law set forth in part I, the purpose of this section will be to discuss the reasoning of both the majority and dissenting opinions of *DeShaney*.

A. *Reasoning of the Majority*

Chief Justice Rehnquist wrote on behalf of the six member majority.[57] His reasoning began with an interpretation of the limiting language of the due process clause, followed by a discussion of "special relationships" that suffice to impose a constitutional duty. He then provided a reminder that all torts committed by state actors are not constitutional violations, and concluded by deferring this matter to the legislature.

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by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care . . . ." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citations and footnotes omitted).

54. *Archie*, 847 F.2d at 1219.

55. 709 F.2d 782, 790-92 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). *See infra* text accompanying note 99.

56. Sowers v. Bradford Area School Dist., 694 F. Supp. 125, 135 (W.D. Pa. 1988).

57. Justices White, Stevens, O'Connor, Scalia, and Kennedy joined in the majority opinion. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1007 (1989).

1. *Inherent limitation of the due process clause and establishment of a special relationship*

Plaintiffs' argument that Joshua was deprived of his constitutional right to liberty when the state failed to protect him from his father's abuse is substantive in nature, not procedural.[58] Nevertheless, the Court responded that the due process clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[59] Moreover, the Court held that the absence of positive rights in the Constitution precluded liability based on a state's failure to act, especially when the harm was not inflicted by a state actor.[60] The Court found that the language of the due process clause is consistent with this notion of "negative liberties";[61] its purpose is to protect people from the state, not to have the state protect people from each other.[62] Therefore, there is no affirmative obligation or right to governmental aid.[63] Based on this reasoning, the majority held that it was not a constitutional violation of the due process clause when the state failed to protect Joshua from his father's violence.

The Court also rejected the plaintiffs' argument that Joshua's situation constituted a "special relationship" when the

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58. *DeShaney*, 109 S. Ct. at 1003; *see* Ingraham v. Wright, 430 U.S. 651, 673-74 (1977) (historic liberty to be free from "unjustified intrusions on personal security . . . always [has] been thought to encompass freedom from bodily restraint and punishment"). Although the petitioners argued that Joshua was entitled to protection because of the state statute, the argument was raised for the first time on appeal to the Supreme Court, so the Court refused to consider it. *DeShaney*, 109 S. Ct. at 1003 n.2. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 316 n.19 (1982). If this argument had been raised at the commencement of the suit, it could have been a viable alternative for recovery under the due process clause. *See* discussion *infra* at notes 89-92 and accompanying text.

59. *DeShaney*, 109 S. Ct. at 1003.

60. *Id.*

61. *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone . . . ."). *But see DeShaney*, 109 S. Ct. at 1008 (Justice Brennan readily concedes that "[n]o one . . . has asked the Court to proclaim that . . . the Constitution safeguards positive as well as negative liberties.") (Brennan, J., dissenting).

62. Prior case decisions support this rationale interpreting the due process clause as a means of preventing the government's abuse of power. *See, e.g.*, Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981).

63. *See* Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."); Harris v. McRae, 448 U.S. 297, 316 (1980) (state not required to pay for abortions; government cannot place obstacles to prevent one's freedom of choice, nor is it required to remove those obstacles created by others).

state learned of Joshua's danger and by "word and by deed" agreed to protect him from that danger.[64] The majority recognized the lower courts' reasons for finding a special relationship,[65] but they were neither expressly affirmed nor rejected. Rather, the Court discussed the creation of a special relationship only when one is in the custody of the state,[66] and held that the corresponding constitutional duty is imposed only when the state limits the individual's freedom to act on his own behalf.[67]

2. *Constitutional duty to protect and the legislative role in defining the scope of this duty*

Justice Rehnquist specifically denied that the action taken by the state—taking temporary custody of Joshua and then returning him to his father's home—placed him in any worse danger than had the state refused to act at all.[68] For this reason, the state had no constitutional duty to protect. Admittedly, volunteering to protect Joshua from harm created a duty under state tort law,[69] but not every tort committed by a state actor is a

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64. *DeShaney*, 109 S. Ct. at 1004.

