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An Abused Child's Right to Life, Liberty, and Property in the Home: Constitutional Approval of State Inaction

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**AN ABUSED CHILD'S RIGHT TO LIFE, LIBERTY,
AND PROPERTY IN THE HOME:
CONSTITUTIONAL APPROVAL OF STATE
INACTION**

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Child abuse is a horror that our society condemns but our legal system perpetuates. Although there is much talk about protecting children, our legal system is far more concerned about protecting parents' rights. Indeed they should be considered as sacred, but at what cost?¹

I. INTRODUCTION

The notion of childhood, for most of us, conjures memories of the warm, safe feeling of "home." It was a time when few cares could penetrate the safety and security created by familial love. For many children, however, violent injuries, inflicted by supposed loved ones, disrupt these formative years. Often, these injuries result in permanent disabilities or, shockingly, death.

Consequently, state and/or local governments routinely investigate suspected occurrences of child abuse. In appropriate cases, a court order can either limit or terminate parental rights to the custody of minor children.² The courts, however, use these measures cautiously. For example, the West Virginia Supreme Court of Appeals requires the state to produce "clear, cogent and convincing proof" when seeking a court order to limit or terminate parental rights.³

Many scholars criticize this increased burden of proof as an over-protection of the parents at the expense of the child.⁴ The courts typically justify these precautions by emphasizing the importance of maintaining paramount parental rights.⁵ Even though judicial atti-

1. Dorros & Dorsey, *Whose Rights Are We Protecting Anyway?*, CHILDREN TODAY, May-June 1989, at 6, 7.

2. See, e.g., *State ex rel. Miller v. Locke*, 162 W. Va. 946, 948, 253 S.E.2d 540, 542 (1979) (upholding the constitutionality of a statute permitting the removal of a child from his home for up to 10 days where there exists both an imminent danger to the child and no reasonable alternatives to removal).

3. *In re Willis*, 157 W. Va. 225, 245, 207 S.E.2d 129, 140 (1974), *superseded by statute on other grounds*, *State v. Carl B.*, 301 S.E.2d 864, 868 (W. Va. 1983). See also *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (Rehnquist, J., dissenting) (holding that the state must prove grounds for the termination of parental rights, at a minimum, by clear and convincing evidence).

4. E.g., Horowitz, *Tighten Standards for Termination of Parental Rights*, CHILDREN TODAY, May-June 1989, at 9, 10.

5. The West Virginia Supreme Court emphasized the importance of parental rights as follows: In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person. The Supreme Court of the United States has recognized the

tudes impede state efforts to intervene on behalf of abused children, the state should still *attempt* to protect a threatened child from abusive parents, especially when the state knows that the child is in imminent physical danger.

This note examines the constitutional rights of children injured by domestic abuse and the potential liability of state officials where the state had knowledge of the impending abuse and failed to act.⁶ The discussion will proceed through three separate stages. First, this note will analyze relevant constitutional developments in the areas of a child's fourteenth amendment due process rights and state inaction through 1988.⁷ Second, it will present a detailed study of the recent landmark United States Supreme Court decision addressing this issue, *DeShaney v. Winnebago County Department of Social Services*.⁸ Finally, after examining cases decided after *DeShaney*, this note will consider the direction of future interpretation of a child's due process rights as affected by a state's failure to act.

II. DEVELOPMENT OF THE LAW: A CHILD'S CONSTITUTIONAL RIGHTS AND THE SECTION 1983 CLAIM BASED ON STATE INACTION BEFORE *DESHANEY*

A. *A Child's Constitutional Rights*

Children basically enjoy the same constitutional protections and liberties as adults.⁹ However, judicial interpretation of these rights

right to raise one's children is a fundamental personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. . . . [T]he West Virginia Constitution in equal measure protects this fundamental right of parenthood.

Willis, 157 W. Va. at 237, 207 S.E.2d at 136-37 (citation omitted), *noted in In re Betty J. W.*, 371 S.E.2d 326, 327 (W. Va. 1988).

6. The party being sued will generically be referred to as the "state," even though a variety of state controlled entities and employees may be named as defendants. *See Comment, Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 & n.2 (1986) (recognizing, however, that the state itself cannot be liable for damages under section 1983 because of the eleventh amendment).

7. The abuse of children potentially affects both the substantive and procedural aspects of the due process clause. Hereinafter, any mention of "due process," absent a specific label, refers to either the substantive or the procedural component.

8. 109 S. Ct. 998 (1989).

9. *See, e.g., In re Gault*, 387 U.S. 1, 31-57 (1967) (holding that basic constitutional rights enjoyed by adults accused of crimes also apply to juvenile defendants).

differ between minority and adulthood.¹⁰ A child's constitutional rights may be either expanded or restricted according to a state's "*parens patriae* interest in preserving and promoting the welfare of the child."¹¹ The state acts as *parens patriae* "when parental control falters" because "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."¹²

Illustrating the states' *parens patriae* interest in the health and welfare of children, the Supreme Court in *Parham v. J.R.*¹³ recognized that "some parents 'may at times be acting against the interests of their children,' " despite stating that "parents generally do act in the child's best interest."¹⁴ In *Parham*, both the majority¹⁵ and the dissent¹⁶ noted that parents do not have an absolute right to determine the destiny of their minor children because a state may override a parental decision when the physical or mental health of a child is jeopardized. Also, a state's *parens patriae* interest has prompted the Supreme Court to sustain state efforts to *limit* a child's liberties which could expose them to corruptive or improper influences.¹⁷

The Supreme Court has applied the states' general interest as *parens patriae* for minor children in several specific contexts. However, prior to *DeShaney*, the Court had not addressed whether this

10. See *Schall v. Martin*, 467 U.S. 253, 263 (1984) ("[T]he Constitution does not mandate elimination of all differences in the treatment of juveniles.").

11. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). See also *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning it [sic] uncritically transferred to determination of a State's duty toward children.").

12. *Schall v. Martin*, 467 U.S. 253, 265 (1984).

13. 442 U.S. 584 (1979).

14. *Id.* at 602 (quoting *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-48 (E.D. Pa. 1974), *vacated and remanded*, 431 U.S. 119 (1979)).

15. "[W]e have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Id.* at 603.

16. "Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children." *Id.* at 631 (Brennan, J., dissenting).

17. See, e.g., *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1594 (1989) (upholding city ordinance limiting the use of dance halls to persons between the ages of 14 and 18 as non-violative of first amendment associational rights); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (upholding statute prohibiting the sale of obscene materials to minors under 17 years of age as non-invasive of children's freedom of expression or other constitutionally guaranteed freedoms).

interest is strong enough to require the state to protect potentially abused children. Under these circumstances, "parental control" has clearly "faltered" and "the State must play its part as *parens patriae*."¹⁸ Does a state's role as *parens patriae* merely *permit*, or more significantly, *require* protection of abused children?

