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### Due Process

Carrie Foote

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## DUE PROCESS

*U.S. CONST. amend. V:*

*No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .*

*U.S. CONST. amend. XIV:*

*No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .*

*N.Y. CONST. art. I, § 6:*

*No person shall be deprived of life, liberty, or property without due process of law.*

## COURT OF APPEALS

Mark v. Sabol<sup>1</sup>  
(decided August 31, 1999)

Plaintiffs, children placed in foster homes who were allegedly abused or neglected after placement,<sup>2</sup> filed suit in New York Supreme Court against welfare officials of the City of New York, seeking monetary damages for alleged violations of their procedural and substantive due process rights<sup>3</sup> under the

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<sup>1</sup> 93 N.Y.2d 710, 695 N.Y.S.2d 730 (1999).

<sup>2</sup> Numerous state claims were brought by plaintiffs, eleven children, who allegedly suffered abuse and neglect while placed in foster care or while living in their private residences. To establish a due process violation, a claim could only be made by children who were placed in foster care at the time of the abuse and neglect, and who were owed a duty by the government. Hence, children whose claims arose out of private family abuse and neglect were not part of the constitutional claim. See *Sabol*, 93 N.Y.2d at 725, 695 N.Y.S.2d at 737.

<sup>3</sup> *Sabol*, 93 N.Y.2d at 722, 695 N.Y.S.2d at 735.

Fourteenth Amendment of the United States Constitution.<sup>4</sup> The New York Court of Appeals affirmed the Appellate Division's decision upholding the dismissal of the complaint, but allowed for plaintiffs to amend their constitutional claim<sup>5</sup> to allege a violation of the standard of care put forth by the United States Supreme Court in *Youngberg v. Romeo*,<sup>6</sup> thereby giving plaintiffs a substantive due process claim.

The Court of Appeals distinguished between procedural and substantive due process claims under the Fourteenth Amendment by explaining that "procedural due process claims challenge the procedures used by the government in effecting a deprivation of a right, whereas substantive due process claims challenge the action itself."<sup>7</sup> Simply put, plaintiffs' procedural due process claims challenged "how the deprivation was accomplished,"<sup>8</sup> and their substantive due process claims challenged the deprivation itself.<sup>9</sup>

A procedural due process claim will be recognized when the government "acts to deny or curtail someone's life, liberty or property interest and defends its action by asserting that it employed fair procedures in furtherance of a legitimate governmental objective."<sup>10</sup> The Court of Appeals determined that in the instant case, the plaintiffs had not sufficiently alleged a violation of their procedural due process rights because they could

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<sup>4</sup> U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* The original complaint was drafted prior to the United States Supreme Court's decision in *DeShaney v. Winnebago*, discussed *infra*. See *Sabol*, 93 N.Y.2d at 725, 695 N.Y.S.2d at 737.

<sup>5</sup> *Sabol*, 93 N.Y.2d at 726, 695 N.Y.S.2d at 738.

<sup>6</sup> 457 U.S. 307 (1982).

<sup>7</sup> *Sabol*, 93 N.Y.2d at 723, 695 N.Y.S.2d at 735-36.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Sabol*, 93 N.Y.2d at 723, 695 N.Y.S.2d at 736 (citing *Schall v. Martin*, 467 U.S. 253 (1984) [pretrial juvenile detention]; *Vitek v. Jones*, 445 U.S. 480 (1980) [prison to mental hospital transfer]; *Addington v. Texas*, 441 U.S. 418 (1979) [civil commitment]. In *Schall*, *Vitek* and *Addington*, the government claimed a legitimate governmental interest in taking the individuals into custody.

not show that the government's goal was to deny or deprive them of "safety or entitlements"<sup>11</sup> without fair process,<sup>12</sup> and that simply alleging a violation was inadequate.<sup>13</sup>

Under substantive due process, when the government places an individual in its custody, it is obligated to afford a certain duty of care and protection, and the nature of the duty owed to the individual in the government's custody depends upon the type of custody in which the individual is placed.<sup>14</sup> In determining the duty owed to the plaintiff foster children, the Court considered three United States Supreme Court decisions in which the plaintiffs sought monetary damages for alleged violations of their substantive due process rights.<sup>15</sup>

In *Estelle v. Gamble*,<sup>16</sup> the Supreme Court determined that, when an individual in the government's custody is a prisoner, a substantive due process claim arises when the government demonstrates "deliberate indifference"<sup>17</sup> to the prisoner's medical needs, amounting to an "unnecessary and wanton infliction of pain"<sup>18</sup> for Eighth Amendment<sup>19</sup> purposes. However, with respect to individuals who have been involuntarily civilly committed, the

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<sup>11</sup> *Sabol*, 93 N.Y.2d at 723-724, 695 N.Y.S.2d at 736.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The Court subsequently affirmed the dismissal of plaintiffs' procedural due process claim. *Id.*

<sup>14</sup> *Sabol* at 724-25, 695 N.Y.S.2d at 736-37.