65. The idea of a "special relationship" originated in Martinez v. California, 444 U.S. 277, 285 (1980), which left open the issue of whether a parole officer could actually "deprive" someone of life when death was caused by a parolee. *DeShaney*, 109 S. Ct. at 1004 n.4. The Court then stated:

> Several of the Courts of Appeals have read this language as implying that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a "special relationship" arises between the State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection.

Id.

66. *DeShaney*, 109 S. Ct. at 1005-06. The opinion discussed three examples in which the state acquires an affirmative duty to protect the individual because he is in the custody of the state. *See supra* text accompanying notes 32-34.

67. The court summarized its analysis as follows:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, *not its failure to act to protect his liberty interests against harms inflicted by other means.*

DeShaney, 109 S. Ct. at 1006 (emphasis added).

68. *Id.* The court did recognize, however, that if Joshua had been placed in a foster home instead of his father's home, then an affirmative duty might have been imposed. *Id.* at n.9. *See, e.g.*, Doe v. New York City Dep't of Social Servs., 709 F.2d 782 (2d Cir.) (agency negligent in section 1983 action for failing to supervise placement of foster child), *cert. denied*, 464 U.S. 864 (1983).

69. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1965) (liability imposed for under-

constitutional violation.[70] The Court summarily concluded that since the state's action did not trigger a constitutional duty to protect Joshua, it did not violate the due process clause.

Justice Rehnquist also reiterated that it was Joshua's father who inflicted the harm, not state officials. These officials simply failed to act "when suspicious circumstances dictated a more active role for them."[71] Justice Rehnquist concluded with the following:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[72]

B. *Reasoning of the Dissent*

In the dissent, Justice Brennan focused on the action the state did take, pointed out the effect of the existing state statute, and found the state's conduct to be a violation of the arbitrary standard set forth by the Supreme Court.[73]

1. *State action versus inaction: the effect of Wisconsin's child-welfare system*

The dissent focused on the initial action that the State of Wisconsin took, rather than its subsequent inaction. Justice

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taking protective services if harm is suffered because of other's reliance upon the undertaking or from failure to exercise reasonable care to complete performance); PROSSER ON TORTS § 56 at 381 (liable if one misleads plaintiff into believing that danger has been removed or deprived him of other help or if there is a duty to exercise control over third persons).

70. *DeShaney*, 109 S. Ct. at 1007. The Court has stated this rule many times before. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 335-36 (1986) (not all duties owed by government actors are constitutionalized by the fourteenth amendment); Paul v. Davis, 424 U.S. 693 (1976) (not all torts committed by state officials are in violation of the Constitution); Baker v. McCollan, 443 U.S. 137, 146 (1979) ("[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."); Archie v. City of Racine, 847 F.2d 1211, 1217 (7th Cir. 1988) (should not "treat a violation of state law as a violation of the Constitution").

71. *DeShaney*, 109 S. Ct. at 1007.

72. *Id.*

73. Justices Marshall and Blackmun joined Justice Brennan. *Id.* at 1007. Justice Blackmun also wrote a dissenting opinion. *Id.* at 1012.

Brennan began by analyzing two prior Supreme Court decisions, *Estelle v. Gamble*,[74] and *Youngberg v. Romeo*,[75] which both ruled that once an actor cuts off other sources of aid and then refuses to provide aid, the actor is liable for subsequent inaction.[76] Justice Brennan also refused to limit affirmative acts to just physical restraint situations.[77] He further explained that action and inaction are not mutually exclusive, and ultimately decided that "a State's prior actions may be decisive in analyzing the constitutional significance of its inaction."[78]

Justice Brennan pointed out that the state's actions were authorized and required by Wisconsin statute, resulting in a constitutional responsibility to protect those falling within the scope of the child welfare statute.[79] The DSS received all reports of possible abuse of Joshua,[80] and also had the power to deter-

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74. 429 U.S. 97 (1976).