B. The Section 1983 Claim Based on State Inaction

An abused child who alleges a violation of a constitutional right by a state's failure to act typically seeks redress under section 1983 of the Civil Rights Act of 1871.¹⁹ To come within the meaning of section 1983, the child usually claims that the state, as *parens patriae*, failed to protect the child from a parent's physical abuse, thereby causing a deprivation of "life, liberty, or property, without due process of law."²⁰ To establish a section 1983 claim based on a state's failure to protect a citizen, the plaintiff must satisfy two requirements.²¹ The plaintiff must show that the failure to act resulted in the deprivation of a constitutionally protected right,²² and that the official responsible to act showed "deliberate indifference" to the plaintiff's situation.²³

18. *Schall*, 476 U.S. at 265.

19. 42 U.S.C. § 1983 (1982). The statute states in pertinent part:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

20. U.S. CONST. amend. XIV, § 1 (the due process clause), *applied in, e.g., Milburn v. Anne Arundel County Dep't of Social Services*, 871 F.2d 474 (4th Cir. 1989); *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

21. *E.g., Taylor v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1337 (1989); *Doe v. New York City Dep't of Social Services*, 649 F.2d 134, 141 (1981).

22. *Taylor*, 818 F.2d at 794 (citing *Rizzo v. Goode*, 423 U.S. 362 (1976)). *Accord Baker v. McCollan*, 443 U.S. 137, 140 (1979).

23. *Taylor*, 818 F.2d at 794 (citing *Turpin v. Maillet*, 619 F.2d 196 (2d Cir. 1980) *cert. denied sub nom. Turpin v. West Haven*, 449 U.S. 1016 (1980)).

Abuses of government power, evaluated through "a disinterested inquiry pursued in the spirit of science, . . . a balanced order of facts exactly and fairly stated, . . . the detached consideration of conflicting claims, . . . [and] a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society," must "shock the conscience" to result in a deprivation of substantive due process. *Rochin v. California*, 342 U.S. 165, 172 (1952) (citation omitted) (emphasis in original).

1. State Inaction as a Violation of Constitutionally Protected Rights

As stated above, plaintiffs typically allege a violation of the abused child's fourteenth amendment due process rights in a section 1983 action based upon a state's failure to act. Several federal cases, decided prior to *DeShaney*, and discussed below, significantly contributed to the development of judicial attitudes toward alleged violations of fourteenth amendment liberties through a state's failure to offer protection.

a. Protection as a General Due Process Right

Section 1983 provides a federal remedy for state action which deprives an individual of a constitutional right.²⁴ Many courts have attempted to identify situations where the state may be held liable for failing to *prevent* the deprivation of a constitutional right.²⁵ When a court does identify one of these situations, the imposition of liability for state inaction effectively places an affirmative duty of protection on the state.²⁶ The decisions discussed below illustrate the federal courts' resistance to arguments for a general due process right to protection. Before *DeShaney*, the Seventh Circuit consistently refused to accept protection as a due process right.²⁷ Other federal circuits adopted the Seventh Circuit view.²⁸

During this period, the Supreme Court remained silent on the specific issue of liability for injuries to private individuals arising from state inaction. Nonetheless, in three significant opinions, the Court limited the scope of state liability, thereby hampering a section 1983 claimant's ability to prevail in an action based on a state's failure to offer protection.

24. See *supra* note 19 and accompanying text.

25. See Comment, *supra* note 6, at 1048.

26. *Id.*

27. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

28. See, e.g., *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir. 1986); *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986).

In upholding a statute granting the state immunity from torts committed by paroled or released prisoners,²⁹ the Court, in *Martinez v. California*,³⁰ did not address the issue of state inaction. Instead, the Court chose to decide the case on causation principles, avoiding the question of whether the plaintiff had been deprived of her constitutional rights.³¹ Consequently, the Supreme Court dismissed the section 1983 action against the state, initiated on behalf of a girl who had been murdered by a parolee, because neither the life³² nor the property³³ of a decedent is deprived where the death is "too remote a consequence" of the related state action.³⁴

In *Daniels v. Williams*,³⁵ the Supreme Court considered the mental state required for a violation of the due process clause. Previously, in *Parratt v. Taylor*,³⁶ the Court held that loss of property due to a negligent act by the state could amount to deprivation under the fourteenth amendment.³⁷ In *Daniels*, however, a unanimous Court overruled this portion of *Parratt*, holding that a negligent act causing unintended loss of life, liberty, or property does not violate the due process clause.³⁸ Even though the Court did not expressly address

29. Cal. Gov't CODE § 845.8(a) (West Supp. 1979) provides as follows: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

30. 444 U.S. 277 (1980), *reh'g denied*, 445 U.S. 920 (1980).

31. *Id.* at 284-85.

32. The court reasoned as follows:

A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

Martinez, 444 U.S. at 281.

33. The court addressed 'property' as follows:

[T]he cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause. On [this] hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials.

Id. at 281-82.

34. *Id.* at 285.

35. 474 U.S. 327 (1986).

36. *Parratt v. Taylor*, 451 U.S. 527 (1981).

37. *Id.* at 536-37.

38. *Daniels*, 474 U.S. at 328.

state inaction, its ruling apparently established a state of mind requirement for all violations of the due process clause.³⁹ Therefore, because negligent state actions cannot constitute a deprivation of fourteenth amendment rights, negligent inaction would also fail to support a section of 1983 claim.

Davidson v. Cannon,⁴⁰ a companion case to *Daniels*, confirmed this implication. In *Davidson*, the Court, specifically dealing with state inaction, held that a prison official's lack of due care in failing to protect a prison inmate from another prisoner does not violate the due process clause.⁴¹ However, unlike the unanimous ruling in *Daniels*, three justices dissented from the *Davidson* majority. Justice Brennan, believing that reckless official conduct causing injury constitutes a due process violation, stated that the record indicated a reckless, and not merely negligent, failure to act.⁴² Justice Blackmun went a step further, suggesting that even negligent state action can deprive a prison inmate of constitutionally protected liberties.⁴³ As this note will discuss more fully in later sections, Justice Blackmun's dissent explained that "once the State has taken away an inmate's means of protecting himself . . . , a prison official's negligence in providing protection can amount to a deprivation of the inmate's liberty"⁴⁴

Therefore, prior to *DeShaney*, the Supreme Court, without specifically ruling on protection as a general due process right, nonetheless had gradually excluded sources of state liability under section 1983. However, as mentioned above, several of the federal circuits, led by the Seventh Circuit, expressly refused to classify protection as a constitutional right.

For example, in *Bowers v. Devito*,⁴⁵ the Seventh Circuit dismissed a section 1983 claim brought on behalf of a woman who had been

39. See *id.* at 335-36.

40. 474 U.S. 344 (1986).

41. *Id.* at 348 ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.")

42. *Id.* at 349 (Brennan, J., dissenting).