<sup>15</sup> *Id.*

<sup>16</sup> 429 U.S. 97 (1976). Gamble was a state prisoner who brought suit against Estelle, the Director of the Texas Department of Corrections, alleging deliberate indifference by prison personnel to Gamble's serious illness or injury sustained while in the state's custody. *Id.* at 101-02.

<sup>17</sup> *Estelle*, 429 U.S. at 104.

<sup>18</sup> *Id.* The indifference must be that which is "repugnant to the conscience of mankind." Therefore, negligence or even medical malpractice is insufficient simply because the patient is a prisoner. *Id.* at 105-06.

<sup>19</sup> U.S. CONST. amend VIII. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The Court held that Gamble failed to demonstrate deliberate indifference to his medical needs because he was seen on seventeen separate occasions by medical personnel over a three month period, and could only argue that he was inadequately treated, which the Court felt amounted to malpractice at best. *Estelle*, 429 U.S. at 107.

government owes a different degree of care. The Supreme Court, in *Youngberg v. Romeo*,<sup>20</sup> held that the “professional judgment”<sup>21</sup> standard of care is breached when the government substantially departs from “accepted professional judgment, practice, or standards as to demonstrate that [it] actually did not base [its] decision on such a judgment.”<sup>22</sup> The Supreme Court distinguished between the *Estelle* and *Romeo* degrees of care, allowing that individuals “who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”<sup>23</sup>

In *DeShaney v. Winnebago*,<sup>24</sup> the Supreme Court held that a substantive due process claim for monetary damages could not be asserted on behalf of a child who suffered harm while in the custody of his own father, because the due process clause is designed to protect individuals from being harmed by the state, but does not generally impose an affirmative obligation on the state to protect individuals from each other.<sup>25</sup> The import of *DeShaney* to the instant case comes in the form of a footnote in the Supreme Court’s holding, in which the Court stated: “[H]ad the State by the affirmative exercise of its power removed [the child] from free

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<sup>20</sup> 457 U.S. 307 (1982). The mother of a mentally impaired individual, who was involuntarily committed to a state institution, alleged that the institution substantially departed from accepted professional judgment, practice, or standards in the care and treatment of her son. *Romeo*, 457 U.S. at 310.

<sup>21</sup> *Romeo*, 457 U.S. at 321. The Supreme Court determined that professional judgment encompasses “professionally acceptable choices,” but did not expressly restrict this standard of care to specific choices a state could make in exercising its judgment. *Id.*

<sup>22</sup> *Romeo*, 457 U.S. at 323.

<sup>23</sup> *Id.* at 321-22.

<sup>24</sup> 489 U.S. 189 (1989). Joshua DeShaney’s mother brought suit on his behalf against the Winnebago County Department of Social Services alleging that the defendant owed a duty to Joshua to protect him from violence at the hands of his father while in his father’s custody. *Id.* 489 U.S. at 193.

<sup>25</sup> *DeShaney*, 489 U.S. at 196.

society and placed him in a home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”<sup>26</sup> The Court, however, “express[ed] no view on the validity of this analogy.”<sup>27</sup>

In the instant case, the Court of Appeals determined that the plaintiffs failed in their complaint to meet *Estelle*'s deliberate indifference standard of care.<sup>28</sup> However, the Court found *Romeo*'s professional judgment standard to be the appropriate one with regard to substantive due process claims asserted by foster children.<sup>29</sup> The plaintiffs did not allege a violation under *Romeo*, and the Court was unwilling to imply one,<sup>30</sup> because the claims of harm suffered by the children were found to be “very much incidental”<sup>31</sup> to the many other state and federal claims they asserted.<sup>32</sup> Finally, a claim under *DeShaney* could not be sustained because the plaintiffs asserted that the government failed to provide “protective and preventive services to the plaintiffs’ families in order to avoid foster care placement . . . or to minimize their stay in foster care through rehabilitation services,”<sup>33</sup> and *DeShaney* does not extend “substantive due process rights to foster

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<sup>26</sup> *Id.* at 201.

<sup>27</sup> *Id.*

<sup>28</sup> *Sabol*, 93 N.Y.2d at 725, 695 N.Y.S.2d at 737.

<sup>29</sup> *Id.* at 726, 695 N.Y.S.2d at 737.

<sup>30</sup> *Id.* at 726, 695 N.Y.S.2d at 738.

<sup>31</sup> *Id.*

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

<sup>33</sup> *Sabol*, 93 N.Y.2d at 726, 695 N.Y.S.2d at 737-38.

children . . . protective services before placement . . . or to family social services during placement.”<sup>34</sup>

The Court, therefore, affirmed the dismissal of the complaints and allowed the plaintiffs leave to replead their substantive due process claims.<sup>35</sup>

*Carrie Foote*

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<sup>34</sup> *Id.*

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