75. 457 U.S. 307 (1982).

76. *DeShaney*, 109 S. Ct. 1008-09 (Brennan, J., dissenting); *see Estelle*, 429 U.S. at 103-05 (deliberate indifference toward prisoners medical needs constituted violation of the eighth amendment) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities *fail to do so*, those needs will not be met.") (emphasis added); *Youngberg*, 457 U.S. at 315, 324 (An institutionalized mental patient alleged that the State *failed to provide* constitutionally required conditions of confinement beyond those conceded by the state—"adequate food, shelter, clothing, and medical care." The Court ruled that the patient did indeed have "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.") (emphasis added).

77. *DeShaney*, 109 S. Ct. at 1008-09 (Brennan, J., dissenting); *see, e.g.*, White v. Rochford, 592 F.2d 381, 387 (7th Cir. 1979) ("The right to personal security can hardly consist only of freedom from direct bodily harm and exclude what will often be more important, freedom from unnecessary and unjustifiable exposure to physical danger or to injury to health."); *see also supra* note 69. Justice Brennan also recognized, contrary to the majority opinion, that knowledge and expressions of intent may also impose a limitation on one's ability to act. *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting).

78. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting). Justice Brennan cites to some "instructive" cases to support this conclusion. *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (state cannot deny access to courts for divorce without violating due process); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state liable for a restaurant's actions which violated the fourteenth amendment because the restaurant was located in a public building owned and operated by the state).

In his own opinion, Justice Blackmun also agreed that the majority failed to recognize a duty "because it attempt[ed] to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring clauses of the Fourteenth Amendment." *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting).

79. WIS. STAT. ANN. § 48.981(3)(c) (West 1987). The statute provides in pertinent part: "Within 24 hours after receiving a report . . . the county department shall . . . initiate a diligent investigation to determine if the child is in need of protection or services." *Id.*

80. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting). The DSS received re-

mine whether to protect Joshua from the reported abuse.[81] Additionally, the statute relieved all other departments and citizens except the DSS from any obligation owed to abused children.[82] Because the statute effectively cut off other sources of aid, Brennan believed that children like Joshua coming within DSS' jurisdiction were in a worse position when the DSS failed to fulfil their prescribed duties.[83] For him, these facts showed that the state actively intervened in Joshua's situation as authorized and required by its own statute.[84]

2. *Criticism of DSS' conduct*

The final argument in Brennan's dissent criticized the conduct of the DSS. Although the question of why the DSS took no action remained unanswered, Brennan accused the DSS of failing to exercise "professional judgment" and instead exhibiting a "kind of arbitrariness that we have in the past condemned."[85]

IV. ANALYSIS

The remainder of this Note will address the deprivation of a constitutional right and the correlative statutory entitlement issue, the establishment of a special relationship, and the requisite state of mind required to invoke a constitutional deprivation. Until these issues are clearly resolved, a uniform standard will not be afforded for future section 1983 claims based on a state's failure to act.

A. *Deprivation of a Constitutional Right and the Statutory Entitlement Issue*

As stated previously, a fundamental requirement of a section 1983 cause of action is that the state's conduct must have

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ports from several different sources, including Randy DeShaney's ex-wife, the police, hospital officials, neighbors, and even the social worker herself. *Id.*

81. *Id.* Such control included the decision to take Joshua into temporary custody, and his return to his father's home. *Id.*

82. *Id.* at 1011; *see* WIS. STAT. ANN. § 48.981(2), (3) (West 1987) (Anyone having reasonable cause to suspect child abuse is to immediately report to the DSS.).

83. *DeShaney*, 109 S. Ct. at 1011 (Brennan, J., dissenting).