43. See *id.* at 354-55 (Blackmun, J., dissenting).

44. *Id.* at 354 (Blackmun, J., dissenting).

45. *Bowers*, 686 F.2d 616.

killed by a known schizophrenic.⁴⁶ A state court had previously found the assailant not guilty of murder by reason of insanity, committed to a state mental health center, and subsequently released from the facility.⁴⁷ The complaint alleged both that the state knew the murderer was dangerous when he was released and that the state acted recklessly in releasing him.⁴⁸ Judge Posner, writing for the majority, held that the state had no duty to protect the decedent, stating that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."⁴⁹

Also, in the Seventh Circuit's *DeShaney*⁵⁰ opinion, Judge Posner reaffirmed the Seventh Circuit's belief the state's failure to protect citizens from private violence does not deprive them of any constitutional rights.⁵¹ Distinguishing the section 1983 claim from traditional notions of tort liability, the court again concluded that a constitutional tort requires deprivation by the state through action, not inaction.⁵²

Furthermore, in *Archie v. City of Racine*,⁵³ the Seventh Circuit dismissed a section 1983 claim arising out of a fire department dispatcher's failure to provide requested rescue services for a woman who subsequently died. Extending *Daniels v. Davidson*, the court held that aggravated forms of negligence do not violate the due process clause.⁵⁴ More importantly, the court again rejected the ex-

46. *Id.* at 617.

47. *Id.*

48. *Id.*

49. *Id.* at 618.

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

51. *Id.* at 301 (citing *Waker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Beard v. O'Neal*, 728 F.2d 894, 898-900 (7th Cir. 1984) *cert. denied*, 469 U.S. 825 (1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) *cert. denied*, 465 U.S. 1049 (1984); *Bowers*, 686 F.2d at 618).

The court assumed, *arguendo*, that the state's failure to act was a sufficiently aggravated form of negligence to preclude the application of *Daniels*, 474 U.S. 327, and *Davidson*, 474 U.S. 344.

52. *See DeShaney*, 812 F.2d at 302.

53. 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

54. *See id.* at 1219-20.

istence of an affirmative state duty to “protect its residents from private predators or their own misfortunes,” stating that this rule “is an implication of the language and the structure of the Due Process Clause.”⁵⁵

Therefore, as a general proposition, the federal court system declined to recognize general protection from the actions of private individuals as an affirmative state duty under the Constitution. However, despite considerable disagreement as to its proper application, a significant exception to this rule does exist.

b. The Right to Safety

The right to safety, dating back to the writings of Blackstone, Coke, and Hobbes,⁵⁶ “has deep roots in American legal and philosophical thought.”⁵⁷ Nonetheless, prior to *DeShaney*, acceptance of the right to safety as a constitutional maxim developed “quite slowly” and “lack[ed] clear standards defining its scope.”⁵⁸ However, as an exception to the federal courts’ general reluctance to require the state to provide affirmative protective services to private individuals, most courts recognized the right to safety where the state either acted to limit a citizen’s ability to provide self-protection or previously intervened to assist the threatened individual.

Due to the state created limitations on an individual’s ability to protect himself, judicial acceptance of the right to safety grew out of the eighth amendment, which prohibits the infliction of “cruel and unusual punishments” by the state.⁵⁹ For example, in *Estelle v.*

55. *Id.* at 1221.

56. See Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 218 (1988). “In *Leviathan*, Hobbes asserted that government’s primary purpose and responsibility is protection.” *Id.* Coke, in *Calvin’s Case*, stated that, in the social compact, the citizen provides “true and faithful lineage” and the government “undertakes the duty of protection.” *Id.* (citation omitted) (citing [1608] 4 Co. Rep. 1 (K.B.)). Also, Blackstone defined the right to personal security as the “primary right each citizen possesses” which “consists in . . . uninterrupted enjoyment of . . . life . . . limbs . . . body . . . health, and . . . reputation.” *Id.* (citations omitted) (citing 1 W. BLACKSTONE, COMMENTARIES 129).

57. *Id.* at 218.

58. *Id.*

59. U.S. CONST. amend. VIII.

Gamble,⁶⁰ the Supreme Court, after stating that the eighth amendment prohibits more than “physically barbarious punishment,”⁶¹ held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ prohibited by the Eighth Amendment.”⁶² Under these circumstances, the state’s failure to act violates a constitutional right, thereby creating the basis for a section 1983 cause of action.⁶³

Because the eighth amendment applies only to penal institutions,⁶⁴ federal courts extended this application of the right to safety beyond prison walls by including it within the fourteenth amendment notions of life, liberty, and property.⁶⁵ Consequently, involuntary, non-penal confinement entitles individuals to living conditions bearing some relationship to the purpose of their confinement.⁶⁶

In *Youngberg v. Romero*,⁶⁷ the Supreme Court applied the right to safety to involuntarily confined mentally retarded persons. While institutionalized, the plaintiff in *Youngberg* suffered numerous injuries “both by his own violence and by the reactions of other [patients] to him.”⁶⁸ In his section 1983 action, the plaintiff primarily sought compensation for the state’s failure to protect him from these injuries.⁶⁹ The Court, vacating and remanding the Third Circuit’s

60. 429 U.S. 97 (1976), *reh’g denied*, 429 U.S. 1066 (1977).

61. *Id.* at 102 (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), *reh’g denied*, 429 U.S. 875 (1976); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910)).

The eighth amendment also “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,’ against which we must evaluate penal measures.” *Id.* at 102 (citation omitted) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

62. *Estelle*, 429 U.S. at 104 (citation omitted) (quoting *Gregg*, 428 U.S. at 182-83).

63. *See id.* at 105.

64. *Mushlin*, *supra* note 58, at 222 (citing *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

65. *See id.* at 222-23.

66. For example, “[i]f, as in the case of the mentally ill, confinement is to treat and protect, the deprivation of liberty lacks constitutional support when it fails to advance those purposes.” *Id.* at 223 (citing *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff’d in part, rev’d in part*, 612 F.2d 84 (3rd Cir. 1979) (en banc), *rev’d on other grounds*, 451 U.S. 1 (1980)).

67. 457 U.S. 307 (1982).

68. *Id.* at 310.

69. *Id.* at 311. The amended complaint also sought damages for the state’s failure to provide appropriate “treatment or programs for his mental retardation.” *Id.*

decision,⁷⁰ nonetheless held that the patient “enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.”⁷¹ Also, because of the inherent punitive nature of penal institutions, the Court made the scope of the right to safety contained in the fourteenth amendment considerably broader than the right to safety arising from the eighth amendment.⁷²

Continuing this trend, many courts extended the boundaries of the right to safety beyond institutional walls.⁷³ Even the Seventh Circuit, known for its consistent denial of an affirmative due process right to protection, admitted that the fourteenth amendment requires affirmative state action where the state had placed an individual in a position of danger.⁷⁴ Ultimately, however, the court in *Bowers* refused to find that the state had sufficiently endangered an individual who was murdered by a former mental hospital patient where the state had reason to know that the former patient was dangerous.⁷⁵

As mentioned above, the federal courts also recognized the right to safety where the state had previously offered assistance to a threatened citizen. For example, in child abuse cases, prior actions taken by the state (such as the temporary removal of the abused

70. The Third Circuit held that the fourteenth amendment requires that the involuntarily committed retain liberty interests in both freedom of movement and personal security. *Id.* at 311 (citing *Romeo v. Youngberg*, 644 F.2d 147 (1980)).

71. *Youngberg v. Romeo*, 457 U.S. at 324.

72. *See id.* at 321-22 (“Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish.”).

73. *See Mushlin*, *supra* note 58, at 226.

74. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). After echoing the Seventh Circuit’s position that “[t]he Constitution is a charter of negative liberties” that “does not require the federal government or the state to provide services,” the court stated that where “the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.” *Id.* (emphasis added).

75. *Id.* The court reasoned as follows:

[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution.

child from the home) could give rise to a "special relationship" between the state and the child. Courts uniformly accepted the possibility that the state, by establishing a "special relationship" with an individual, may be liable under section 1983 for failing to act in later situations.⁷⁶

In *Jensen v. Conrad*,⁷⁷ the Fourth Circuit sought to establish a method of determining whether a "special relationship" is created under a given set of facts.⁷⁸ As a result, the court developed the following factors to determine whether a "special relationship" exists:

- 1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident
- 2) Whether the [S]tate has expressly stated its desire to provide affirmative protection to a particular class of specific individuals [and]
- 3) Whether the State knew of the claimant's plight.⁷⁹

Even though the above factors were not necessary to the court's final decision in the case, the court's thorough treatment of the "special relationship" doctrine represented a strong statement of the Fourth Circuit's intended direction if again faced with such facts.⁸⁰

Despite the Fourth Circuit's desire to establish parameters of the "special relationship" doctrine, the Eleventh Circuit, in *Jones v. Phyfer*,⁸¹ refused, with both little discussion and no mention of any standards for evaluation, to find the existence of a "special relationship" between the state and an individual who had been raped by a furloughed juvenile six months after the youth had been convicted and imprisoned for breaking and entering the victim's home.⁸²

76. See Comment, *supra* note 6, at 1051.

77. 747 F.2d 185, 194 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1984).

78. *Id.* at 194 (*dicta*) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for the general proposition that "governmental officials will not be held liable if the law at the time of the alleged wrongdoing was not 'clearly established.'").

79. *Id.*

80. See *id.* at 195 ("Were the issue properly before this court on different facts, there would be . . . a ruling that the facts of [the] case fell within the meaning of 'special relationship.'").

81. 761 F.2d 642 (11th Cir. 1985).

82. *Id.* at 646 (The crime and the subsequent conviction were "not sufficient to establish the required special relationship that would impose a duty on the state to protect plaintiff or to warn her of [his] release.").

However, in *Estate of Bailey v. County of York*,⁸³ the Third Circuit did offer partial guidance for determining whether a “special relationship” is created. In *Estate of Bailey*, the court considered the special relationship issue when the state removed an abused child from her mother’s custody and subsequently returned the child without an adequate investigation.⁸⁴ The child later died as a result of abuse inflicted by her mother’s boyfriend, resulting in the filing of a section 1983 action by the child’s estate against several state entities and officials. In its decision, the court emphasized the differences between dangers to the public at large⁸⁵ and “special dangers” to specific individuals.⁸⁶ While it declined the opportunity to define the “special relationship,”⁸⁷ the court did provide some insight stating that “[w]hen the [state] knows that a child has been beaten, [t]his strengthens the argument that some sort of special relationship has been established.”⁸⁸

The three opinions discussed above demonstrate the federal appellate courts’ general reluctance, prior to *DeShaney*, to establish binding parameters or standards for determining whether a “special relationship” had been created.⁸⁹ In most cases, the courts primarily decided the “special relationship” issue on the facts, with little analytical explanation.⁹⁰ Also, many courts declined to recognize a “special relationship” requiring affirmative state action “merely because the state has chosen to provide basic services to its citizens.”⁹¹

83. 768 F.2d 503 (3d Cir. 1985), *reh’g denied*, 768 F.2d 1353 (1985).

84. *Id.* at 505.

85. *See, e.g.*, *Martinez v. California*, 444 U.S. 277, 285 (1980), *reh’g denied*, 445 U.S. 920 (1980) (holding that the murder by the parolee of a member of the public at large after he was released from prison was “too remote a consequence” to result in a finding of state liability under section 1983).

86. *Estate of Bailey*, 768 F.2d at 510-11 (refusing to hold, as a matter of law, that the plaintiffs will not be able to prove the “necessary causal nexus” between the state’s inaction and the resulting injuries).

87. *Id.* at 511.

88. *Id.* (quoting *Jensen*, 747 F.2d at 194 n.11).

89. Note that while the Fourth Circuit, in *Jensen*, did articulate non-binding factors for “special relationship” analysis, the court declined to create a “comprehensive definition” of the term. *Jensen*, 747 F.2d at 194 n.11 (*dicta*).

90. *See, e.g.*, *Phyfer*, 761 F.2d at 646; *Estate of Bailey*, 768 F.2d at 511.

91. Comment, *supra* note 6, at 1055 (citing, for example, *Estate of Bailey*, 768 F.2d at 511; *Beard*, 728 F.2d at 900; *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983); *Jackson*, 715 F.2d at 1203-06; *Fox v. Custis*, 712 F.2d 86, 88 (4th Cir. 1983)).

Nonetheless, after *Youngberg*, the lower federal courts began to apply the right to safety beyond both prisons and institutions.⁹² Through either a direct assertion of the right to safety⁹³ or an implicit application of this right by way of the "special relationship" doctrine,⁹⁴ many courts recognized some form of a right to personal security for persons not in state custody.⁹⁵ However, prior to *DeShaney*, the issue of state protection as a due process right was "not free from doubt" and the scope of this right was "by no means clear."⁹⁶

Even though the Seventh Circuit recognized the "special relationship" doctrine,⁹⁷ it strengthened its hostility toward the existence of protection as a due process right by consistently finding that such relationship had not been established. In *DeShaney v. Winnebago County Dep't of Social Services*,⁹⁸ the Seventh Circuit expressly rejected the standards offered by both *Estate of Bailey*⁹⁹ and *Jensen*.¹⁰⁰ Therefore, one of the Supreme Court's major tasks in evaluating *DeShaney* would be the resolution of this split of authority between the Seventh Circuit and the Third and Fourth Circuits. Because the Supreme Court represents the sole source of unification for discrepancies in the federal courts, its decision in *DeShaney* would supersede these differing precedents and establish binding law for the entire federal court system.