84. *Id.*

85. *Id.* at 1011. The opinion cites several cases to support this standard. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (due process clause is designed to protect against arbitrary action of the government); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (legislative action "cannot be regarded as arbitrary or capricious").

deprived the plaintiff of a constitutional right. In *DeShaney*, plaintiffs argued that the state deprived Joshua of his constitutional liberty interest by failing to protect him from his father's abuse.[86] The majority's rejection of this argument indisputably supports the general rule that there is no governmental duty to act.[87] Nevertheless, exceptions to this rule remain viable. If the state fails to provide protection which consequently deprives the plaintiff of a *constitutional* right, then the state will have an affirmative duty to protect the plaintiff. A constitutional deprivation will not occur, however, unless 1) the plaintiff was denied the benefits of a particular state statute which entitles the plaintiff to a property or liberty interest protected by the fourteenth amendment; or 2) the state actively intervened to some extent, and then withdrew its aid. The majority refused to recognize the latter situation in *DeShaney*,[88] but left the statutory entitlement issue unresolved.

That the statutory entitlement issue was raised in *DeShaney* for the first time at the Supreme Court and thus dismissed was unfortunate, for this might have validated the relief Joshua sought. This procedural error was the *only* reason the Court gave when it refused to address the issue.[89] As discussed in part I of this Note, usually state law has been relied upon only for procedural due process claims. But because the procedural error was the only reason for not addressing Joshua's substantive entitlement issue, such a claim may succeed if made in a timely manner. If so, a statutory entitlement argument may be

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86. *See supra* notes 58-62 and accompanying text.

87. *See* cases cited *supra* note 63. *See generally* Wells & Eaton, *supra* note 22, at 3-6.

88. *See supra* notes 68-70 and accompanying text. Beyond *DeShaney*, however, future cases may still be able to establish active intervention by the state and thus impose affirmative duty upon the states. As Justice Brennan asserted, failure to act may rise to the level of action. *See supra* notes 77-78 and accompanying text. This theory was also recognized in Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982), where the court noted:

> If 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.

Id. at 618.

89. The reason was stated in the following footnote:

> Petitioners also argue that the Wisconsin child protection statutes gave Joshua an "entitlement" to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation . . . . This argument is made for the first time in petitioners' brief to this Court . . . . We therefore decline to consider it here.

DeShaney, 109 S. Ct. 998, 1003 n.2 (1989) (citations omitted).

a viable means of satisfying the deprivation requirement of section 1983.

In *DeShaney*, Wisconsin's Children's Code imposes mandatory duties upon the county department (DSS).[90] Joshua and other children rely on this state statute for protection from physical abuse. This reliance creates a substantive entitlement that should not be "arbitrarily undermined."[91] Nevertheless, the defendants argued that even if Wisconsin law established a liberty or property interest, the plaintiffs are entitled only to *procedural* due process which is adequately provided for by the common law tort remedy. The plaintiffs, however, did not challenge the adequacy of a procedural remedy. Instead, they contended that Joshua and every other child in Wisconsin has the constitutionally guaranteed substantive right to be free from physical abuse, be it defined as a "liberty" interest in such freedom or as a "property" interest in the guarantee of safety.[92] Either interest is *substantively* guaranteed by the Constitution.

Thus, it appears a future case making this argument in a timely manner may succeed. It will first be necessary to substantiate that the liberty or property interest exists in state law or another source, and that the plaintiff relied on this provision for protection. If so, deprivation of such an interest should be deemed a constitutional violation, and section 1983 could be the vehicle for appropriate redress.

B. Establishing a Claim Against the State for Denial of a Constitutional Right by Means of a Special Relationship

If the denial of a constitutional right is established, the plaintiff must also show the state's involvement. Finding a special relationship between the state and the plaintiff is one way of proving such state involvement.

Because so many circumstances give rise to a custodial relationship, the Court's view in *DeShaney* that the state must "take[] a person into its custody" does not adequately resolve

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90. WIS. STAT ANN. § 48.981(3)(c) (West 1987). This section not only requires an investigation within 24 hours of any report of abuse, a record of the report received, and other follow-up procedures, but it also authorizes the DSS and no one else to investigate reports of abuse and thereafter take any necessary action. *Id.*; *see supra* notes 79-82 and accompanying text.

91. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

92. This is the same argument made in Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989). *See supra* note 23.

the issue of special relationships.[93] The opinion did not overrule any of the lower courts' establishment of special relationships in circumstances outside of the confines of a strictly custodial status. These courts have used a combination of factors to determine whether the particular facts of a case establish such a relationship.[94] Perhaps, had any or all of these factors been used in *DeShaney*, a special relationship would have been found to support Joshua's section 1983 claim.

The lower courts' broader interpretation of special relationships should be recognized and adopted by the Supreme Court. Each of the factors employed by these courts require either a state actor's knowledge, awareness, or affirmative action to establish a special relationship. As discussed in part I, the state must *affirmatively place* the individual in a dangerous position or *affirmatively commit* to protect him; an individual must be subject to the state's *effective control*; or the state must be aware of the individual's *specific risk*.

Although these requirements arguably create a lower threshold for special relationships than the strict custodial analysis in *DeShaney*, the threshold is still difficult to overcome. Additionally, courts that apply the knowledge, awareness, and affirmative action elements mandate the existence of more than one of these elements to establish a special relationship. The result of this approach is twofold. First, the degree of specificity involved prevents an individual's attenuated contact with a state actor from automatically becoming a "special" relationship. Affirmative action, effective control, and particular awareness by the state are much more difficult to establish than passive action or inaction, little or no control, and general knowledge of the individual's circumstances. Second, the main purpose for such a relationship—to provide relief for section 1983 claimants in arguably "custodial" circumstances other than the three types recognized by the Supreme Court—is duly satisfied. Allowing a special relationship in these limited but nonetheless imperative situations will enable the claimants who have suffered just as much as a prisoner, incarcerated mental patient, or police suspect to rightfully recover under section 1983 for the denial of their constitutional rights.

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93. *DeShaney*, 109 S. Ct. at 1005. This confusion is also noted in Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1425 n.4 (9th Cir. 1988).

94. *See supra* text accompanying notes 36-46.

C. *Necessity for a Single Standard of Conduct Sufficient to Impose Liability*

Finally, another important issue that neither the Seventh Circuit nor the Supreme Court resolved in *DeShaney* is the standard of conduct necessary for a violation of substantive due process.[95] Resolving this issue is important because of the inconsistent, vague standards applied by the lower courts. Part I of this Note presented these various standards, ranging from varying degrees of negligence to deliberate indifference. When the *Fargo* court adopted gross negligence or recklessness as an appropriate standard, it made the following distinction between ordinary and gross negligence: "negligence suggests 'no more than a failure to measure up to the conduct of a reasonable person,' while gross negligence generally signifies 'more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences.' "[96] This differentiation is not very persuasive in advocating gross negligence as an appropriate standard of conduct. The court's definition of gross negligence lies somewhere between ordinary inadvertence and conscious indifference. Such ambiguity will not provide the much needed guidance for other courts, especially when other standards are also being applied to section 1983 claims. In addition, the *Fargo* court provided another standard, recklessness, adding to the perplexity in establishing a successful section 1983 claim.

At least one court has recognized the difficulty in clarifying varying degrees of negligence. In *Archie*, the Seventh Circuit adopted deliberate indifference as its standard instead of the imprecise gross negligence standard.[97] The court stated, "Gross negligence blends into negligence; there is an indistinct and unusually invisible line between . . . negligence and . . . gross negligence . . . . A line that cannot be policed is not a line worth drawing in constitutional law."[98]

Other courts that have adopted a deliberate indifference

95. DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989); *DeShaney*, 109 S. Ct. at 1007 n.10. In the dissent, however, Justice Brennan refers to Daniels v. Williams, 474 U.S. 327 (1986), to reiterate that mere negligent conduct will not constitute liability under section 1983. *Id.* at 1012 (Brennan, J., dissenting).