2. "Deliberate Indifference"

In addition to establishing that the state's failure to act led to the deprivation of a constitutional right, the plaintiff in a section

92. See Mushlin, *supra* note 56, at 226.

93. See, e.g., *Taylor v. Ledbetter*, 818 F.2d 791, 794-95 (11th Cir. 1987).

94. See, e.g., *Bowers*, 686 F.2d at 618.

95. See Mushlin, *supra* note 56, at 226-27. See also *Taylor*, 818 F.2d at 797 ("[A] child involuntarily placed in a foster home is in a situation analogous to a prisoner in a penal institution and a child confined in a mental health facility . . . may bring a section 1983 action for violation of fourteenth amendment rights.").

96. See Mushlin, *supra* note 56 at 227 (citing *DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298 (7th Cir. 1987); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986), *cert. denied*, 749 U.S. 882 (1986); *Bradberry v. Pinnellas County*, 789 F.2d 1513 (11th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1265 (1986)).

97. See *Bowers*, 686 F.2d at 618.

98. 812 F.2d 298 (7th Cir. 1987) (the court of appeals decision preceding the Supreme Court's review of the case).

99. 768 F.2d 503.

100. 747 F.2d 185.

1983 action must also prove that the official responsible to act showed "deliberate indifference" to the situation.¹⁰¹ Where no violation of a constitutionally protected liberty occurs, this issue becomes moot. Therefore, in the context of state inaction, the only discussions of deliberate indifference appear in decisions initially holding that the failure to act was unconstitutional. For example, in *Estelle v. Gamble*,¹⁰² the Supreme Court, after finding that the Constitution requires the state to provide basic medical services to prison inmates, held that a prison official's denial of medical care to inmates constitutes deliberate indifference to their serious medical needs.¹⁰³

As a parallel to the difficulty of expanding the right to safety beyond institutional walls, the Second Circuit, in *Doe v. New York City Dep't of Social Services*,¹⁰⁴ tackled the "unusually troublesome task" of determining whether deliberate indifference could be proven outside of a penal institution and in the foster care setting.¹⁰⁵ Despite the presence of a statute requiring reports of abuse,¹⁰⁶ the court

101. *Taylor*, 818 F.2d at 794 (citing *Turpin v. Maillet*, 619 F.2d 196 (2d Cir.) (*Turpin III*), *cert. denied, sub nom. Turpin v. West Haven*, 449 U.S. 1016 (1980)).

102. *Estelle*, 429 U.S. at 103-04.

103. *Id.* The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency in modern legislation codifying the common-law view that "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Id.* at 103-04 (citation omitted) (quoting *Spicer v. Williams*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

104. 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

105. *Id.* at 141-42. The court stated as follows:

There is a closer and firmer line of authority running from superiors and subordinates within an institution than exists in the foster care context. . . . Institutional administrators can readily call in subordinates for consultation. They can give strict orders with reasonable assurance that their mandates will be followed, and as added insurance other employees stationed in proximity of the subordinates to whom orders are directed may be instructed to monitor compliance.

By contrast, [a foster care agency] ha[s] to rely upon occasional visits for its information gathering, and its relationship to the foster family [is] less . . . hierarchial than is the case with prison guards and a warden.

106. New York Social Services Law § 413 (McKinney 1983) states in pertinent part: The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional capacity is an abused or maltreated child: any . . . day care center worker or other child care or foster care worker. . . . Whether such person is required to report under this title . . . he shall immediately notify the person in charge of such institution, school, facility, or agency

acknowledged that "deliberate indifference ought not to be inferred from a failure to act as readily as might be done in the prison context, since . . . there are obvious alternative explanations for a family being given the benefit of the doubt and the agency refusing to intervene."¹⁰⁷ Consequently, the court held that gross negligence on the part of a foster care agency in failing to report the suspected abuse of a foster child only "creates a strong presumption of deliberate indifference."¹⁰⁸ However, the court also stated that "[t]he more a statute or regulation clearly mandates a specific course of conduct, the more it furnishes a plausible basis for inferring deliberate indifference from a failure to act, *even without any specific knowledge of harm or risk.*"¹⁰⁹ Therefore, given both the agency's lackadaisical investigation of suspected abuse¹¹⁰ and the existence of a statutory reporting provision, the court concluded that a finding of deliberate indifference could be made outside of the more structured institutional hierarchy.

In *Taylor v. Ledbetter*,¹¹¹ the Eleventh Circuit, under similar facts, agreed with the Second Circuit's analysis in *Doe v. New York City Dep't of Social Services*. The court again expressed concern over the foster child's ability to show deliberate indifference in a non-institutional setting,¹¹² specifically referring to the problems of proving "actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home."¹¹³ Nonetheless, the court held that deliberate indifference amounting to a violation of fourteenth amendment rights¹¹⁴ can be found in the fos-

107. *Doe v. New York City Dep't of Social Services*, 649 F.2d at 142.

108. *Id.* at 143. "While this presumption is at least theoretically rebuttable, the fact that there can be instances where glaring negligence may not constitute deliberate indifference does not mean that a fact finder is barred from equating negligence of a certain dimension with deliberate indifference." *Id.*

109. *Id.* at 146 (emphasis added).

110. See § II.A.1, *infra*.

111. 818 F.2d 791 (11th Cir. 1987).

112. *Taylor*, 818 F.2d at 796 ("The lack of proximity in the foster home situation simply suggests that deliberate indifference is not as easily inferred or shown from a failure to act.").

113. *Id.*

114. The court, after discussing such constitutional issues as the "liberty interest" (right to safety) and the "special relationship," did not attribute its finding to any one doctrine; instead, the decision seemed to base its holding on a general consideration of fourteenth amendment liberties.

ter care setting.¹¹⁵

While the question of deliberate indifference had only been addressed in several limited circumstances, federal courts extended this issue beyond the institutional setting to the field of foster care. However, unlike the right to safety, which also evolved out of the prison context, there was much less confusion and debate over the application and definition of deliberate indifference before the Supreme Court's decision in *DeShaney*.

Summarizing the federal courts' attitudes toward section 1983 claims arising out of the state's failure to protect a private citizen, it becomes apparent that, before the Supreme Court issued its landmark decision in *DeShaney*, the definition and parameters of both the "special relationship" doctrine and the right to safety significantly lacked clarity and uniformity. Did the recent extensions of the right to safety fall within the scope of the Constitution, and would this expansion, if constitutional, continue into the area of child abuse inflicted by either foster parents or natural parents?

III. *DESHANEY V. WINNEBAGO COUNTY DEP'T OF SOCIAL SERVICES.*

A. *Background*

"The facts of this case are undeniably tragic."¹¹⁶ In January of 1982, Randy DeShaney's second wife, at the time of their divorce, informed the police that Mr. DeShaney previously abused his young son Joshua.¹¹⁷ The Winnebago County Department of Social Services (hereinafter "DSS") subsequently investigated these accusations. However, after Mr. DeShaney denied abusing his son, the DSS did not pursue the matter.¹¹⁸

115. Note, however, that Georgia implements a comprehensive statutory foster care and placement scheme which requires "the duty to protect," regular foster home inspections, and "through visits . . . made as frequently as necessary for the best interest of the child." *Taylor*, 818 F.2d. at 799 (emphasis and citation omitted) (citing GA. COMP. R. & REGS. r. 290-2-12-08).

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

117. *Id.*

118. *Id.*

In early 1983, Randy DeShaney's girlfriend brought Joshua, covered with bruises and abrasions, to a local hospital.¹¹⁹ She claimed that the injuries were inflicted by another child, but the hospital personnel suspected child abuse.¹²⁰ The DSS, upon notification, immediately sought and obtained, pursuant to Wisconsin statutory law,¹²¹ a court order placing Joshua in the temporary custody of the hospital.¹²² Three days later, an ad hoc "Child Protection Team" decided that there was insufficient evidence of child abuse to retain Joshua in the court's custody.¹²³

Although the team decided to release Joshua, it did recommend that (1) Joshua should be enrolled in a preschool program, (2) Mr. DeShaney should receive counseling from the DSS, and (3) Mr. DeShaney's girlfriend should move out of his house, because he had suggested that she might have been abusing Joshua.¹²⁴ Both the DSS and Mr. DeShaney voluntarily consented to these terms in a written agreement.¹²⁵ Three weeks later, the court dismissed the child protection case.¹²⁶

One month later, the DSS caseworker learned that Joshua had once again been treated for "suspicious injuries"; however, the caseworker concluded that there was "no basis for action."¹²⁷ Over the next six months, the same caseworker visited the DeShaney home on a monthly basis; she consistently noticed "a number of suspicious injuries," including head wounds, a scratched cornea, and a scraped chin (which looked like a cigarette burn).¹²⁸ During this time, Mr. DeShaney's girlfriend had not moved out of the house and Joshua had not been enrolled in preschool.¹²⁹ The caseworker recorded these

119. *DeShaney*, 812 F.2d at 299.

120. *Id.*

121. See WIS. STAT. ANN. §§ 48.13(3), 48.19, 48.207 (West 1987).

122. *DeShaney*, 812 F.2d at 300. See also *DeShaney*, 109 S. Ct. at 1001.

123. *DeShaney*, 812 F.2d at 300. Prolonged custody is "authorized by Wisconsin law if 'probable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others. . . .'" *Id.* (citation omitted (citing WIS. STAT. ANN. § 48.205(1)(a) (West 1987))).

124. *Id.*

125. *Id.*

126. *Id.*

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

128. *DeShaney*, 818 F.2d at 300.

129. *Id.*

incidents, along with her continuous suspicions that Joshua was being abused, "but did nothing more."¹³⁰

In November, the local hospital treated Joshua for multiple bruises and lacerations.¹³¹ Hospital personnel informed the DSS that they believed Joshua was being abused; however, "there was no reaction from [the DSS]."¹³² When the caseworker next attempted to visit Joshua, Mr. DeShaney told her that she could not see Joshua because he was ill.¹³³ Finally, on March 7, she returned to the house after being told, several days earlier, that Joshua had fainted for no apparent reason.¹³⁴ This time, she did not even ask to see the child.¹³⁵

What followed appears as presented in the Seventh Circuit's decision:

The next day Randy DeShaney beat Joshua so severely that he critically injured Joshua's brain. The neurosurgeon who treated Joshua found evidence of previous traumatic injury to the head, and Joshua's body was covered with bruises and lesions of different vintages. Joshua's mother was summoned from Wyoming. When she arrived [the caseworker] told her, '*I just knew the phone would ring some day and Joshua would be dead.*' He was not dead, but half his brain had been destroyed. He is confined to an institution for the profoundly retarded, and will remain institutionalized for the rest of his life.¹³⁶

Joshua and his mother subsequently brought a section 1983 action against the county, the DSS, the caseworker, and her supervisor, alleging that these state actors deprived Joshua of his liberty without due process of law under the fourteenth amendment.¹³⁷ The United States District Court for the Eastern District of Wisconsin dismissed the suit on the defendants' motion for summary judgment.¹³⁸

The Seventh Circuit Court of Appeals affirmed,¹³⁹ holding that although Joshua had been deprived of liberty within the meaning

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

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *DeShaney*, 812 F.2d at 300 (emphasis added).

137. *Id.*

138. *Id.*

139. *Id.*

of the due process clause, the state did not share responsibility for the deprivation.¹⁴⁰ As discussed above, the court specifically rejected the Third Circuit's position in *Estate of Bailey v. County of York*,¹⁴¹ and the Fourth Circuit's dicta in *Jensen v. Conrad*,¹⁴² both of which advocated the imposition of an affirmative duty on the state to protect a child through the creation of a "special relationship."¹⁴³ The court stressed that "a constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others."¹⁴⁴

The Supreme Court granted the plaintiffs' petition for certiorari,

[b]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights . . . and the importance of the issue to the administration of state and local governments"¹⁴⁵

B. *The Majority Opinion*

Chief Justice Rehnquist, writing for a six to three majority, quickly dismissed any notion that the due process clause, in and of itself, requires the state to protect citizens against private actors.¹⁴⁶ "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other."¹⁴⁷ The Chief Justice then emphasized that the Due Process Clause does not generally confer affirmative rights to governmental assistance, "even where

140. *Id.* at 301.

141. 768 F.2d 503 (3rd Cir. 1985).

142. 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

143. *DeShaney*, 812 F.2d at 303-04.

144. *Id.* at 302 (citing *Martinez v. California*, 444 U.S. 277 (1980), *reh'g denied*, 445 U.S. 920 (1980) for the assertion that "state inaction which might be deemed a proximate cause of the plaintiff's injury under evolving common law notions is not enough to establish a violation of the Fourteenth Amendment.").

145. *DeShaney*, 109 S. Ct. at 1002 (citation omitted) (*citing* *Archie v. City of Racine*, 847 F.2d 1211, 1220-23 (7th Cir. 1988)).

146. *Id.* The Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 1003.

147. *Id.*

such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."¹⁴⁸ Therefore, "[a]s a general matter," the majority concluded that state inaction "simply" does not result in a deprivation of an individual's due process rights where the individual is confronted with private violence.¹⁴⁹

Chief Justice Rehnquist flatly rejected the plaintiffs' contention that an affirmative state duty to act arose through the creation of a "special relationship" between the state and Joshua,¹⁵⁰ and, in doing so, apparently rejected the entire concept of "special relationships."¹⁵¹ He acknowledged the imposition of an affirmative duty of care and protection on the state in "certain limited circumstances" only.¹⁵² To illustrate this point, the Chief Justice discussed the right to safety in the institutional setting.¹⁵³ He then stressed the narrow scope of this duty, stating that these cases "stand only for the proposition that when the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."¹⁵⁴ The Chief Justice concluded, then, that the state's act of restraining an individual's freedom to act on his own behalf constitutes a "deprivation of liberty" which requires the state to provide protection for the individual.¹⁵⁵

148. *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (no obligation to fund abortions or other medical services); *Lindsey v. Normet*, 405 U.S. 56 (1972) (no obligation to provide adequate housing)).