96. Fargo v. City of San Juan Bautista, 857 F.2d 638, 641 (9th Cir. 1988) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986) and PROSSER ON TORTS § 34 at 212).

97. Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

98. *Id.* at 1219.

standard have provided some guidance in determining when the standard is met. For example, the court in *Doe v. New York City Department of Social Services* held that deliberate indifference could be established " 'from a pattern of omissions revealing deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse.' "[99] Likewise, in *Sowers*, the district court stated that the Supreme Court "characterized deliberate indifference as 'the wanton infliction of unnecessary pain.' "[100] Both of these definitions are much more precise than a "more than . . . but less perhaps than . . ." test for gross negligence.[101] A standard of conduct employing specific words like pattern, deliberate, and wanton, is more easily applied to the particular facts and circumstances of cases as opposed to the unclear standard of gross negligence.

Rather than foregoing the opportunity to determine one standard as the Court did in *DeShaney*,[102] the Court should or could have addressed the conflicting standards. When the Court is faced with this issue again, it should adopt the Seventh Circuit's approach in *Archie* of rejecting gross negligence and adopting the single standard of deliberate indifference. The difficulty in meeting this stricter, higher standard would also reflect the Supreme Court's overall reluctance in sustaining section 1983 claims.

The most compelling reason for limiting the scope of section 1983 is to prevent the threat of unlimited liability.[103] As a result, Supreme Court opinions for a variety of civil rights actions, including *DeShaney*, have set forth certain limiting rules. For example, the Supreme Court has interpreted the language of the due process clause as not imposing an affirmative *constitutional* duty upon a state to protect an individual.[104] Accordingly, Justice Rehnquist suggested in *DeShaney* that the state legislature,

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99. Doe v. New York City Dep't of Social Servs., 709 F.2d 782, 791 (2d Cir.) (quoting Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 145 & n.8 (2d Cir. 1981)), *cert. denied*, 464 U.S. 864 (1983).

100. Sowers v. Bradford Area School Dist., 694 F. Supp. 125, 135 (W.D. Pa. 1988).

101. *See supra* text accompanying notes 95-98.

102. The *DeShaney* majority noted the following footnote from *Daniels*: "[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986), *noted in DeShaney*, 109 S. Ct., 998, 1007 n.10 (1989).

103. *Supra* note 30 and accompanying text.

104. *See supra* notes 58-63 and accompanying text.

not the judiciary, should decide whether to impose a duty for the state's failure to act.[105]

The plaintiffs in *DeShaney* were aware of this hesitant attitude and suggested the following:

> Only conduct totally beyond negligence, and rising into the vaulted heights of extreme misconduct . . . is to be held actionable . . . . We only want to take the most extreme situations, . . . rather than merely a mistake in judgment or a difference in opinion or approach, and afford them the relief to which they are entitled.[106]

Deliberate indifference is a logical standard of conduct to alleviate the Court's apprehension; the resulting singularity will also eliminate the existing confusion in lower courts.

V. CONCLUSION

Joshua's plight is indeed a tragedy. Although the Supreme Court found no deprivation of Joshua's constitutional right to liberty, the opinion left open the possibility of maintaining a section 1983 claim based on a "statutory entitlement" argument. First, the plaintiff's entitlement must be created in a state statute which provides for a constitutional liberty or property interest. When the state fails to comply with the statute, its failure constitutes a deprivation of the plaintiff's constitutional right. To establish a claim for the denial of this right, the plaintiff must also establish the existence of a special relationship. Given its wide acceptance by lower courts and their use of several factors that were unaddressed in *DeShaney*, a special relationship could be extended beyond custodial situations. Finally, the state must also be in violation of a certain standard of conduct. Since there is confusion in this area, the Supreme Court should adopt the standard of deliberate indifference to comport with the other strict requirements of section 1983.

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105. *See supra* text accompanying note 72.

106. Brief for Petitioners at 33, DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987) (No. 87-154).