149. *Id.*

150. The plaintiff argued that a "special relationship" was created by the state taking temporary custody of Joshua, placing a duty on the state to continue its protection of the child in a "reasonably competent fashion." The state's failure to discharge this duty constituted an abuse of power that "shocks the conscience," resulting in a violation of Joshua's due process rights. *Id.* (citing Brief for Petitioners 20).

151. *See id.* at 1004 n.4.

152. *Id.* at 1004-05.

153. *Id.* (discussing *Estelle v. Gamble*, 429 U.S. 97 (1976) (the state must provide adequate medical care to prisoners); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the state must provide involuntarily committed mental patients with services necessary to ensure their "reasonable safety" from themselves and others)).

154. *DeShaney*, 109 S. Ct. at 1006. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.*

155. *Id.*

This duty, in the majority's opinion, does not extend to the protection of harms inflicted by private actors in other settings.¹⁵⁶ Note, however, that the Court refused to address whether the state establishes a duty to protect a child where, "by the affirmative exercise of its power," the state places the child in a foster home operated by its agents.¹⁵⁷ The majority deliberately left this door open, stating that, under such circumstances, "we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."¹⁵⁸

Chief Justice Rehnquist ultimately refused to apply the "*Estelle-Youngberg*" analysis to the present facts.¹⁵⁹ The Chief Justice noted that Joshua was not in the custody of the state when his injuries were inflicted, and, while the state might have known that he was in danger, it played no part in creating or aggravating this danger.¹⁶⁰ Even though the state had once taken custody of Joshua, the majority held that no affirmative duty was created because "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."¹⁶¹

Although the Court denied the plaintiffs' plea for a constitutional remedy, it did recognize that the state might have acquired a duty to protect Joshua under state tort law.¹⁶² In addition, the majority noted that a state may impose affirmative duties of care and protection upon its agents through its own courts or legislature.¹⁶³

Nonetheless, Chief Justice Rehnquist, after acknowledging the sympathetic nature of the situation, reminded those who would re-

156. *Id.*

157. *Id.* at 1006 n.9.

158. *Id.* at 1006.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* The court cited the RESTATEMENT (SECOND) OF TORTS § 323 (1965), which provides that: [O]ne who undertakes . . . to provide services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking, if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance on the undertaking.

163. *Id.*

quire the state to compensate Joshua for his injuries that the harm was inflicted by his father and not by the state.¹⁶⁴ Under these circumstances, the Constitution does not guarantee an affirmative duty to protect. Therefore, a section 1983 claim based on a violation of due process rights through state inaction must fail as a matter of law.¹⁶⁵

C. *The Dissenting Opinions*

Justice Brennan, joined by Justice Marshall and Justice Blackmun, dissented, stating that Chief Justice Rehnquist's irrelevant proclamation that the Constitution contains no general guarantees of positive liberties make the majority "unable to appreciate [the Court's] recognition in *Estelle* and *Youngberg* that this principle does not hold true in all circumstances."¹⁶⁶ According to Justice Brennan, the Court should have initially focused on the acts that the state had already taken with respect to Joshua.¹⁶⁷ By focusing on the state's prior actions, the Court can then more readily assess the constitutional significance of the state's subsequent inaction.¹⁶⁸ Justice Brennan believes that state knowledge of an individual's plight combined with expressions of intent to assist him can result in a "limitation of his freedom to act on his own behalf."¹⁶⁹ Therefore, Justice Brennan, unlike the majority, would interpret *Estelle* and *Youngberg* as standing for the "much more generous proposition" that a state, by cutting off private sources of aid and subsequently refusing to offer assistance, cannot "wash its hands" of the consequences of its failure to act.¹⁷⁰

Justice Blackmun, in addition to joining Justice Brennan's dissent, filed his own opinion, focusing more on the principles of natural law than on the majority's sterile formalism.¹⁷¹ He disagreed

164. *Id.*

165. *See id.*

166. *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting).

167. *Id.* (citing *Estelle*, 429 U.S. 97 (1976); *Youngberg*, 457 U.S. 307 (1982)).

168. *See id.*

169. *Id.* at 1009 (quoting *DeShaney*, 109 S. Ct. at 1006).

170. *Id.*

171. *See id.* at 1012 (Blackmun, J., dissenting).

with the Chief Justice's attempt to treat the issue of action and inaction in black and white terms.¹⁷² To Justice Blackmun, a proper reading of fourteenth amendment precedent does not ignore the "dictates of fundamental justice," and recognizes that compassion does not have to be removed from judicial decision-making.¹⁷³

D. Practical Concerns

Opponents of an affirmative state duty to protect abused children fear that this obligation could conceivably expand to require affirmative police, fire and medical services.¹⁷⁴ They fear that a trend toward broad affirmative state duties "might lead to inappropriate federal interference in the inner workings of state agencies, a chilling effect on state assistance efforts to its citizens, and the eventual finding of a state duty to the public at large."¹⁷⁵

The Court could have avoided this problem without finding that the state had no duty to protect Joshua DeShaney. Rather than limiting the threshold finding of state action to a present deprivation of the individual's liberty, the Court could have based this finding on both a present and a *past* deprivation of liberty affecting the individual's present ability to protect himself.¹⁷⁶ Therefore, because Joshua DeShaney had previously been in state custody, he could have come within the scope of the state protection requirement (assuming that the Court would have accepted the argument that the past state action diminished Joshua's later ability to protect himself) without paving the way for a potentially harmful expansion of the duty to protect in the lower courts.

IV. STATE INACTION SUITS AFTER *DESHANEY*

Joshua DeShaney will never know it, unfortunately, but he has had a dramatic impact on constitutional law. The case that grew out of his tragedy - decided

172. *See id.*

173. *See id.* at 1012-13. "Poor Joshua! . . . It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all,' that this child . . . now is assigned to live out the remainder of his life profoundly retarded." *Id.*

174. *See* Winchenback, *Snake Pits and Slippery Slopes: DeShaney Revisited*, A.B.A. J., Sept. 1989, at 65.

175. *Id.*

176. *See id.*

last February by the Supreme Court - is already affecting law suits across the country.¹⁷⁷

A. *The Effects of DeShaney*

With *DeShaney*, the Supreme Court severely limited the range of circumstances requiring affirmative state action as a constitutional right. The Court blocked the expansion of the right to safety beyond those situations where the state action has involuntarily deprived an individual's liberty, and, in doing so, rejected the creation of a duty to act through "special relationships" between the state and members of the general public.

This holding removed most of the prior confusion concerning the extent to which the fourteenth amendment requires affirmative state action. The Fourth Circuit, in *Milburn v. Anne Arundel County Dep't of Social Services*,¹⁷⁸ illustrated this result. In *Milburn*, a former foster child brought a section 1983 action against a variety of state actors for failing to report child abuse inflicted by his foster parents. As in *DeShaney*, the state knew of Charles Milburn's injuries and suspected that his foster parents were abusing him, yet the state did nothing. While the Fourth Circuit had recognized the "special relationship" doctrine and had previously expressed a desire to apply its "special relationship" analysis to an appropriate set of facts,¹⁷⁹ the court, with no hesitation, followed *DeShaney*, thereby abandoning *Jensen's* "special relationship" factors analysis.¹⁸⁰

Although *DeShaney* did not reach the issue of whether an affirmative duty to act arises out of an involuntary placement of a child in a foster home, the Fourth Circuit did not address this issue because the child in *Milburn* was *voluntarily* placed in the foster

177. *Doe v. Milwaukee County*, 712 F. Supp. 1370, 1370 (E.D. Wis. 1989).

178. 871 F.2d 474 (4th Cir. 1989).

179. *See Jensen v. Conrad*, 747 F.2d 185, 194-95 n.11 (4th Cir. 1984) (dicta) (articulating factors that should be included in a "special relationship" analysis).

180. *See Milburn*, 871 F.2d at 476-79. The facts of *DeShaney* and *Milburn* were "indistinguishable," except that the abuse was inflicted by a natural parent in the former case, as opposed to a foster parent in the latter. On this issue, the court concluded that foster parents, like natural parents, are not state actors, thereby absolving the state from direct responsibility for the foster parents' actions. *Id.* at 476.

home by his natural parents.¹⁸¹ Here, unlike the scenario discussed in *DeShaney*, the state had not restrained the plaintiff's liberty by an affirmative exercise of its power. Therefore, according to the Supreme Court's rigid holding, the state's actions could not have created a duty to act.¹⁸²

Also strictly following the *DeShaney* holding, the Third Circuit, in *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*,¹⁸³ recognized that *DeShaney* overruled its decision in *Estate of Bailey v. County of York*.¹⁸⁴ In *Philadelphia Police & Fire*, a mentally retarded person living at home challenged the constitutionality of cuts in habilitative services provided by the city.¹⁸⁵ The United States District Court for the Eastern District of Pennsylvania, in a decision rendered prior to *DeShaney*, relied on the "special relationship" doctrine and the right to safety in holding that the cutbacks violated the plaintiffs' substantive due process rights.¹⁸⁶ In light of *DeShaney*, the court of appeals reversed the lower court's ruling because the plaintiffs were not within the narrow range of individuals entitled to affirmative state action as a right.¹⁸⁷

In at least one decision, however, a federal district court employed the *DeShaney* holding to support a section 1983 suit based on state inaction. In *Pagano v. Massapequa Public Schools*,¹⁸⁸ the United States District Court for the Eastern District of New York refused to dismiss a complaint which alleged that the state knew that a young public school student had been physically and verbally abused by other students, that it expressed a desire to prevent such attacks in the future, and that the state subsequently failed to protect the abused student.¹⁸⁹ The court believed that the present facts more

181. *Id.* at 476.

182. *Id.*

183. 874 F.2d 156 (3d Cir. 1989).

184. 768 F.2d 503 (3d Cir. 1989) (holding that state knowledge of an individual's plight could lead to the creation of a "special relationship").

185. 874 F.2d at 157.

186. *Id.* at 166.

187. *Id.* at 166-69.

188. 714 F. Supp. 641 (E.D.N.Y. 1989).

189. *Id.*

closely resembled *Doe v. New York City Dep't of Social Services*¹⁹⁰ than *DeShaney*, "since both the victim and the perpetrators were under the care of the school in its *parens patriae* capacity at the time these alleged incidents occurred."¹⁹¹ Given state truancy laws requiring elementary school students to attend school, the court decided that these students should be entitled to "some duty of care."¹⁹²

B. The Future

Although *DeShaney* unified the federal courts on most of the constitutional issues relating to state inaction, this area of law is far from being settled. Not only has the Supreme Court expressly permitted the states to impose an affirmative state duty to protect through the principles of tort law, but the Court, by declining to address the existence of a duty to protect in the foster care setting, has also left open a potential means of constitutional expansion. As seen above in *Pagano*, the federal courts, employing a little creative reasoning, might begin to "fit" various fact patterns, by analogy, into this apparently narrow exception. Over time, the holdings produced by the various federal circuits could equal or surpass the uncertainty witnessed by the Supreme Court prior to *DeShaney*.

For example, in time, a federal court could even apply the *DeShaney* exception to facts similar to those presented by *DeShaney* itself. Because situations "sufficiently analogous" to involuntary confinement might create an affirmative duty to protect, a court could reason that the state, by affirmatively protecting parental autonomy through judicial decisions and legislative enactments, effectively prevents an abused child from escaping the custody of his parents and entering "free society."¹⁹³ State law supports the parents' custody rights, thereby restricting the abused child's freedom to act on his own behalf. *DeShaney* stated that the duty to protect arises from this type of limitation.¹⁹⁴ Therefore, under this analysis,

190. 649 F.2d 134 (2d Cir. 1981) (holding that a duty to protect exists in the foster home situation).

191. *Id.*

192. *Id.*

193. *See DeShaney*, 109 S. Ct. at 1006 n.9.

194. *See id.* at 1005-06.

the scope of the *DeShaney* exception might include these circumstances of child abuse giving rise to an affirmative state duty to protect.

V. CONCLUSION

Prior to *DeShaney*, a variety of constitutional doctrines relating to state inaction developed in the federal court system.¹⁹⁵ It was not clear if or when the state's failure to act constituted a deprivation of an individual's due process rights. Furthermore, the issue of state inaction in the context of child abuse inflicted by natural parents represented practically uncharted constitutional waters.

The Supreme Court, with its decision in *DeShaney*, both refused to extend the duty to protect abused children and significantly narrowed the scope of affirmative state action requirements.¹⁹⁶ However, the Court refused to decide whether an involuntarily placed foster child has an affirmative right to safety in the foster home.¹⁹⁷

As evidenced by at least one decision since *DeShaney*, this exception could pave the way for future constitutional expansions by the federal courts.¹⁹⁸ If a set of facts relating to child abuse creates a sufficient analogy to institutionalization or imprisonment, the state duty to protect could arise.

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195. See *supra* notes 19-116 and accompanying text.

196. See *supra* notes 146-65 and accompanying text.

197. See *supra* notes 157-58 and accompanying text.

198. See *supra* notes 188-92 and accompanying text.

